Federal Court of Appeal  Cour d'appel fédérale

Date: 20180216

Dockets: A-46-17

Citation: 2018 FCA 38

CORAM: **PELLETIER J.A.**
NEAR J.A.
WOODS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

CHRISTOPHER JOHN WHALING

Respondent

Heard at Vancouver, British Columbia, on January 30, 2018.

Judgment delivered at Ottawa, Ontario, on February 16, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NEAR J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The Attorney General appeals from a decision of the Federal Court of Canada striking the statements of claim in two proposed class actions for reasons reported as *Whaling v Canada (Attorney General)* and *Liang v Canada (Attorney General)*, 2017 FC 121, 374 C.R.R. (2d) 249 (Reasons). The Attorney General appeals from a decision in which she was successful because, having struck the claims in their entirety, the Federal Court granted the plaintiffs (respondents in

the appeals) leave to amend. The Attorney General contends that the claims cannot be amended in a way that will disclose a reasonable cause of action.

[2] The statements of claim sought damages pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* because of the unconstitutionality of the retrospective application of the *Abolition of Early Parole Act*, S.C. 2011 c. 11 (the *Act*). In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, the Supreme Court ruled that the retrospective application of the Act was a violation of Mr. Whaling's right to be free of double jeopardy pursuant to paragraph 11(*h*) of the *Charter*.

[3] In Mr. Liang's case, the British Columbia Court of Appeal held that the retrospective loss of the right to early parole effectively increased the penalty for the offence for which he was convicted. This was held to be a violation of his right under paragraph 11(*i*) of the Charter to the benefit of the lower punishment where the punishment for an offence has been varied between the time of the commission of the offence and the time of sentencing: *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 311 C.C.C. (3d) 159.

[4] Mr. Whaling and Mr. Liang each commenced a proposed class proceeding in the Federal Court by way of a statement of claim in which each claimed to be a representative plaintiff. The statements of claim were substantially the same. Each claimed damages under subsection 24(1) of the *Charter* on the basis that the passage of the legislation with unconstitutional retrospective effect was done recklessly, in a grossly negligent manner, in bad faith and/or in abuse of the defendant's power by passing a bill into law which it knew, or ought to have known, was

unconstitutional and would infringe the rights of those to whom it applied, and did so motivated by political self-interest.

[5] The Attorney General brought a motion to have each statement of claim struck pursuant to Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 (the *Rules*), on the basis that it did not disclose a reasonable cause of action and was an abuse of process.

[6] The Federal Court agreed that the facts pleaded did not disclose recklessness, bad faith or abuse of power such as to ground a claim for relief under subsection 24(1) of the *Charter*: Reasons at para. 12. To be clear, the Federal Court did not rule that the cause of action advanced by the plaintiffs was not known to law; it ruled that the pleading of the facts was defective, and so the proceedings should be struck. However, the Court declined to exercise its discretion with respect to the Attorney General's arguments as to cause of action estoppel or abuse of process because it was of the view that doing so would result in unfairness to potential class members, should the claims be certified as class proceedings. The Court did not accept the Attorney General's contention that the applicable limitation period had expired. It found that the applicable limitation period is six years as set out in subsection 39(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 because the cause of action arose otherwise than in a province. In the end, the Federal Court struck out the claims in their entirety but gave the plaintiffs leave to amend.

[7] In this Court, the Attorney General argues that the Federal Court erred in granting leave to amend. She relies on this Court's decision in *Collins v. Canada*, 2011 FCA 140, 418 N.R. 23

(*Collins*) as authority for the proposition that the test for granting leave to amend is whether a claim can be cured by an amendment: see *Collins* at para. 26.

[8] In the Attorney General's submission, these claims cannot be cured because they are doomed to fail. The Attorney General advances five grounds in support of her position. She says that the claims are non-justiciable and are subject to legislative privilege. Next, she alleges that the claims are statute-barred because the applicable limitation period is the provincial limitation period of two years. The Attorney General also maintains that the claims are caught by the doctrines of cause of action estoppel and abuse of process, largely because of the plaintiffs' failure to include their claim under subsection 24(1) of the *Charter* in their actions to have the legislation declared unconstitutional. She argues that the plaintiffs were bound to raise all possible claims in their original proceedings and that, not having done so, they are estopped from raising their subsection 24(1) claims in a separate proceeding. Finally, the Attorney General submits that these claims are an abuse of process as they compel her to relitigate a question which has already been decided with the attendant risk of inconsistent verdicts, a result which would bring the administration of justice into disrepute: see *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (*C.U.P.E.).*

[9] The standard of review of an interlocutory decision of the Federal Court sitting as a trial court is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law, palpable and overriding error for questions of fact and questions of mixed fact and law, unless one can identify an extricable question of law, in which case, the correctness standard applies. Where the decision in issue is discretionary, the same standard applies: see

Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology, 2016 FCA 215 at para. 83, [2017] 1 F.C.R. 331.

[10] The first two arguments made by the Attorney General, justiciability and legislative immunity, refer to two distinct legal doctrines which on the facts of this case are intertwined. Justiciability refers to the judiciary's reluctance to engage with questions which are not appropriate for adjudication. In *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 at page 546, 83 D.L.R. (4th) 297, the Supreme Court of Canada held that "a question which possesses a sufficient legal component to warrant a decision by a court" is, to that extent, justiciable.

[11] As for legislative immunity, in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 at paragraphs 78 to 82, 209 D.L.R. (4th) 564 (*Mackin*), the Supreme Court held that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional […] [emphasis added]". The general rule that the enactment of unconstitutional legislation is not actionable does not apply where the plaintiff can show "conduct that is clearly wrong, in bad faith or an abuse of power."

[12] In deciding whether the plaintiff's statement of claim should be struck, the test is whether it is "plain and obvious" that the plaintiff's claim will fail: *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959 at page 980, 74 D.L.R. (4th) 321. Taking *Mackin* at face value, it is not plain and obvious that the doctrine of legislative immunity is an absolute bar to the plaintiff's action.

Further, a question as to whether *Charter* damages will be awarded because of "conduct that is clearly wrong, in bad faith or an abuse of power" in the enactment of a law subsequently found to be unconstitutional "possesses a sufficient legal component" to be justiciable. These arguments fail.

[13] The Attorney General next argues that the claims could not be cured because they are statute barred. As noted above, the Federal Court found that the cause of action allegedly arose otherwise than in a province so that the limitation period in subsection 39(2) of the *Federal Courts Act* applied. The Federal Court emphasized the following passage of *Markevich v. Canada*, 2003 SCC 9 at paragraph 40, [2003] 1 S.C.R. 94 (*Markevich*):

> If the cause of action were found to arise in a province, the limitation period applicable to the federal Crown's collection of tax debts could vary considerably depending upon the province in which the income was earned and its limitation periods. In addition to the administrative difficulties that potentially arise from having to determine the specific portions of tax debts that arise in different provinces, the differential application of limitation periods to Canadian taxpayers could impair the equitable collection of taxes.
>
> Reasons, at para. 32

[14] In addition, the Federal Court was particularly influenced by the fact that the plaintiffs' actions were brought in response to parliamentary action in enacting unconstitutional legislation resulting in the loss of rights guaranteed by federal legislation. The Court found that these claims could only be purposively seen as arising "otherwise than in a province": see Reasons at paragraph 33.

[15] The Attorney General relies upon the jurisprudence which holds that a claim for *Charter* damages is not *sui generis*; a claim that is subject to a provincial limitation period remains

subject to that limitation period even if it is advanced as a claim for *Charter* damages: see namely *St. Onge v. Canada*, 2001 FCA 308 at para 2, 288 NR 3; *Vancouver (City) v Ward*, 2010 SCC 27, at para 43, [2010] 2 S.C.R. 28; *Ravndahl v Saskatchewan*, 2009 SCC 7 at para 17, [2009] 1 SCR 181.

[16] While the Attorney General correctly states the law, the proposition upon which she relies is not determinative of the limitations issue. The issue here is the interpretation of section 39 of the *Federal Courts Act*, in particular the determination of when a cause of action arises "otherwise than in a province." We were not directed to any jurisprudence which deals with the interpretation of this phrase in section 39 in the context of proceedings arising from the enactment of an unconstitutional law.

[17] *Markevich*, which was relied upon by the Federal Court, considered the limitations issue from the perspective of the effect upon the Crown of applying provincial limitations to proceedings to collect debts owed to the Crown pursuant to federal legislation. No such issue arises in this case. Whether one applies federal or provincial limitation periods will have no effect whatsoever upon federal administration of penitentiaries. The limitations question arises only in connection with actions arising from the enactment of unconstitutional legislation.

[18] While I do not necessarily disagree with the views expressed by the Federal Court as to the appropriateness of a federal limitation period, those views are not the correct basis for determining where the cause of action in these cases arose.

[19] A cause of action is a set of facts that provides the basis for an action in court: see *Markevich*, at paragraph 27. A cause of action arises in a province when all of the elements of the cause of action are present in that province: see *Canada v. Canada Maritime Group (Canada) Inc.*, [1995] 3 F.C. 124 at page 129, 185 N.R. 104; *Apotex v. Sanofi-Aventis*, 2013 FCA 186 at paragraph 105, [2015] 2 F.C.R. 644. The question as to which facts constitute the plaintiffs' cause of action and where they arose does not appear to have been canvassed in the Federal Court and it was not debated on this appeal. Given the importance of the question for these litigants and for the jurisprudence, I would allow the appeal in part and return this question to the Federal Court, to be decided as directed by the case management judge.

[20] The Attorney General's last two grounds of appeal are that the Federal Court erred in not exercising its discretion to find that the proceedings were doomed to fail because they were caught by the doctrines of *res judicata* and abuse of process. The Federal Court found that the application of these doctrines was discretionary and that the discretion should be exercised so as to ensure that the requirements of justice are met and that the Court's processes are not abused: Reasons at para. 36.

[21] In my view, the Federal Court committed no palpable and overriding error in exercising its discretion as it did. While these proceedings have not yet been certified, I do not believe that the Federal Court erred in having regard to the position of potential class members in exercising its discretion. These considerations are certainly material to meeting the requirements of justice. As for the question of abuse of process, these proceedings are not an attempt to re-litigate a

question which was finally determined in other proceedings, as in *C.U.P.E.* There is no risk of inconsistent findings here.

[22] For these reasons, I have not been satisfied that the Federal Court's decision should be set aside other than with respect to the question of the appropriate limitation period. I would therefore allow the appeal in part and return the matter to the Federal Court so that the issue of the correct limitation period can be determined as provided in these reasons and in accordance with the directions of the case management judge. In light of the divided success, each party should bear their own costs.

"J.D. Denis Pelletier"
J.A.

"I agree
D.G. Near J.A."

"I agree
J. Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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