Federal Court  Cour fédérale

Date: 20141104

Docket: T-536-04

Citation: 2014 FC 1001

Ottawa, Ontario, November 4, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

OMAR AHMED KHADR

Plaintiff

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

AMENDED ORDER AND REASONS

[1] This is a motion by the Plaintiff filed July 29, 2014, seeking an Order, pursuant to Rules 75(1), 76, 77, 78, 79 and 201 of the *Federal Courts Rules*, SOR/98-106, granting leave to:

1. further amend the Statement of Claim; and

2. file the Amended Amended Amended Fresh as Amended Statement of Claim;

[2] I outlined the complex history of this action, and related but separate proceedings brought by the Plaintiff, in an Order dated January 7, 2014 (the January Order). It is unnecessary to repeat those details here.

[3] The Plaintiff's claim initially alleged breaches of various *Charter* rights. By motion filed November 15, 2013, the Plaintiff sought to greatly expand the scope of the action. Among other things, he sought leave to amend the Statement of Claim so as to seek $20,000,000 in compensatory damages alleging negligence, negligent investigation, conspiracy with the United States in the arbitrary detention, torture, cruel, inhuman and degrading treatment, false imprisonment, intentional infliction of mental distress and assault and battery of the Plaintiff, failure to comply with domestic and international obligations with regard to treatment while confined, and misfeasance in public office. In the alternative, he sought an award of damages pursuant to s 24(1) of the *Charter* and a declaration that the Defendant violated the Plaintiff's ss 7, 8, 9, 10, 12 and 15 *Charter* rights.

[4] The January Order disposed of the abovementioned motion. Although I agreed with the Defendant that the Amended Statement of Claim filed at that time was deficient for various reasons, I found that most of the new allegations would be permissible if properly framed. In the result, I denied the motion to amend the Statement of Claim without prejudice to the Plaintiff to seek leave to file a further amended Statement of Claim.

[5] The present motion is the latest chapter in this saga. The Plaintiff seeks leave to make refined amendments and to file a proposed Amended Amended Amended Fresh as Amended

Statement of Claim. Therein he seeks $20,000,000 in damages, including compensatory damages for negligent investigation, conspiracy and misfeasance in public office; *Charter* damages pursuant to s 24(1) for breaches of ss 7, 10(a), 10(b) and 12 of the *Charter*; punitive and aggravated damages; and special damages. The Defendant strenuously objects to these amendments.

[6] The general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided that the amendment would not result in an injustice to the other party not capable of being compensated by costs and that it would serve the interests of justice: *Canderel Ltd v Canada*, [1994] 1 FC 3 (FCA) at paras 9, 14. New causes of action may be added after the close of pleadings if (1) the new cause of action arises out of substantially the same facts as the cause of action originally pleaded and (2) it seems just to allow the amendment: Rule 201 of the *Federal Courts Rules*; *Francoeur v Canada*, [1992] 2 FC 333 (FCA); *Seanix Technology Inc v Synnex Canada Ltd*, 2005 FC 243 at paras 16-17. Factors relevant to the prejudice assessment include the timeliness of the motion to amend, the extent to which the amendment would delay an expeditious trial, the extent to which the original position caused another party to follow a course which is not easily altered, and whether the amendment facilitates the Court's consideration of the merits of the action: *Valentino Gennarini SRL v Andromeda Navigation Inc*, 2003 FCT 567 at para 29 citing *Scannar Industries Inc et al v Canada (Minister of National Revenue)* (1994), 172 NR 313 (FCA).

[7] The Defendant contends that the proposed conspiracy claim "merges" with the other causes of action raised by the Plaintiff, as it adds no further liability against the Defendant that is not already covered by the alleged torts of misfeasance in public office and negligent investigation and the alleged *Charter* breaches. The Defendant says that allowing a duplicative claim of this sort is not in the interests of justice because it is unnecessary and risks impeding the Court's analysis of the merits, in addition to prolonging delay in bringing the matter to trial. The Defendant also submits that allowing the conspiracy claim would inflict prejudice that is not compensable by costs: specifically, it might extend the tort of conspiracy beyond its typical context to the realm of international relations and thereby expand Crown liability in Canada.

[8] In my view, the Plaintiff's motion falls within the class of cases where this Court has granted leave to amend. As a preliminary matter, his plea of conspiracy is permissible because it shares the same factual basis as his other claims, as required by Rule 201 and *Francoeur*, above.

[9] Moreover, the Defendant has not advanced a persuasive argument warranting a revision of my finding in the January Order that "it is difficult to see how the Defendant would suffer prejudice not compensable by costs if the claim were allowed to proceed". Although the Plaintiff commenced his action through his grandmother in 2004, he was then a minor detained at Guantanamo Bay. Given his personal circumstances, the case has proceeded at a rather slow pace. In fact, the parties have not yet completed discovery. The production of documents is ongoing under the supervision of this Court. Whether the Plaintiff succeeds in amending his Statement of Claim or not, it is unlikely that a trial will occur in the foreseeable future. Viewed in light of this special context, this motion to amend is timely and does not risk causing

inordinate delay in bringing the matter to trial. Any additional delay would be proportionate to the benefit of holding a complete trial and could be compensated, at least in theory, with an award of costs.

[10] Further, it does not appear that the Plaintiff's original Statement of Claim caused the Defendant to follow a course of action that cannot be easily altered at present. The Defendant has not even argued that it will have to modify its defence to the original claims in order to address the allegation of conspiracy. Finally, the impugned amendments would not hamper the Court's consideration of the action on its merits. If anything, adding conspiracy to the Statement of Claim clarifies the nature of the controversy between the parties and facilitates its comprehensive examination by a court.

[11] The Defendant's argument that it will suffer prejudice that cannot be compensated with costs is not persuasive. Whether the tort of conspiracy can cover state-to-state conduct is a matter that should be decided by a judge at trial, with the full benefit of evidence and legal argument. It should not be dealt with on a motion. The Supreme Court endorsed this position in *Hunt v Carey Canada*, [1990] 2 SCR 959 at paras 48-55. I also note that all amendments in Crown liability cases run the risk of imposing liability on the government and creating unfavourable precedent. That is precisely the goal of a rational plaintiff suing the Crown. To avoid this prejudice, the Defendant ought to present a viable defence. It should not ask this Court to extend an overly generous interpretation of "prejudice" under *Canderel*, above, so as to pre-empt claims made against it.

[12] Beyond its argument on prejudice, the Defendant suggests that granting leave is not in the interests of justice because the conspiracy claim relies upon the same facts as the Plaintiff's other causes of action. This presents the Court with what might be characterized as a "catch-22" argument. Pursuant to Rule 201, *Francoeur* and *Seanix*, above, a party can only amend its pleadings to add a new cause of action if it is grounded on substantially the same facts as those originally pleaded. The Defendant submits that adding a cause of action grounded on substantially the same facts frustrates the interests of justice. On this logic, a party could *never* plead a new cause of action by way of amendment. Such a cause of action would be either (1) grounded on substantially different facts, in contravention of Rule 201, or (2) grounded on substantially similar facts, in contravention of the "interests of justice" branch of *Canderel*. This is a false dilemma. Granting leave when amendments conform to the requirements of the law serves the interests of justice – it does not frustrate them.

[13] In addition, several considerations suggest that granting leave would better serve the interests of justice than refusing it. The Plaintiff's case has attracted significant public attention. Whether Canada conspired with foreign officials to violate the fundamental rights of a citizen is not a trivial matter. Furthermore, the uncertain scope of the tort of conspiracy is a reason to give a court the opportunity to consider the question. Justice is served when courts decide cases which raise novel issues, thereby participating in the gradual evolution of the common law.

[14] The Defendant's invocation of the doctrine of merger must also fail. This doctrine justifies striking out a plea of conspiracy in particular circumstances. Lord Denning pronounced the authoritative statement of this doctrine in *Ward v Lewis*, [1955] 1 All ER 55 (Eng CA) at 56:

"It is important to remember that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort means nothing. The prior agreement merges in the tort." The doctrine of merger therefore applies without controversy to cases where the plaintiff alleges that the defendants committed a tort against him and also conspired to commit that same tort. However, parties often invoke this doctrine when their opponents allege a conspiracy and a distinct tort which nonetheless arises from the same facts as the conspiracy.

[15] In *Hunt*, above, at paras 57-58, the Supreme Court warned that the doctrine of merger must be applied with great caution to such cases. The Ontario Superior Court of Justice built upon these reasons in *Dominion of Canada General Insurance Co v MD Consult Inc*, 2013 ONSC 1347 [*Dominion of Canada*]. At para 36, the Court opined that "separate and different claims" in conspiracy and another tort may arise from an identical set of facts: "That is, it is not the fact that the two claims are based on common facts that is determinative, but the theory of liability that attaches to the claim." In such cases, the doctrine of merger ought not to apply. The Court also highlighted the requirement that special damages must be pleaded specifically for conspiracy, although they may be quantified in the same amount as the damages claimed for another tort: para 44.

[16] The Plaintiff's amendments do not allege a conspiracy to commit a tort or *Charter* breach already disclosed in his pleadings. While he has pleaded negligent investigation, misfeasance in public office and various *Charter* breaches, his conspiracy claim alleges that Canada formed an agreement with the United States government to commit the following torts against him: false imprisonment, intentional infliction of emotional distress, assault and battery. The torts forming

the object of the conspiracy are distinct from those raised as alternative causes of action. This case does not call for the straightforward application of the doctrine of merger.

[17] Following *Hunt and Dominion Canada*, above, I decline to apply the doctrine of merger simply because the Plaintiff might succeed in holding the Defendant liable under another cause of action. Each claim exhibits a distinct theory of liability. As will become apparent, a trial judge might reach different conclusions about the Defendant's liability under each of the causes of action raised by the Plaintiff. My objective is not to assess the relative strength of the Plaintiff's claims – that is exactly what *Hunt*, above, counsels against. What I endeavour to show is that this Court should permit the Plaintiff to plead conspiracy because it is not a foregone conclusion that a trial judge will decide that claim identically to his other claims.

[18] It is not necessary to delve into the details of the law governing the sections of the *Charter* invoked by the Plaintiff to understand that it differs fundamentally from the law governing the tort of conspiracy. A civil wrong does not have the same meaning as a constitutional violation. Courts assess state conduct through different legal tests in *Charter* and private law cases. There is no reason to force the Plaintiff to choose one of these paradigms at the expense of the other.

[19] Two kinds of conspiracy exist in Canadian law: predominant purpose conspiracy and unlawful means conspiracy. The Supreme Court recently restated the test for each branch in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]. To hold the defendant liable for predominant purpose conspiracy, the plaintiff must prove the following: (1) the

defendant entered into an agreement with one or more other parties; (2) the defendant committed actions (either lawful or unlawful in themselves) pursuant to that agreement, with the predominant purpose of causing injury to the plaintiff; and (3) the plaintiff did in fact suffer loss caused by the defendant's conduct: para 74.

[20] To hold the defendant liable for unlawful means conspiracy, the plaintiff must prove the following: (1) the defendant entered into an agreement with one or more other parties; (2) the defendant committed unlawful actions directed towards the plaintiff pursuant to that agreement; (3) the defendant knew or should have known that injury to the plaintiff was likely to result (this is sometimes referred to as "constructive intention" to injure the plaintiff); and (4) the plaintiff did in fact suffer loss caused by the defendant's conduct: para 80.

[21] The Supreme Court of Canada recognized the tort of negligent investigation in *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 [*Hill*]. This tort tailors the cause of action of negligence to investigative conduct by the state. A majority of the Supreme Court held that a duty of care exists between police officers and suspects under investigation. To determine whether an officer has breached this duty, a court must measure his conduct against the standard of a reasonable police officer in like circumstances.

[22] It is plain that the Plaintiff might succeed in conspiracy and fail under negligent investigation. For one, the trial judge might decline to find that the impleaded Canadian officials owed him a duty of care. In *Hill*, above, the Supreme Court only established such a duty between

police officers and criminal suspects – it is a live issue whether it also arises between diplomatic and intelligence personnel and the suspected terrorists whom they are investigating.

[23] Additionally, the Plaintiff might have difficulty proving that the Defendant's agents acted in contravention of acceptable practice, as the test also requires. At the very least, a court may have to review complex evidence to determine what amounts to reasonable conduct for diplomatic and intelligence officers working on national security matters with foreign colleagues. A court might possibly find that the impugned conduct did not contravene the requisite standard under negligent investigation, yet accept that it satisfies the test for predominant purpose conspiracy simply by causing intended harm to the plaintiff.

[24] In Canadian law, the authoritative statement of the tort of misfeasance in public office can be found in *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*]. To hold the defendant liable, the plaintiff must prove the following: (1) the defendant is a public official or a public body exercising its public functions; (2) the defendant deliberately engaged in unlawful conduct in the exercise of those functions; (3) the defendant acted either with the actual intention of harming the plaintiff or with the constructive intention of harming the plaintiff (the public officer must have been aware that the conduct was unlawful and that it was likely to harm the plaintiff); and (4) the plaintiff suffered loss caused by the defendant's conduct: paras 22-23.

[25] Once again, the Plaintiff might fail under this tort but succeed in conspiracy. If the trial court holds that the Defendant did not commit unlawful acts, the misfeasance claim would automatically fail but the claim in predominant purpose conspiracy would not.

[26] Furthermore, it is not clear that the mental components of unlawful means conspiracy and misfeasance in public office are identical. Under unlawful means conspiracy, "constructive intention" requires that the defendant be aware that its actions are likely to cause harm to the plaintiff. Under misfeasance, "constructive intention" requires that the defendant be aware of this and also be aware that its actions are unlawful.

[27] What result obtains if a particular defendant knew that its actions would probably harm the plaintiff but sincerely believed that these actions were lawful? The law is clear that the defendant is not liable under misfeasance in public office. However, it is unclear whether the same mental state might render the defendant liable in conspiracy. A court could reach this conclusion, provided that the defendant conspired to commit acts which were in fact unlawful (whether he knew this or not) with the knowledge that they would harm the plaintiff. Given the possibility of diverging outcomes, the Plaintiff should be permitted to plead unlawful means conspiracy. This tort might hold the Defendant liable for its conduct even if it escapes liability on these other grounds.

[28] As a final observation on this matter, it is settled law that a plaintiff alleging conspiracy must claim special damages. In my view, the Plaintiff has satisfied this requirement by claiming "special damages" in his Amended Amended Amended Fresh as Amended Statement of Claim, even though he does not specifically state that they stem from the conspiracy. Any ambiguity on this point is minimal and does not justify denying the conspiracy claim.

[29] The Defendant's second set of submissions contend that the Plaintiff's claim of unlawful means conspiracy offends the principle of sovereign immunity (also known as state immunity), by indirectly impleading the United States government in these proceedings. I am aware that this Court must proceed carefully in the sensitive area of international relations, yet it is my opinion that the doctrine of sovereign immunity, properly understood, cannot stand as a bar to the impugned amendments.

[30] The doctrine of sovereign immunity arises from customary international law. Parliament incorporated this doctrine into federal legislation through the *State Immunity Act*, RSC 1985, c S-18 [*SIA*]. This was done with the purpose of codifying and continuing a doctrine grounded in international law: *Kuwait Airways Corp v Iraq*, 2010 SCC 40 at para 13; *Re Canada Labour Code*, [1992] 2 SCR 50 at 73 [*Labour Code*]. For this reason, a court may refer to the text of the *SIA* itself and to common law and international authorities to determine the reach of the doctrine in Canada. According to the Supreme Court, the *SIA* should be interpreted in a manner that is consistent with international law in the absence of an express contradiction: *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para 50; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 63 [*Kazemi*].

[31] In this context, immunity amounts to protection from the enforcement jurisdiction of courts. I will now briefly trace its development in the common law and Canada, aided by the helpful discussion found in *United Mexican States v British Columbia*, 2014 BCSC 54.

[32] Sovereign immunity is a procedural bar to an action that might otherwise be sound in law. In the classic case *Compania Naviera Vascongado v "Cristina" (The)*, [1938] AC 485 (UK HL), at 490, Lord Atkin explained that the doctrine encompasses two propositions. First, a court may not "implead" a foreign sovereign: that is, it cannot make him a party to a legal proceeding against his will. Second, a court cannot in any way seize or detain the property of a foreign sovereign, whether the sovereign is a party to the proceedings or not. At common law, therefore, much turns on the meaning of the word "implead." In *Sultan of Johore v Abubakar*, [1952] 1 All ER 1261 (Singapore PC), the House of Lords clarified that the doctrine applies only to proceedings where the resulting judgment could affect the foreign state's legal interests. Evidently, this might occur even if the state itself is not a party to the case.

[33] The courts of England eventually made clear that the doctrine does not prohibit courts from examining the conduct of a foreign state, provided that this does not affect its legal interests. In *Buttes Gas & Oil Co v Hammer (No 2)*, [1975] QB 557 (Eng Ch Div) at 573 [*Hammer No 2*], Lord Denning offered the following example. A newspaper might publish an article alleging that a domestic oil company bribed a foreign state. The company is allowed to sue the newspaper in defamation, even though the trial judge will have to inquire into the conduct of the foreign state to decide the matter. Despite overturning this decision on different grounds, the House of Lords affirmed Lord Denning's conclusions on sovereign immunity: *Buttes Gas & Oil v Hammer (No 3)* (1981), [1982] AC 888 (UK HL) at 926.

[34] In Canada, the *SIA* creates some exceptions to the applicability of sovereign immunity. In fact, "the words of s. 3(1) of the *SIA* completely oust the common law and international law as a

source of potential exceptions to the immunity which it provides": *Kazemi*, above, at para 58. For instance, s 5 permits lawsuits against foreign states in relation to their commercial activities. In *Labour Code*, above, the Supreme Court interpreted the scope of this exception by considering the rationale for sovereign immunity. It defined commercial activity in a manner that avoided interference with a foreign state's sovereign functions. In my view, this rationale also helps answer the question of whether a foreign state is indirectly impleaded: this occurs when proceedings could restrict its autonomy over its sovereign functions.

[35] Therefore, the common law delineates three circumstances where sovereign immunity operates as a procedural bar: (1) when proceedings "implead" a foreign state as a party against its will; (2) when proceedings place property owned by the foreign state at risk of seizure or detention; and (3) when proceedings "indirectly implead" a foreign state by affecting its legal interests. There is no reason to interpret the *SIA* as imposing a different rule. In *United Mexican States v British Columbia*, above, at para 90, the British Columbia Supreme Court relied on these cases and held that the *SIA* does not have as its objective "to preserve the dignity of foreign states or prevent their embarrassment in a colloquial sense, but rather to protect foreign states from foreign proceedings that would stand to interfere with their autonomy in performing their sovereign functions."

[36] As such, the Plaintiff's claim of conspiracy does not fall within the traditional ambit of the doctrine of sovereign immunity. The Defendant could possibly craft a sophisticated argument for extending the doctrine to these facts, although it has not yet done so. Such an argument should be assessed at trial, not on a motion to amend.

[37] The Plaintiff does not ask this Court to make the United States a party to this action. Nor does he seek any remedy that could be enforced against property owned by the United States. The Defendant nonetheless asserts that the principle of sovereign immunity bars his conspiracy claim because it "indirectly impleads" the U.S. government. The question is whether this claim affects this state's legal interests in a manner recognized in the case law.

[38] The Defendant fails to show how a potential judgment of this Court holding Canada liable in conspiracy might affect any legal interest of the U.S. government. There is no indication that such a judgment might impose any liability on the United States – a non-party to the action – and lead to enforcement against its assets. The ability of the United States to freely perform its sovereign functions would not be hindered in any way. While the Defendant suggests that a judgment rendered by this Court would influence judicial bodies in the United States, it does not explain how this might occur. Quite plainly, the Plaintiff could not ask any American court to enforce a judgment imposing liability on *Canada* against the United States. Nor could he present such a judgment as definitive proof of misconduct perpetrated by the American government before any U.S. court. If an American court were ever to rely on a finding made by this Court, it would be by choice. There is no way for this Court to usurp the jurisdiction of its American counterparts and impose binding conclusions upon them.

[39] The Defendant is correct that this Court would have to deem the conduct of U.S. officials unlawful in order to hold Canada liable under unlawful means conspiracy. However, it is well accepted that a court may evaluate the behaviour of a foreign state for purposes that do not affect its legal interests. Lord Denning explicitly held that this is permissible in *Hammer No 2*, above.

Moreover, this Court routinely scrutinizes the behaviour of foreign states in refugee cases. To determine whether claimants are at risk of persecution or torture upon return, Federal Court judges often assess the likelihood that state agents might commit some of the most egregious international crimes against them, often by investigating the past behaviour of those states.

[40] The weakness of the Defendant's position becomes apparent upon consideration of *R v Hape*, 2007 SCC 26. In that case, the Supreme Court held that the *Charter* does not apply to Canadian officials abroad as a general rule. However, the Court carved out an important exception: the *Charter* applies when those officials violate Canada's international obligations with respect to human rights. In itself, the fact that Canada's agents act on foreign soil, in concert with foreign governments, does not grant them a license to violate the constitutional rights of Canadian citizens. The Supreme Court followed this authority in a prior case involving the Plaintiff: *Canada (Justice) v Khadr*, 2008 SCC 28 [*Khadr 2008*]. This precedent sits uneasily with the proposition that the Plaintiff cannot sue Canada under the private law if his action requires scrutinizing the behaviour of a foreign government. I see no principled basis for accepting that Canadian officials may escape the reach of tort law – but not of the *Charter* – simply by virtue of collaborating with foreign agents when committing harm to a Canadian citizen abroad.

[41] Although I believe that this Court is entitled to pronounce upon the lawfulness of U.S. conduct within the confines of this case, it is worth noting that American case law facilitates this task. Three decisions of the United States Supreme Court have deemed procedures at Guantanamo Bay illegal during the time of the Plaintiff's detention. In *Rasul v Bush*, 542 US 466

(2004), the Court held that the U.S. government illegally denied detainees the right to file *habeas corpus* petitions. In *Hamdan*, 548 US 557 (2006), the Court held that the military commissions put in place to try detainees violated the *Uniform Code of Military Justice* (a piece of American domestic legislation) and the *Geneva Conventions*. In *Boumediene v Bush*, 553 US 723 (2008), the Court held that legislation enacted in response to *Hamdan* – which purported to remove the jurisdiction of the federal courts over *habeas corpus* actions filed by detainees – violated the U.S. Constitution. Congress responded to this last decision by enacting legislation modifying the structure of the military commissions. The Plaintiff's convictions were ultimately secured under this regime, whose legality does not seem to have been tested to date.

[42] The Defendant argues that these cases are of no assistance because they do not involve any actions committed against the Plaintiff. This is true but irrelevant. The Plaintiff does not bear the burden of identifying American case law which endorses his specific claims in order to present it as binding precedent to a Canadian court. The Federal Court is free to make factual findings that the Plaintiff suffered unlawful treatment on the basis that the United States Supreme Court has already deemed similar treatment faced by other detainees unlawful. This is precisely what the Supreme Court of Canada did in *Khadr 2008*, above, and *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [*Khadr 2010*]. It cited *Rasul* (*Khadr 2008* at para 22), *Hamdan* (*Khadr 2008* at para 23) and *Boumediene* (*Khadr 2010* at para 17) to ground its finding that Canada participated in an unlawful process targeting the Plaintiff.

[43] As a final observation on this issue, the Plaintiff correctly submits *Husayn (Abu Zubaydah) v Poland* (no 7511/13) as an example where a foreign court (the European Court of

Human Rights) assessed the conduct of the United States in order to impose liability on a state over which it had jurisdiction (Poland). Interestingly, that Court considered several international sources, in addition to the American case law cited above, when determining that the United States behaved unlawfully. Chief among these were the United Nations Working Group on Arbitrary Detention's *Opinion No 29/2006*, UN Doc A/HRC/4/40/Add1 at 103 (2006) and the Parliamentary Assembly of the Council of Europe's *Resolution 1340 (2003)*. These are not binding sources of law for Canadian courts, yet they may be valuable in assessing the legality of the conduct to which the Plaintiff was exposed.

[44] I note in passing that the recent Supreme Court of Canada decision *Kazemi*, above, has no direct bearing on the Plaintiff's action. Unlike the plaintiff in *Kazemi*, he is not suing a foreign state but instead Canada. For the above reasons, the Defendant has not shown that the Plaintiff's amendments trigger the doctrine of sovereign immunity. They cannot be refused on such a basis.

[45] Next, the Defendant argues that several specific paragraphs of the Amended Amended Amended Fresh as Amended Statement of Claim offend fundamental principles of pleading. It first takes issue with paragraphs 58, 59 and 60, which plead misfeasance in public office. The Defendant submits that paragraph 58, which pleads that the Plaintiff was denied "meaningful rehabilitative opportunities, including education, counseling, medical attention and other therapy" at Guantanamo Bay, fails to attribute this denial to any Canadian public servant. It is implausible that any Canadian agent would be in a position to cause this harm to the Plaintiff while he was in the custody of the United States. Therefore, in the Defendant's view, the allegation cannot succeed in making out the cause of action.

[46] The Defendant also objects to paragraphs 59 and 60 because they incorporate paragraphs 29 to 56. The Defendant accepts that the Plaintiff may claim misfeasance on the basis of interviews conducted by Canadian officials. However, it alleges that the incorporation of paragraphs 29 to 56 expands and confuses the claim by referring to U.S. actions as well. According to the Defendant, the same problem arises with the reference to "the above noted acts and omissions" in paragraph 60. Purportedly, these allegations are so broad that they do not offer the Defendant an opportunity to offer a meaningful response.

[47] To assess the merits of these objections, I turn to Rule 174 (requiring pleadings to contain material facts) and Rule 181 (requiring pleadings to contain particulars). These Rules require that "each constituent element of each cause of action must be pleaded with sufficient particularity": *Simon v Canada*, 2011 FCA 6 at para 18. The courts do not, however, impose an inordinately high hurdle. The two principal functions of pleadings are to define the issues with clarity and to give fair notice of the case to be met: *Weatherall v Canada (AG)*, [1989] 1 FC 18 (FCA) at para 14. As such, a pleading will be accepted – even if some of its elements are incomplete – as long as it "contains enough information to allow the opposing party to know with some certainty the case to be met": *Brantford Chemicals Inc v Merck & Co*, 2004 FCA 223 at para 2 [*Brantford*].

[48] I conclude that in paragraphs 59 and 60, the Plaintiff pleads material facts that are sufficiently particularized to ground misfeasance in public office, in accordance with Rules 174 and 181. However, paragraph 58 does not contain enough particulars to merit inclusion.

[49] Paragraph 58 pleads that "Canadian Officials" (a term that captures RCMP, CSIS and DFAIT personnel) failed to secure rehabilitative opportunities for the Plaintiff during his detention, in contravention of "Canada's legal obligations". This goes to the second step of the test for the tort of misfeasance in public office (deliberate unlawful conduct in the exercise of official functions). Further, the Plaintiff pleads that they did this with the knowledge that "their actions" would harm him or that they were unlawful. This goes to the third step of the test (actual or constructive intention to cause harm).

[50] The Federal Court of Appeal has stressed the importance of careful pleading when raising the tort of misfeasance in public office: *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 [*Merchant LG*] and *St John's Port Authority v Adventure Tours*, 2011 FCA 198 [*Adventure Tours*]. Bald allegations do not suffice. Plaintiffs must particularize the identity of the impugned officials (even though they may do so by referring to their department or position: *Merchant LG*, above, at para 38), the acts committed by those officials and their state of mind. Pleadings otherwise offend Rule 181 and must be struck.

[51] On my reading of paragraph 58, the Plaintiff does not satisfy these requirements. It is not clear which officials he impleads. Are all the employees of the RCMP, CSIS and DFAIT who had something to do with his case responsible for this purported illegality? The nature of the illegality is also mysterious: the paragraph invokes "legal obligations" without specifying their source or content. Finally, the very conduct of which the Plaintiff complains is unclear. Even if Canada did have an obligation to provide rehabilitation, how did its agents breach it in the circumstances? Is it by failing to make diplomatic representations to the U.S. government? Or by

failing to inquire into his well-being when they spoke with him? Or by some other means? In fact, the term "actions" invites confusion because the paragraph likely refers to omissions. For these reasons, the Defendant is correct that this paragraph does not contain sufficient particulars to give notice of the case to be met.

[52] Turning to paragraphs 59 and 60, the Defendant says they are impermissibly broad and do not give it a chance to raise a meaningful defence. I disagree. Contrary to the Defendant's suggestion, the Plaintiff never states that Canadian officials committed every act outlined in paragraphs 29 to 56, which include various acts done by the United States. The Plaintiff rather accuses Canadian officials of interrogating him with the knowledge that he had been tortured by the Americans, "as detailed in paragraphs 29 to 56." The Defendant must therefore address the charge that its agents committed unlawful interviews (the second step of the misfeasance tort) with the knowledge that this would cause harm to the Plaintiff, even if that harm was directly inflicted by American officials (the third step of the misfeasance tort). It is quite obvious that the Plaintiff does not allege that the Defendant's agents committed acts which his pleadings explicitly impute to U.S. personnel. If he were to raise such an argument at trial, the Defendant could object to it at that stage. Paragraphs 59 and 60 might not be a paragon of clarity, yet they should be allowed because they disclose the case to be met to the Defendant: *Brantford*, above, at para 2.

[53] I see only a minor problem with paragraph 60: the inclusion of the word "omissions". This probably refers to Canada's failure to secure rehabilitation, in line with my reading of

paragraph 58. Striking this word would remove any ambiguity from paragraph 60. Reference to "the above noted acts" clearly points to the interrogations mentioned at paragraph 59.

[54] I conclude this point by noting that the Federal Court of Appeal emphasized the importance of particulars when raising the tort of misfeasance in public office in *Merchant LG* and *Adventure Tours*, above. In both those cases, the pleadings were insufficient. The Court cautioned that pleadings are not a pretext to embark on a "fishing expedition" (*Merchant LG* at para 34) and that particulars must be pleaded with respect to the defendants' state of mind (*Merchant LG* at para 35; *Adventure Tours* at para 37) and the damage suffered by the plaintiff (*Adventure Tours* at para 37).

[55] Paragraphs 59 and 60 are adequate in light of these decisions. The Plaintiff does not appear to be "fishing" for information. He alleges misfeasance based on the conduct of interviews which occurred at specific dates and which were previously raised before the Supreme Court of Canada in *Khadr 2008* and *Khadr 2010*, above. When addressing the state of mind of Canadian officials, he does not use vague words. He says that these officials "knew that their actions would lead to harm of Omar, or in the alternative knew that their actions were unlawful", that they were "aware that use of this illegally gathered information would harm Omar" and that they acted "knowing that such conduct is contrary to [law] and that it would and in fact has caused damages to Omar". The Defendant can rebut the allegations by showing that its agents did not have such knowledge. Finally, the Plaintiff has adequately claimed damages under various heads at paragraphs 1 and 61-63. In cases involving several causes of action, the law does not require a Plaintiff to state the exact amount attributed to the tort of misfeasance.

[56] The Defendant also attacks subparagraphs 54(a) and 54(b) of the Amended Amended Amended Fresh as Amended Statement of Claim. These subparagraphs refer to statements made by the Prime Minister and his representative. In the Defendant's view, they do not contribute to any cause of action and simply add colour to the claim of conspiracy.

[57] Rule 221(1)(a) permits this Court to strike a pleading which "discloses no reasonable cause of action or defence, as the case may be". In *Pembina County Water Resource District v Manitoba*, 2008 FC 1390 at para 12 [*Pembina*], this Court stated that this Rule applies to amendments. When deciding whether to permit an amendment, this Court must ask whether it would be capable of being struck out under Rule 221 if it were included in the original pleading.

[58] In *Pembina*, above, at paras 14-17, Justice Russell succinctly explained the test required by Rule 221(1)(a). He wrote that "so long as there is a cause of action which would not plainly and obviously be struck out as futile, the proposed amendment should be allowed" (para 14) and that "the Court is required to take a generous approach to amendments" (para 16).

[59] The Plaintiff presents the Prime Minister's statements as acts committed by Canada in furtherance of its conspiracy to violate his rights. He does not contend that they ground any other private law cause of action, such as negligent investigation or misfeasance in public office. It is not plain and obvious that these amendments add nothing to the claim of conspiracy. For instance, it is possible that a court might find that these statements contributed to his continued detention by turning popular opinion against him at a time when several groups were publicly advocating for his repatriation. A court might also view the statements as evidence of the

Defendant's intention to harm the Plaintiff, another necessary element of the conspiracy tort. In light of the high threshold for striking out set by the "plain and obvious" test and the generous approach reserved for amendments, I allow these subparagraphs to stand.

[60] It is unnecessary to consider whether these subparagraphs offend the other requirements of Rule 221(1), such as the rule against scandalous, frivolous and vexatious pleadings. The Defendant only reproduced the language of Rule 221(1)(a) in its submissions attacking this amendment and I see no reason to extend the scope of this inquiry.

[61] The Defendant's final challenge relates to subparagraph 55(i) of the Amended Amended Amended Fresh as Amended Statement of Claim. This subparagraph alleges that Canada knew that the United States committed criminal offences against the Plaintiff, in contravention of the *Geneva Conventions Act of Canada*, RSC 1985, c G-3 [*GCA*] and the *Crimes against Humanity and War Crimes Act of Canada*, SC 2000, c 24 [*CHWCA*]. The Defendant objects to this amendment for two reasons. First, it invites a Canadian court to assume jurisdiction over U.S. acts. Second, there is no evidence that American officials have been convicted of criminal offences pursuant to the *GCA* or the *CHWCA*. In the Defendant's view, neither of these statutes has any bearing on a civil action for damages.

[62] As I explained previously, the doctrine of sovereign immunity does not prevent a Canadian court from making factual findings about the conduct of foreign states in proceedings which do not affect their legal interests. The Plaintiff alleges that American officials committed acts against him that constitute crimes under the *GCA* and *CHWCA*. He does so for the purpose

of substantiating his conspiracy claim against Canada. If the trial judge were to make a finding of fact that this occurred, that finding would in no way impose any liability – civil or criminal – upon the United States or its agents.

[63] The most that can be said against this subparagraph is that it appears unnecessary for the conspiracy claim. If the Plaintiff establishes Canada's knowledge of the other unlawful acts allegedly committed by U.S. officials – including torture, as pleaded at subparagraph 55(l) – then he might succeed without having to qualify those acts as crimes under the *GCA* or *CHWCA*. However, the Rules do not require this Court to determine whether every segment of a pleading is necessary to making out a cause of action on a motion to amend. Pleadings are struck out only if they disclose no reasonable cause of action. Clearly, a finding that Canada knew about U.S. conduct which violated the *GCA* or *CHWCA* would assist the Plaintiff in making out conspiracy. Therefore, this subparagraph does not offend any established principle of pleadings.

[64] In the result, this motion is granted in part. I allow the Plaintiff to file the Amended Amended Amended Fresh as Amended Statement of Claim with two modifications. First, the current paragraph 58 is struck in its entirety. Second, the word "omissions" in the current paragraph 60 is struck.

[65] The Plaintiff was successful on nearly every aspect of this motion. Only a handful of the Defendant's myriad arguments had any merit. By opposing this motion, the Defendant considerably increased the costs and delay of this complex action, which has occupied this Court

for ten years now. Consequently, I exercise my discretion to award costs in favour of the Plaintiff, pursuant to Rules 400 and 401.

ORDER

THIS COURT ORDERS that

1. The motion is granted in part;

2. The Plaintiff is granted leave to file the Amended Amended Amended Fresh as Amended Statement of Claim with the two following modifications: (i) the current paragraph 58 is struck out in its entirety and (ii) the word "omissions" is struck from the current paragraph 60; and

3. The Plaintiff is granted the costs of this motion.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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