Federal Court of Appeal | Cour d'appel fédérale

Date: 20151210

Dockets: A-211-14
A-343-13
A-356-13

Citation: 2015 FCA 281

CORAM: **DAWSON J.A.**
RYER J.A.
WEBB J.A.

BETWEEN:

R. MAXINE COLLINS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 17, 2015.

Judgment delivered at Ottawa, Ontario, on December 10, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: DAWSON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RYER J.A.

I. INTRODUCTION

[1] The three appeals (A-211-14, A-343-13 and A-356-13) before the Court are from decisions of Justice Gleason (the "Judge") of the Federal Court (as she then was) with respect to a number of motions that relate to an action for damages for misfeasance in public office (the

"Action") that was brought by Ms. R. Maxine Collins ("Ms. Collins") against Her Majesty the Queen (the "Crown"). These appeals were consolidated by an order of Justice Stratas of this Court, dated May 6, 2014, with A-211-14 designated as the lead appeal.

[2] File A-211-14 is an appeal from an order of the Judge, dated April 1, 2014, dismissing a motion for summary judgment that was brought by Ms. Collins (the "Summary Judgment Motion"), granting a motion for summary trial that was brought by the Crown (the "Summary Trial Motion") and dismissing the Action in the summary trial that the Judge conducted. The reasons for this order are reported at 2014 FC 307.

[3] File A-343-13 is an appeal from an oral ruling rendered by the Judge, on September 26, 2013, dismissing an oral motion by Ms. Collins for an order dismissing the Summary Trial Motion on the basis of prematurity (the "Prematurity Order"). The transcript of this oral ruling is appended to the Judge's reasons that are reported at 2014 FC 307.

[4] File A-356-13 is an appeal from an order of the Judge, dated October 11, 2013 in Court File T-997-09, in which she made a number of findings with respect to the admissibility of certain portions of the affidavit evidence tendered by the Crown in relation to the Summary Judgment Motion and the Summary Trial Motion (collectively, the "Summary Relief Motions"). The reasons for this order may be found at page 50 of Volume 1 of the Appeal Book.

[5] Despite Ms. Collins' thorough presentation at the hearing, for the reasons that follow, I would dismiss the appeals. A copy of these reasons will be placed in the file for each of the consolidated appeals.

II. BACKGROUND

[6] Ms. Collins was an employee of the Canada Revenue Agency (the "CRA") from November 2005 to November 2007. She alleges that in early 2006 she heard her team leader, Mr. Rickaye Low, and several colleagues discussing personal bankruptcy. Because she had previously undergone a personal bankruptcy, she interpreted these comments as revealing that her colleagues had inappropriately accessed her personal tax information through the CRA computer system.

[7] As a result of this interpretation, Ms. Collins made a request under the *Privacy Act*, R.S.C. 1985, c. P-21, for a list of all CRA employees who had accessed her personal tax information from January 1, 2005 to July 2006. The response to this request showed all accesses to Ms. Collins' file and indicated that there was only one unauthorized access - conducted by Mr. Perry Zanetti.

[8] Ms. Collins was unsatisfied with this response. Mr. Zanetti was not a member of her team at the CRA and he did not have contact with her team. She remained convinced that members of her team had also accessed her personal tax information.

[9] On July 31, 2006, Ms. Collins requested an internal CRA investigation into her concern that members of her team had accessed her personal tax information.

[10] On August 2, 2006, the Acting Assistant Director of Audit in the Toronto West Tax Services Office, Mr. Jim Stathakos, requested a computer access report from the CRA Internal Affairs and Fraud Prevention Directorate. A computer access report is a document created by the CRA National Audit Trail System, which records each access by a CRA employee to a taxpayer's file (the "audit trail"). Mr. Stathakos' review of the audit trails revealed that no member of Ms. Collins' team had accessed her personal tax information and that Mr. Zanetti's access was not within the scope of his duties as an auditor. Mr. Zanetti was subsequently investigated by the CRA with respect to a number of accesses that he had made into taxpayers' personal information outside of the scope of his duties. He was ultimately dismissed from the CRA as a result of this conduct.

[11] Ms. Collins remained unsatisfied with this response. She launched complaints with the Office of the Privacy Commissioner on January 1, 2007, the Office of the Public Sector Integrity Commissioner of Canada (the "OPSIC") on June 17, 2007, and the Royal Canadian Mounted Police (the "RCMP") on September 21, 2007. None of these complaints resulted in any further findings of unauthorized access to Ms. Collins' CRA files.

[12] Ms. Collins alleged that she began to experience workplace harassment as a result of the investigations. Specifically, Ms. Collins alleged that she was subjected to public embarrassment through comments about her personal finances, physical threats were made against her,

management interfered with the performance of her work duties and credit was withheld for the work she performed.

[13] On November 6, 2007, she tendered her resignation from her employment with the CRA.

III. PROCEDURAL HISTORY

[14] On July 7, 2011, Ms. Collins filed an Amended Amended Statement of Claim in respect of the Action against the Crown. In it she alleged misfeasance in public office against various employees of the CRA, an employee of the Department of Justice (the "DOJ"), members of the RCMP and the former Deputy Commissioner of the OPSIC.

[15] The Crown filed a Statement of Defence on October 31, 2011. The Crown denied that any Crown servant had committed the tort of misfeasance in public office.

[16] Ms. Collins filed a reply on November 3, 2011. In her reply, Ms. Collins claimed that the Crown had failed to provide substantive defences to her claims.

[17] On December 13, 2011, Ms. Collins brought the Summary Judgment Motion. The Crown brought the Summary Trial Motion on December 20, 2011.

[18] Pursuant to an order of Justice Rennie of the Federal Court (as he then was), dated January 23, 2012, the Summary Judgment Motion and the Summary Trial Motion were ordered to be heard at the same time.

[19] Pursuant to written directions of Justice Mosley of the Federal Court, dated March 1, 2012, the Crown was permitted to serve and file a single motion record with respect to both of the Summary Relief Motions. The motion records of Ms. Collins and the Crown contained the following affidavits:

a) R. Maxine Collins, affirmed December 13, 2011;
b) R. Maxine Collins, affirmed March 19, 2012;
c) Pierre Léveillé, affirmed March 7, 2012 (the "Léveillé Affidavit");
d) Rob Coelho, affirmed March 6, 2012 (the "Coelho Affidavit");
e) Jim Stathakos, affirmed March 8, 2012 (the "Stathakos Affidavit");
f) Anuradha Marisetti, affirmed March 2, 2012 (the "Marisetti Affidavit");
g) Perry Zanetti, affirmed March 8, 2012 (the "Zanetti Affidavit");
h) Robert Vladescu, affirmed March 9, 2012 (the "Vladescu Affidavit");
i) Rickaye Low, affirmed February 29, 2012 (the "Low Affidavit");
j) Susan Pattison, affirmed March 7, 2012 (the "Pattison Affidavit"); and
k) Kamlesh Kumar, affirmed March 5, 2012 (the "Kumar Affidavit").

[20] At the hearing of the Summary Relief Motions, which commenced on September 26, 2013, Ms. Collins brought two motions, only one of which is the subject of this appeal. Ms. Collins moved to have the Summary Trial Motion dismissed as premature because the Crown had not yet filed an affidavit of documents and because examinations for discovery had not yet been conducted. The Judge denied this motion orally, providing reasons in an appendix to her reasons for judgment with respect to the Summary Relief Motions.

[21] Ms. Collins also objected to the admissibility of parts of the Crown's evidence contained in the Léveillé Affidavit, the Coelho Affidavit, the Stathakos Affidavit, the Pattison Affidavit, the Low Affidavit and the Marisetti Affidavit. No objection was taken to the admissibility of the Kumar Affidavit, the Zanetti Affidavit or the Vladescu Affidavit. The Judge adjourned the hearing to address Ms. Collins' evidentiary challenges.

[22] By order dated October 11, 2013, the Judge found that certain portions of the impugned affidavits were inadmissible and would not be considered by her in the Summary Relief Motions.

[23] On November 21, 2013, the Judge heard the merits of the Summary Relief Motions. She issued her judgment and reasons for judgment on April 1, 2014.

IV. THE JUDGE'S DECISIONS

[24] On September 26, 2013, the Judge made an oral ruling that the Crown's motion for summary trial was not premature. The Judge held that Rule 213 of the *Federal Courts Rules*, S.O.R./98-106 (the "*Federal Courts Rules*") provides that a motion for summary trial may be brought at any time after a statement of defence has been filed and before the time and place for trial have been fixed. However, she concluded that it was open to Ms. Collins to argue the lack of discovery as a defence against the Summary Trial Motion when the Court heard that motion on its merits.

[25] By order dated October 11, 2013, the Judge dealt with Ms. Collins' challenges to portions of the Crown's evidence. The Judge determined that paragraphs 4, 6, 9 and 13 of the Léveillé Affidavit, paragraphs 5, 6 and the words "from my human resources contact and" in paragraph 13 of the Coelho Affidavit, paragraph 18 of the Stathakos Affidavit and paragraph 2 of the Marisetti Affidavit were inadmissible as hearsay. The Judge determined that the remainder of the challenged evidence was properly before her on the Summary Relief Motions.

[26] The Judge rejected the challenge to the admissibility of the audit trails. She held that the audit trails of the accesses to Ms. Collins' personal tax information were properly admissible under the business records exception in subsection 30(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the "*Canada Evidence Act*"). She rejected Ms. Collins' argument that the audit trails were an investigative record, within the meaning of subsection 30(10) of the *Canada Evidence Act*. She ruled that the portions of the Crown's affidavit evidence that explained the audit trails were necessary and admissible pursuant to subsection 30(4) of the *Canada Evidence Act*.

[27] By order dated April 1, 2014, the Judge dismissed the Summary Judgment Motion, allowed the Summary Trial Motion and dismissed the Action.

[28] With respect to the Summary Judgment Motion, the Judge found that Ms. Collins had failed to discharge her burden of establishing that there was no genuine issue for trial. Ms. Collins had claimed that there was no genuine issue for trial because the Statement of Defence contained no substantive defence. The Judge held that there was nothing improper with a

statement of defence comprised of denials, the effect of which was to put Ms. Collins to proof of her claim.

[29] The Judge determined that the brief affidavit tendered by Ms. Collins (located at page 472 of Volume 3 of the Appeal Book), which had to be considered "her best foot forward", failed to establish an essential element of her claim – that a public officer engaged in deliberate and unlawful conduct in his or her capacity as a public officer. In addition, the Judge found that the Crown's evidence indicated that Mr. Zanetti was the only person who had made an unauthorized access to Ms. Collins' CRA file, that he had not done so in an official capacity as a public officer and that he was not aware that his unlawful conduct would likely harm Ms. Collins. Accordingly, the Judge concluded that Ms. Collins had failed to establish that there was no genuine issue for trial and dismissed the Summary Judgment Motion.

[30] The Judge granted the Crown's Summary Trial Motion. She found that the matter was appropriate for summary trial because:

a) the matter was not overly complex, involving only well-established legal and straight-forward factual issues;

b) the matter had been outstanding for years and the interests of justice favoured deciding it on the merits in an expeditious fashion;

c) credibility was not a crucial factor because the answers to the written cross-examinations had not raised any credibility concerns; and

d) there was no issue of cutting the litigation into slices because the Summary Trial Motion was heard at the same time as the Summary Judgment Motion and so the record from the Summary Relief Motions should be considered the best foot forward of both parties.

[31] The Judge rejected Ms. Collins' argument that a fulsome discovery process was required because Ms. Collins had brought a motion for summary judgment and, as a result, was presumed to have already put her best foot forward. Further, Ms. Collins had availed herself of the opportunity for written cross-examination of the Crown's affiants and could have requested further cross-examination if she had wanted to do so.

[32] With respect to the merits of the summary trial, the Judge enunciated the elements of the tort of misfeasance in public office from the Supreme Court of Canada decision in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 [*Odhavji Estate*].

[33] The Judge found that the audit trails revealed that the only unauthorized access to Ms. Collins' personal information was Mr. Zanetti's access on June 12, 2005, between 1:35 p.m. and 1:41 p.m. The Judge accepted Mr. Zanetti's evidence that he accessed his colleagues' and other taxpayers' records out of curiosity, did not remember accessing Ms. Collins' information specifically or recall any information that he saw in her file, knew that such access was contrary to CRA policy, conducted these accesses in private and did not share any of the information that he saw with anyone. Mr. Zanetti's evidence was corroborated in part by Mr. Stathakos' investigation.

[34] The Judge found that the evidence failed to show that Mr. Zanetti was aware that his conduct was likely to harm Ms. Collins or that it was done with the express purpose of harming Ms. Collins. Additionally, she found that there was no evidence to show that anyone other than Mr. Zanetti had made an unauthorized access to Ms. Collins' personal tax information. Finally,

she held that there was also no evidence regarding Ms. Collins' allegations against the RCMP, the DOJ, the OPSIC, or any individual employed by them.

[35] The Judge also rejected, as unsubstantiated, assertions by Ms. Collins that the audit trails had been edited to protect the CRA.

[36] The Judge concluded that Ms. Collins had failed to establish the elements of the tort of misfeasance in public office and that judgment should be granted to the Crown.

V. ISSUES

[37] There are four issues before the Court:

a) Whether the Judge erred in ruling that the Summary Trial Motion was not premature;

b) Whether the Judge erred in her treatment of the admissibility of evidence;

c) Whether the Judge erred in dismissing Ms. Collins' Summary Judgment Motion; and,

d) Whether the Judge erred in granting the Crown's Summary Trial Motion.

VI. STANDARD OF REVIEW

[38] In my view, the appellate standards of review, as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, govern this Court's review of all three appeals. Questions of law are reviewed on a standard of correctness while questions of fact and mixed fact and law in respect of which there are no extricable questions of law are reviewed on a standard of palpable and overriding error. See also *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, 464 N.R. 187; *Manitoba v. Canada*, 2015 FCA 57, 470 N.R. 187.

VII. ANALYSIS

A. *Preface*

[39] Portions of Ms. Collins' written submissions consist of personal attacks on the Judge's impartiality and independence, and, in some cases, amount to allegations of bias.

[40] Any suggestion of bias requires careful consideration because "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so" (*Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 57, [2003] 2 S.C.R. 259). As Ms. Collins has been informed:

> [T]here is a strong presumption that judges will administer justice impartially. This presumption is not easily rebutted and "convincing evidence" is required to prove an allegation of reasonable apprehension of bias.
>
> [Citation omitted]

> *Collins v. Canada*, 2011 FCA 140 at para. 7, 418 N.R. 23. See also *Collins v. Canada*, 2011 FCA 123, 418 N.R. 196; *Collins v. Canada*, 2011 FCA 171, 421 N.R. 201.

[41] There is nothing before the Court that remotely suggests any bias or impartiality on the part of the Judge. Personal attacks on the Judge's integrity have no place in a memorandum of fact and law, the purpose of which is to provide the Court and the respondent with a concise statement of the law and facts upon which the appellant relies to challenge the decisions under appeal.

B. *Prematurity Order*

[42] The question of whether the *Federal Courts Rules* preclude a motion for summary trial before discoveries is a pure question of law that is reviewable on a standard of correctness.

[43] Rules 213(1) of the *Federal Courts Rules* reads as follows:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213**. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés
[Emphasis added]	[Je souligne]

[44] The text of this Rule is clear – a party may bring a motion for summary trial "at any time" after the defendant has filed a defence. The only *proviso* is that such a motion must be brought before the time and place for the trial has been fixed.

[45] The Crown asserts that Ms. Collins' interpretation of Rule 213(1) of the *Federal Courts Rules* is belied by her own actions in the bringing of the Summary Judgment Motion before discoveries. More effectively, in my view, the Crown asserts that the power of the Court, under Rule 218 of the *Federal Courts Rules*, to circumscribe discoveries that occur after a motion under Rules 215 or 216 of the *Federal Courts Rules* has been less than fully successful must mean that it is no precondition to a motion for summary trial under Rule 213(1) of the *Federal Courts Rules* that discoveries must have occurred.

[46] I am not persuaded that the Crown was precluded from bringing the Summary Trial Motion for the reasons asserted by Ms. Collins. Moreover, I do not read any of the British Columbia jurisprudence, that Ms. Collins cited in her factum, as establishing the requirement that discoveries must take place before a motion for summary trial may proceed.

[47] In denying Ms. Collins' prematurity motion, it should be noted that the Judge correctly, in my view, permitted Ms. Collins to raise the lack of discoveries as a defence to the Crown's Summary Trial Motion on the merits.

C. *Evidentiary Order*

[48] Ms. Collins asserts that the audit trails are inadmissible hearsay evidence and that the Judge erred in concluding that they fell within the "business records" exception to the rule against admitting hearsay that is contained in subsection 30(1) of the *Canada Evidence Act*. In particular, Ms. Collins asserts that the Judge should have concluded that the audit trails were records "made in the course of an investigation or inquiry" and therefore inadmissible by virtue of subsection 30(10) of the *Canada Evidence Act*.

[49] In *R. v. Youvarajah*, 2013 SCC 41 at paragraph 31, [2013] 2 S.C.R. 720, [*Youvarajah*] Justice Karakatsanis stated:

> [31] The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 81.

[50] The relevant portions of these provisions of the *Canada Evidence Act* are as follows:

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record	**30**. (1) Lorsqu'une preuve orale concernant une chose serait admissible dans une procédure judiciaire, une pièce établie dans le cours ordinaire des affaires et qui contient des renseignements sur cette chose est, en vertu du présent article, admissible en preuve dans la procédure judiciaire sur production de la pièce.
[…]	[…]

(10) Nothing in this section renders admissible in evidence in any legal proceeding	(10) Le présent article n'a pas pour effet de rendre admissibles en preuve dans une procédure judiciaire :
(*a*) such part of any record as is proved to be	*a*) un fragment de pièce, lorsqu'il a été prouvé que le fragment est, selon le cas :
(i) a record made in the course of an investigation or inquiry,	(i) une pièce établie au cours d'une investigation ou d'une enquête,
[Emphasis added]	[Je souligne]

[51] The determination of whether the audit trails are "business records", within the meaning of subsection 30(1) of the *Canada Evidence Act*, or "investigation records", within the meaning of subsection 30(10) of the *Canada Evidence Act*, is largely factual. As stipulated in *Youvarajah*, factual findings made by a judge that underpin a determination of the admissibility of hearsay evidence are entitled to deference.

[52] The Judge referred to the Vladescu Affidavit (which was not challenged by Ms. Collins) and found that the National Audit Trail System automatically creates a record of every access made by a CRA employee to a taxpayer's files. She went on to find that the recordation of accesses to Ms. Collins' CRA files occurred independently of any investigation that arose out of her assertion that members of her audit team had unlawfully accessed her CRA files. Additionally, the Judge found that the audit trails that Mr. Stathakos considered were simply gathered for his review. This led her to find that the audit trails were "business records" under subsection 30(1) of the *Canada Evidence Act* and were not "investigation records" for the purposes of subsection 30(10) of the *Canada Evidence Act*. In my view, these are largely factual findings that were open to the Judge and are entitled to deference.

[53] The Judge concluded that because the audit trails were "business records", they were admissible under subsection 30(1) of the *Canada Evidence Act*. In my view, in so concluding, the Judge made no error of law.

[54] Ms. Collins also asserts that the Judge erred in her interpretation of subsections 30(1) and (10) of the *Canada Evidence Act* in relying upon case law that the parties did not provide to her. In *Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203, 2010 D.T.C. 5126, [*Heron Bay*], this Court concluded that when addressing an issue raised by the parties, a judge cannot be precluded from referring to case law that was not cited by the parties. Accordingly, the Judge made no error in relying upon additional case law in determining the admissibility of the audit trails pursuant to subsections 30(1) and (10) of the *Canada Evidence Act*.

[55] Ms. Collins asserts that the Judge erred in admitting portions of the Pattison Affidavit (paragraph 16), the Coelho Affidavit (paragraphs 7 to 12 and the majority of 13) and the Stathakos Affidavit (paragraphs 13, 15, 17, 21 and 23) on the basis that those portions provide an explanation of the audit trails pursuant to subsection 30(4) of the *Canada Evidence Act*. That provision reads as follows:

30(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original	**30**(4) Lorsque la production d'une pièce ou d'une copie d'une pièce décrite au paragraphe (1) ou (2) ne révélerait pas au tribunal les renseignements contenus dans la pièce, du fait qu'ils ont été consignés sous une forme qui nécessite des explications, une transcription des explications de la pièce ou copie, préparée par une personne qualifiée pour donner les explications, accompagnée d'un document de cette

of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is	personne indiquant ses qualités pour les donner et attestant l'exactitude des explications est admissible en preuve, en vertu du présent article, de la même manière que s'il s'agissait de l'original de cette pièce. Le document prend la forme soit d'un affidavit reçu par une personne autorisée, soit d'un certificat ou d'une déclaration comportant une attestation selon laquelle ce certificat ou cette déclaration a été établi en conformité avec les lois d'un État étranger, que le certificat ou l'attestation prenne ou non la forme d'un affidavit reçu par un fonctionnaire de l'État étranger.
(*a*) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or	
(*b*) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.	
[Emphasis added]	[Je souligne]

[56] Ms. Collins asserts that the Judge erred by relying upon subsection 30(4) of the *Canada Evidence Act* as the basis for her finding because that provision was not put to her by the Crown. In my view, this assertion lacks merit.

[57] The Judge referred to subsection 30(4) of the *Canada Evidence Act* when she considered the applicability of subsections (1) and (10) of section 30 of that legislation in dealing with the

arguments that were put to her by the parties. Ms. Collins has not provided any authority that establishes that a judge is precluded from referring to another subsection of a provision that was put in issue by the parties. Accordingly, in my view, the Judge committed no error of law in basing her admissibility determinations in respect of the impugned portions of the Pattison Affidavit, the Coelho Affidavit and the Stathakos Affidavit, referred to above, on subsection 30(4) of the *Canada Evidence Act*.

[58] In terms of the factual underpinnings of these admissibility determinations, it is evident from the Judge's order that the meaning of the audit trails was not clear to her and that she required an explanation of their meaning. Accordingly, in my view, the Judge committed no reviewable error in accepting the explanatory portions in the Pattison Affidavit, the Coelho Affidavit and the Stathakos Affidavit as admissible evidence pursuant to subsection 30(4) of the *Canada Evidence Act*.

[59] As earlier mentioned, the Judge found that a number of paragraphs in the Léveillé Affidavit, the Coelho Affidavit, the Stathakos Affidavit and the Marisetti Affidavit were inadmissible. Before this Court, Ms. Collins asserts that the Judge erred in failing to conclude that a number of additional paragraphs of the affidavit evidence were also inadmissible.

[60] Before dealing with these assertions, it is useful to consider the relevance of the affidavit evidence that was placed before the Judge. That evidence was tendered in the Summary Relief Motions. The focal point in each of those motions was Ms. Collins' claim that she had been the victim of the tort of misfeasance in public office.

[61] The elements of that tort are evident from paragraph 32 of *Odhavji Estate* wherein Justice Iacobucci stated:

> [32]…[T]he tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[62] Thus, the question of the admissibility of the impugned paragraphs in the Crown's affidavits must be tested in relation to the elements of the tort that Ms. Collins says has been committed. If the Judge erred in her determination of the admissibility of a particular portion of these affidavits under the hearsay rules, but that portion did not relate to an element of the alleged tort, then such an error would be immaterial because it would have no impact upon the determination of the Summary Relief Motions.

[63] Reverting to the impugned affidavits, Ms. Collins asserts that the Judge erred by admitting paragraphs 8, 9 and 10 of the Low Affidavit. These paragraphs contain attestations dealing with Mr. Low's relationship with Ms. Collins as a member of his audit team, certain "Interim Competency Assessment Reports" and Ms. Collins' reactions to such reports. In my view, these paragraphs have no bearing on the issues that were before the Judge in the Summary Relief Motions and therefore ought to have been stuck as inadmissible. That said, it is my view that the Judge's ruling on their admissibility was not material to her decisions on those motions.

[64] Paragraph 16 of the Pattison Affidavit and paragraphs 7 to 13 of the Coelho Affidavit contain the affiants' explanations of the audit trails. For the reasons given above, it is my view that the Judge committed no reviewable error in finding these paragraphs admissible pursuant to subsection 30(4) of the *Canada Evidence Act*.

[65] Paragraphs 13 and 15 of the Stathakos Affidavit contain the affiant's explanation of the audit trails and for the reasons given above, in my view, the Judge did not err in finding them admissible pursuant to subsection 30(4) of the *Canada Evidence Act*. Paragraphs 17, 21 and 23 of this affidavit contain attestations with respect to investigations as to whether Ms. Collins was a "rat" and whether she had requested or had been offered alternate employment. These matters have no bearing on the issues in the Summary Relief Motions. As such, in my view, the Judge's ruling on their admissibility was not material to her decision.

[66] In conclusion, I have not been persuaded that the Judge made any material errors in her admissibility findings.

D. *Summary Judgment Motion*

[67] The question of whether the Judge erred in denying the Summary Judgment Motion is a question of mixed fact and law that is reviewable on the standard of palpable and overriding error.

[68] Ms. Collins asserts that the Judge should have granted the motion because the Crown did not oppose it. It is clear that this assertion must fail. The Crown did oppose the Summary Judgment Motion.

[69] Ms. Collins asserts that the Judge failed to properly articulate the legal principles that are applicable to summary judgment motions. Ms. Collins accepts that the moving party has the burden of establishing that a genuine issue for trial does not exist; she asserts that the responding party must also establish that a genuine issue for trial does exist. Ms. Collins further asserts that the Judge erred by failing to conduct an analysis of the evidence that was before her on this motion.

[70] At the hearing, Ms. Collins provided additional authorities. One of those is particularly helpful in explaining the test for summary judgment. In *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, 2003 ABCA 298, 339 A.R. 165 [*Pioneer Exploration*], Justice Wittmann dealt with the requirements under Rule 159 of the previous *Alberta Rules of Court*, A.R. 390/1968 which, like Rule 215 of the *Federal Courts Rules*, permits an Alberta court to grant summary judgment if there is no genuine issue for trial. At paragraphs 15 to 19, Justice Wittmann stated:

> THE TEST FOR SUMMARY JUDGMENT
>
> [15] Rule 159 states that a plaintiff may be granted summary judgment "if the court is satisfied that there is no genuine issue for trial". When applying for summary judgment as a plaintiff, the plaintiff bears the ultimate legal onus of meeting the requirements of R. 159. This ultimate burden is to be distinguished from the evidentiary burden that shifts when applying the R. 159 test.
>
> [16] In the transcripts from the chambers proceedings below, counsel and the chambers judge discuss proving a *prima facie* case beyond a reasonable doubt, phrases which arise from some decisions of the Court of Queen's Bench: *Gerling*

> *Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.*, (1998) 64 Alta. L.R. (3d) 174 (Q.B.). These phrases are unfortunate. Neither "*prima facie*" nor "reasonable doubt" is appropriate in the context of the standard of proof for summary judgment under Rule 159.
>
> [17] The test is succinctly set out in *Royal Bank of Canada v. McLean* (1997), 211 A.R. 297 (Q.B.) at paras. 27 to 34, where Hutchinson, J. set out a two step process.
>
> [18] First, the plaintiff bears the evidentiary burden of proving its cause of action on a balance of probabilities. Each and every fact necessary to support the claim must be proven: *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (C.A.).
>
> [19] After the plaintiff has proved its case on a balance of probabilities, the evidentiary burden shifts to the defendant but the ultimate burden remains, as always, with the plaintiff. The defendant can avoid a summary judgment in favour of the plaintiff by proving that there is a genuine issue for trial. If the defendant meets this evidentiary burden, the plaintiff fails to meet its ultimate burden. It must be beyond doubt that no genuine issue for trial exists.
>
> [Emphasis added]

[71] Some additional light can be shed upon this test by the Ontario Court of Appeal decision in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 111 O.A.C. 201, 164 D.L.R. (4th) 257 [*Dawson*] . This case was decided at a time when the summary judgment provisions of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 were essentially the same as Rule 215 of the *Federal Courts Rules* and, as such, it provides useful guidance. At paragraphs 17 and 18, Justice Borins stated:

> [17] At the summary judgment stage, the court wants to see what evidence the parties have to put before the trial judge, or jury, if a trial is held. Although the onus is on the moving party to establish the absence of a genuine issue for trial, as rule 20.04(1) requires, there is an evidentiary burden on the responding party who may not rest on the allegations or denials in the party's pleadings, but must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. The motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial. See *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25 (Gen. Div.), and the cases cited therein.

> [18] The caselaw and the experience of this court suggest that motions judges frequently encounter difficulty in the analytical exercise of determining whether the record demonstrates that there is no genuine issue in respect to a material fact which requires resolution by a trial judge or jury. In this regard, it is helpful to emphasize that the dispute must center on a material fact, and that it must be genuine: *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.); *Rogers Cable T.V. Ltd., supra; Royal Bank of Canada v. Feldman* (1995), 23 O.R (3d) 798 (Gen. Div.), appeal quashed (1995), 27 O.R. (3d) 322 (C.A.); *Blackburn v. Lapkin* (1996), 28 O.R. (3d) 292 (Gen. Div.).
>
> [Emphasis added]

[72] In my view, the analytical framework that the Judge adopted was consistent with that set forth in *Pioneer Exploration* and *Dawson*. The Judge then went on to find that Ms. Collins' evidence failed to persuade her that any individual was engaged in unlawful conduct in his or her capacity as a public officer – an essential element of the tort that Ms. Collins was obliged to establish. In my view, this finding was open to the Judge and she committed no palpable and overriding error in making it.

[73] It is also my view that this finding alone would have been sufficient to ground the Judge's decision to dismiss the Summary Judgment Motion. However, she went on to consider the evidence tendered by the Crown and found that it established that only Mr. Zanetti had made an unauthorized access to Ms. Collins' CRA file, such access by Mr. Zanetti was not made in his capacity as a public officer and that Mr. Zanetti was unaware that his conduct would likely harm Ms. Collins.

[74] In considering the evidence tendered by the Crown, the Judge ensured that if any evidentiary burden had shifted to the Crown, that burden was met by virtue of the facts thereby

established, which showed that the factual components of the elements of the tort of misfeasance in public office remained genuine issues for trial.

[75] In conclusion, it is my view that the Judge made no error in dismissing the Summary Judgment Motion.

E. *Summary Trial Motion*

[76] The question of whether the Judge erred in granting the Summary Trial Motion is a question of mixed fact and law that is reviewable on the standard of palpable and overriding error.

[77] Ms. Collins asserts that the Judge erred in granting this motion because significant issues of credibility were raised.

[78] The Judge found that credibility was not a crucial issue in this summary trial. She observed that written cross-examinations were undertaken by Ms. Collins and that no credibility issues were apparent in the answers that Ms. Collins obtained.

[79] In my view, these findings were open to the Judge and Ms. Collins has not established that they were premised upon any palpable and overriding error.

[80] The existence of conflicting affidavit evidence establishes that there is disagreement among the affiants. It does not necessarily establish that any of the affiants lack credibility. In

this Court, Ms. Collins has failed to persuade me that any finding made by the Judge that underpinned her decisions to grant the Summary Trial Motion and to dismiss the Action was premised upon a lack of credibility on the part of any affiant.

[81] Ms. Collins also asserts that the Judge erred by not making an adverse inference as a consequence of the Crown's decision not to cross-examine Ms. Collins on her affidavit. It is clear that the power under Rule 216(4) of the *Federal Courts Rules* to make an adverse inference is permissive. Ms. Collins has not established any error on the Judge's part in declining to exercise her discretion to draw the requested inference.

[82] In conclusion, I have not been persuaded that the Judge made any error in granting the Summary Trial Motion.

F. *The Summary Trial*

[83] In dealing with the merits of the Action, the Judge stated the elements of the tort of misfeasance in public office that Ms. Collins was required to establish.

[84] The Judge considered the evidence contained in the Zanetti Affidavit, Exhibits "A" and "C" to the Pattison Affidavit, paragraph 9 of the Coelho Affidavit, paragraphs 13 and 15 of the Stathakos Affidavit and paragraphs 8, 11-12, and 14-15 of the Low Affidavit. She concluded that there was only one brief unauthorized access to Ms. Collins' CRA files, by Mr. Zanetti, who did not remember, or pass on to anyone else, anything that he saw during that access. She also found that Mr. Zanetti was unaware that his conduct was likely to harm Ms. Collins. She did not accept

Ms. Collins' assertion that Mr. Low, and others on his audit team, had made any unauthorized accesses to Ms. Collins' CRA files. Further, the Judge found no evidence that the audit trails had been edited to protect the CRA.

[85] Based upon these findings, she concluded that Ms. Collins had failed to establish the tort of misfeasance in public office as alleged in the Amended Amended Statement of Claim.

[86] At pages 28 to 30 of her factum, Ms. Collins makes assertions that take issue with the Judge's findings and her conclusion that Ms. Collins failed to establish the tort that she had pleaded. In my view, these assertions are, in large measure, re-assertions of arguments that Ms. Collins unsuccessfully put to the Judge. None of these assertions has persuaded me that the Judge made any palpable and overriding error in making her findings and reaching her conclusion that the necessary elements of the tort of misfeasance in public office had not been established.

[87] Ms. Collins asserted that the lack of discovery was a live issue. In rejecting this assertion, the Judge determined that by bringing the Summary Judgment Motion, Ms. Collins was taken to have put her "best foot forward", in other words had put forward evidence that she believed was sufficient for her to meet her burden of proving the elements of the tort that she had pleaded. In my view, this determination is a sufficient answer to Ms. Collins' assertion that she required discovery.

[88] In conclusion, I have not been persuaded that in dismissing the Action the Judge made any error that warrants our intervention.

VIII. DISPOSITION

[89] For the above reasons, I would dismiss the appeals with one set of costs.

"C. Michael Ryer"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-211-14, A-343-13, A-356-13

FOR: A-211-14:

APPEAL FROM AN ORDER, OF THE HONOURABLE MADAM JUSTICE GLEASON OF THE FEDERAL COURT, DATED APRIL 1, 2014 IN DOCKET No: T-997-09.

FOR: A-343-13:

APPEAL FROM AN ORDER, OF THE HONOURABLE MADAM JUSTICE GLEASON OF THE FEDERAL COURT, DATED SEPTEMBER 26, 2013 IN DOCKET No: T-997-09.

FOR A-356-13:

APPEAL FROM AN ORDER, OF THE HONOURABLE MADAM JUSTICE GLEASON OF THE FEDERAL COURT, DATED OCTOBER 11, 2013 IN DOCKET No: T-997-09.

STYLE OF CAUSE:	R. MAXINE COLLINS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
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REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	DAWSON J.A. WEBB J.A.
DATED:	DECEMBER 10, 2015

APPEARANCES:

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