

Date: 20081007

**Dockets: A-495-07
A-509-07
A-549-07
A-550-07**

Citation: 2008 FCA 298

**CORAM: NADON J.A.
SEXTON J.A.
PELLETIER J.A.**

BETWEEN:

RON CROWE

Appellant

and

THE ATTORNEY GENERAL OF CANADA, THE HONOURABLE CHIEF JUSTICE OF CANADA BEVERLY McLACHLIN, THE HONOURABLE JUSTICE CHARRON, THE HONOURABLE JUSTICE ROTHSTEIN OF THE SUPREME COURT OF CANADA, THE HONOURABLE CHIEF JUSTICE OF ONTARIO ROY McMURTRY, THE HONOURABLE JUSTICE FELDMAN, THE HONOURABLE JUSTICE LANG OF THE COURT OF APPEAL FOR ONTARIO, THE HONOURABLE MADAM JUSTICE JANET WILSON OF THE ONTARIO SUPERIOR COURT OF JUSTICE, THE HONOURABLE RICHARD SCOTT, CHIEF JUSTICE OF MANITOBA AND CHAIRPERSON OF THE JUDICIAL CONDUCT COMMITTEE OF THE CANADIAN JUDICIAL COUNCIL, (in their judicial and private capacities) THE CANADIAN JUDICIAL COUNCIL, THE MARITIME LIFE ASSURANCE COMPANY, now known as THE MANUFACTURERS LIFE INSURANCE COMPANY, MANULIFE FINANCIAL, DOMINIC D'ALESSANDRO, ARTHUR R. SAWCHUK, JOHN CASSADAY, LINO J. CELESTE, GAIL COOK-BENNETT, THOMAS P. D'AQUINO, RICHARD B. DE WOLFE, ROBERT E. DINEEN JR., PIERRE Y. DUCROS, ALLISTER P. GRAHAM, THOMAS E. KIERANS, LORNA R MARSDEN, HUGH W. SLOAN JR., GORDON G. THIESSEN (in their corporate and private capacities), PAOLO GREGO

Respondents

Heard at Toronto, Ontario, on September 17, 2008.

Judgment delivered at Ottawa, Ontario, on October 7, 2008.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

**NADON J.A.
SEXTON J.A.**

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REASONS FOR JUDGMENT

PELLETIER J.A.

Introduction

[1] Mr. Ron Crowe, acting on his own behalf, appeals from two decisions of Mr. Justice Harrington of the Federal Court (the motions judge) in which the latter struck the claims against all of the defendants in the action brought by Mr. Crowe. In the first decision reported at 2007 FC 1020, the motions judge dismissed Mr. Crowe's claims against The Manufacturers Life Insurance Company, Manulife Financial, and their directors (collectively the insurers) as well as the claim against Mr. Crowe's former solicitor, Mr. Greco. In addition, the motions judge struck the claim against the Attorney General of Canada. In his second decision, reported at 2007 FC 1209, the motions judge dismissed the claims against Madam Justice Wilson of the Ontario Superior Court, Chief Justice McMurtry and Justices Feldman and Lang of the Ontario Court of Appeal, as well as Chief Justice McLachlin and Justices Charron and Rothstein of the Supreme Court of Canada. In addition, he also struck the claims against Chief Justice Richard Scott of the Manitoba Court of Appeal in his capacity as Chair of the Judicial Conduct Committee of the Canadian Judicial Council as well as the claim against the Canadian Judicial Council (the Council) itself. The effect of the two decisions was to strike the claims against all defendants, thus putting an end to Mr. Crowe's action.

[2] In addition to appealing these two decisions, Mr. Crowe also served a Notice of Constitutional Question returnable on the date of the hearing of this appeal, as well as a notice of motion seeking certain other relief which was not opposed. I do not propose to deal with the notice of motion; Mr. Crowe was granted the relief he sought.

Facts

[3] Mr. Crowe's claim against these various persons and entities are set out in a statement of claim which runs to some 60 pages. In essence, what began as a claim on a disability insurance policy in the Ontario Superior Court has become a claim in the Federal Court in which it is alleged that all of the defendants were engaged in a "chain conspiracy" to shield the insurers by depriving Mr. Crowe of his constitutionally protected right to a fair and impartial hearing of his claim against the insurers for damages (including punitive damages).

[4] The insurers allege that they reached a settlement with respect to his disability insurance claim, subject to the execution, in due course, of a release in favour of the insurers. Mr. Crowe alleges that the insurers attempted to defraud him by obtaining a more inclusive release than had been agreed to in the settlement negotiations. His former solicitor is alleged to have participated in this scheme.

[5] When the parties could not agree on the terms of the release, a motion was brought before Justice Wilson who ruled that there should be a summary trial of the issue of whether Mr. Crowe was bound by the terms of the settlement. Mr. Crowe notes that this assumes the existence of a settlement on agreed terms, a matter which he disputes. He alleges that Justice Wilson, knowing that the matter could not proceed by summary trial without his consent, obtained his consent to proceed by summary trial by misrepresentation.

[6] Mr. Crowe says that Justice Wilson and the other judicial defendants, acted knowingly without jurisdiction by either making orders which they knew they lacked jurisdiction to make, or, in the case of the appellate judges, by failing to intervene with respect to the deliberate wrongful acts of the other judicial defendants. The Canadian Judicial Council and Chief Justice Scott are alleged to have failed in their duty to sanction the extra-judicial wrongdoing of the judicial defendants; the Government of Canada, as represented by the Attorney General of Canada (the Federal Government), is said to be liable to Mr. Crowe for the wrongful conduct of the judicial defendants. Further particulars of the allegations against the various defendants can be found in the decisions of the motions judge.

The decision under appeal

[7] The motions judge dismissed the claims against the various defendants on various grounds. As regards the insurers, he found that the claim was essentially one sounding in property and civil rights and therefore within the jurisdiction of the provincial superior courts. He came to the same conclusion with respect to the claim against Mr. Crowe's former solicitor: see 2007 FC 1020, at paras. 19 to 21. As regards the claim against the Federal Government, he referred to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the *CLPA*). He held that, since the Federal Government's liability was contingent upon the liability of servants of the Crown and that, since Superior Court judges (including judges of the appellate courts) were not servants of the Crown, the claim contained no reasonable cause of action against the Federal Government: see 2007 FC 1020, at paras. 28 to 30.

[8] As regards the judicial defendants, the motions judge found that there was no federal law which would support an action against a judge of a provincial superior court (which includes members of the provincial court of appeal) or judges of the Supreme Court of Canada. Saying that it would be sterile to decide the question on jurisdictional grounds only, the motions judge went on to deal with the claims against the judicial defendants on more substantive grounds by invoking the notion of judicial immunity, acknowledging that immunity was partial and not absolute. Citing Lord Denning, the motions judge held that the immunity is lost if the judge is "not acting judicially, knowing that [s]he had no jurisdiction to do it.": see 2007 FC 1209, at para. 39. The motions judge found that Justice Wilson was acting within her jurisdiction in making the order to which he objects (see para. 41 of his reasons), and that the other judicial defendants were acting within their jurisdiction when they declined to intervene as requested by Mr. Crowe: see para. 46 of his reasons. As a result of his application of the doctrine of judicial immunity, the motions judge held that there was no reasonable cause of action against the judicial defendants.

[9] In so far as the claim against the Council is concerned, the motions judge referred to the decision of this Court in *Canada v. Grenier*, 2005 FCA 348 (*Grenier*), which holds that a federal board commission or tribunal (the Council falls within this class) cannot be sued for damages resulting from the exercise of statutory authority unless its decision is first found to be unlawful in an application for judicial review. Since no such proceedings had been undertaken by Mr. Crowe, his action against the Council could not proceed. In any event, the motions judge found that there was no causal connection between any breach of duty owed to Mr. Crowe by the Council and the damages which he seeks in his action.

Mr. Crowe's submissions

[10] The substance of Mr. Crowe's arguments in support of his appeal can be summarized as follows. In that portion of the motion judge's decision dealing with the motion to strike pleadings for lack of a reasonable cause of action, the judge was bound to take the pleadings as true. He was not in a position to make findings of fact or credibility. In his Statement of Claim, Mr. Crowe alleged that each of the judicial defendants acted deliberately, knowing that they had no jurisdiction. If that plea is taken as true, as it must be for the purposes of the motion to strike, then judicial immunity does not apply and there was a reasonable cause of action against the judicial defendants. Mr. Crowe rejects the argument that he has not pleaded sufficient particulars of the deliberate and wrongful acts, or of the nature of the conspiracy, by pointing out that none of the defendants has filed an affirmative defence, as required by Rule 183 of the *Federal Courts Rules*, SOR/98-106.

[11] As to whether the Federal Court has jurisdiction over his claim against the Federal Government, Mr. Crowe invokes the *CLPA*, and in particular subparagraph 3(b)(ii) which provides as follows:

3. The Crown is liable for the damages for which, if it were a person, it would be liable

...

(b) in any other province, in respect of:

(i) a tort committed by a servant of the Crown or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

3. En matière de responsabilité, l'État est assimilé à une personne pour :

[...]

b) dans les autres provinces :

(i) les délits civils commis par ses préposés,

(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

[12] Relying on the definition of property in subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which includes incorporeal property, "including rights of any kind", Mr. Crowe argues that his right to a fair and impartial trial is property, and that the Federal Government is liable to him, pursuant to subparagraph 3(b)(ii), for its breach of its duty to protect his constitutional right to a fair trial.

[13] As for the jurisdiction of the Federal Court, Mr. Crowe's position is that since the Superior Court of Ontario "impugned" its own jurisdiction by the deliberate and wrongful acts of the judges of that Court, the Federal Court must assume jurisdiction so as to enable him to obtain a fair and impartial hearing of his claim.

[14] Mr. Crowe served and filed a Notice of Constitutional Question, returnable at the hearing of this appeal. The Notice does not seek to question the constitutional validity or operability of any particular statute. By framing certain questions in constitutional terms, Mr. Crowe asks for "affirmative answers" as to the motivation for the various defendants' allegedly wilful and deliberate conduct designed to infringe his constitutional rights.

Analysis

[15] Given that the questions raised in this appeal are all questions of law, the standard of review is correctness.

[16] The difficulty which Mr. Crowe faces is that the Federal Court is a statutory court and, as such, has only the jurisdiction conferred upon it by statute. It is not a court of inherent jurisdiction as are the provincial superior courts:

46 As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court...

[*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46.]

[17] In *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, the Supreme Court of Canada set out the conditions required to support Federal Court jurisdiction at p. 766:

The general extent of the jurisdiction of the Federal Court has been the subject of much judicial consideration in recent years. In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054, and in *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, the essential requirements to support a finding of jurisdiction in the Federal Court were established. They are:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[18] Dealing first with the claims against the judicial defendants, there is no statutory grant of jurisdiction to the Federal Court by the Parliament giving it jurisdiction over the tortious conduct of judges. Nothing in the *Judges Act*, R.S.C. 1985, c. J-1, or in any other act creates civil liability for acts done by judges in their capacity as judges. As a result, the question of judicial immunity simply

does not arise since there is no liability enforceable in the Federal Court to which that immunity could apply. The allegation of loss of immunity by a judge as a result of deliberate misconduct does not create jurisdiction in the Federal Court: any action against the judge must be brought in the provincial superior court. The motions judge was correct to find that the Federal Court lacks jurisdiction to hear the claims brought against the judicial defendants.

[19] The same is true of the claims against the insurers and Mr. Greco. Once again, there is no statutory grant of jurisdiction which would enable the Federal Court to entertain an action against them for damages for wrongful conduct. The legal obligations which Mr. Crowe seeks to enforce against them are not part of a body of existing federal law: they arise from the law of contract or tort administered by the provincial superior courts in the exercise of their jurisdiction as courts of inherent jurisdiction. The motions judge was again correct when he held that the Federal Court has no jurisdiction to entertain the claims against those defendants.

[20] The claim against the Canadian Judicial Council must also be struck. The specific pleadings against the Council appear in paragraph (f) of the Statement of Claim (which follows paragraph 205), in which Mr. Crowe pleads:

The Canadian Judicial Council has refused or failed to protect the fundamental rights of Canadians to fair hearing, impartial adjudication and fair judicial procedure in accordance with the rules of natural justice, and has refused or failed to act in accordance with its stated objects pursuant to s. 60.(1), (2) of the *Judges Act*, R.S. 1985, namely, to improve the quality of judicial services in the superior courts of Canada, and refused or failed to make bona fide inquiries and the investigation of complaints or allegations as is its mandate under section 63.(2) of the *Judges Act*, R.S. 1985, and refused or failed to make a bona fide inquiry under s. 65.(2) thereunder with respect to the conduct of the Honourable Madam Justice Wilson of the Ontario Superior Court of Justice as was requested by the Plaintiff in regard to her

conduct of motions heard by her on December 9, 2005 brought by the Plaintiff and MANULIFE in furtherance of the Plaintiff's claim Court File No. 04-CV-274116CM1 against MANULIFE for long-term disability benefits where it is plain and obvious from the materials submitted to the Canadian Judicial Council by the Plaintiff that the motions judge had been incapacitated or disabled from the due execution of the office of judge by reason of having been guilty of misconduct, having failed in the due execution of that office, and having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office, and the Canadian Judicial Council refused or failed to recommend to the Minister of Justice that the Honourable Madam Justice Wilson be removed from office or sanctioned in any way despite clear and compelling evidence that she had willfully acted with extreme prejudice to the Plaintiff, and in so doing caused further injury to the Plaintiff including extreme emotional anguish and mental distress.

[21] As I understand this pleading, it alleges that the Council has failed to comply with its statutory duty and that, as a result, Mr. Crowe has suffered extreme emotional anguish and mental distress which entitle him to damages. The basis of the allegation of breach of duty is the Council's decision to refuse to proceed with an inquiry into the conduct of the judicial defendants. The Council is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) of the *Federal Courts Act* and as such, its decisions are subject to the judicial review in the Federal Court. This Court's decision in *Grenier* establishes that no action lies against a "federal board, commission or other tribunal" with respect to an action taken under the authority of a federal law unless the decision has first been shown to be unlawful in an application for judicial review before the Federal Court: see paras. 23 to 26. Given that the Council's decision has not been attacked by way of judicial review, Mr. Crowe's action against the Council is premature; it does not disclose a reasonable cause of action and must therefore be dismissed.

[22] Mr. Crowe's pleadings against the Federal Government are found in paragraphs (d) and (e), which follow paragraph 205 of the Statement of Claim. They provide, in their material parts, as follows:

(d) The Crown in Right of Canada and through its agency the Canadian Judicial Council, has wilfully refused or failed its responsibility to protect the inviolable constitutional and quasi-constitutional rights of not only the Plaintiff but all Canadians, by enabling the Canadian judiciary under the rubric of immunity to purposefully subvert justice in order to effect the unjust enrichment of MANULIFE at the expense and to the prejudice of the Plaintiff...

(e) The Crown in Right of Canada and the Attorney General of Canada have refused or failed to protect the Constitutional and quasi-Constitutional rights of the Plaintiff...by knowingly permitting the Canadian Judiciary to proclaim and assume absolutism from public accountability by means of the unwritten principle of judicial immunity which is a perversion and not a fulfillment of jurisprudence in the absence of which the judges in this case would not have considered themselves free to have knowingly misused their judicial offices for a purpose inconsistent with its proper judicial function and in which MANULIFE was knowingly complicit, which has caused injury to the Plaintiff pecuniary and otherwise as disclosed in the pleadings herein for which the Crown of Right in Canada and the Attorney General of Canada are liable.

[23] To the extent that these claims against the Federal Government are claims in tort, then they come within section 3 of the *CLPA* which makes the Federal Government "liable for the damages for which, if it were a person, it would be liable" in respect of any tort committed by a servant of the Crown. In other words, the liability of the Federal Government is established by showing that persons for whom the Crown is liable committed tortious acts: see *Stephens Estate v. Canada* (1982), 40 N.R. 620.

[24] The pleadings quoted above do not refer to servants of the Crown as such, though they do refer to judges and the Canadian judiciary. Judges are not servants of the Crown. They are not employees of the Federal Government. The principle of judicial independence is a constitutional

principle: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 106. Its application requires that judges be, and be seen to be, free of interference from the government of the day. That independence is incompatible with the status of an employee. As a result, even if a judge behaves extra-judicially and without jurisdiction, his or her conduct would not engage the liability of the Federal Government. The motions judge correctly held that the claim against the Federal Government must fail for failure to disclose a reasonable cause of action because, assuming Mr. Crowe's allegations to be true, they do not engage the liability of the Crown.

[25] Insofar as Mr. Crowe's complaint is founded on subparagraph 3(b)(ii) of the Act which deals with property rights, it must be dismissed as well. Mr. Crowe argues that his right to due process and a fair trial is an incorporeal right which is included in the definition of "property" at subsection 2(1) of the *Federal Courts Act*. Starting from this premise, he argues that the Federal Government is liable to him by reasons of subparagraph 3(b)(ii) of the *CLPA*, which provides for a right of action against the Crown for "a breach of duty attaching to the ownership, occupation, possession or control of property." The flaw in Mr. Crowe's argument is that the rights referred to in subparagraph 3(b)(ii) are property rights, that is, rights in relation to real and personal property, whether tangible or intangible. Mr. Crowe's procedural and constitutional rights are not property rights, even though they are intangible and, in that sense only, "incorporeal". As a result, they do not give rise to any claim against the Federal Government under subparagraph 3(b)(ii). This argument fails.

[26] That is sufficient to dispose of Mr. Crowe's appeal. I now turn to the Notice of Constitutional Question filed by Mr. Crowe. In that document, Mr. Crowe raises a series of seven questions which are framed in constitutional terms but which raise no constitutional issue. By way of example, the first question reads as follows:

Question 1: On the Courts' wilful denial of the constitutional rights of the Appellant and its misuse of judicial office for a purpose other than that for which it was intended.

THE APPELLANT INTENDS TO QUESTION the constitutional validity and effect of decisions made by the Ontario Superior Court of Justice, the Court of Appeal for Ontario, the Supreme Court of Canada and the Federal Court, namely what is the affirmative reason for the Courts in the case at hand to have wilfully denied and defeated the fundamental, substantive, quasi-constitutional and constitutional rights of the Appellant to a fair hearing, impartial adjudication, fair judicial procedure and to full plenary trial of all genuine issues in dispute as between the parties by way of consistent decisions made which shield the defendant Manulife from damages in consequence of misconduct which the Courts plainly know to be tortious and to in so doing cause further injury to the Appellant?

[27] Each of the other constitutional questions raised by Mr. Crowe is framed in much the same way. Mr. Crowe characterizes certain acts, decisions or omissions of one or more defendants as wilful attempts to protect the insurers and to injure him, and then seeks an "affirmative answer" to the question as to why the defendants would knowingly and wilfully behave in such a way.

[28] In essence, the questions raised by Mr. Crowe under the rubric of constitutional questions are questions about the motivation of the defendants for doing what Mr. Crowe characterizes as wilful acts designed to injure him. These are not constitutional questions, nor are they questions which this Court can answer. They assume the truth of unproven allegations of misconduct which, notwithstanding Mr. Crowe's convictions to the contrary, are not self-evident. Nothing more need, nor can, be said.

[29] The appeal will be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

"I agree
M. Nadon J.A."

"I agree
J. Edgar Sexton J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-495-07, A-509-07, A-549-07, A-550-07

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(A-549-07: APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON, DATED NOVEMBER 6, 2007, DOCKET NO. T-1526-07.)

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CONCURRED IN BY: NADON J.A.
SEXTON J.A.

DATED: OCTOBER 7, 2008

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