

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100125**

**Docket: A-618-08**

**Citation: 2010 FCA 26**

**CORAM: NADON J.A.  
EVANS J.A.  
TRUDEL J.A.**

**BETWEEN:**

**STEPHEN ANTHONY EDELL**

**Appellant**

**and**

**HER MAJESTY THE QUEEN (Canada Revenue Agency),  
THE SUPERINTENDENT OF BANKRUPTCY and  
RISMAN & ZYSMAN INC.**

**Respondents**

Heard at Toronto, Ontario, on January 21, 2010.

Judgment delivered at Ottawa, Ontario, on January 25, 2010.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

NADON J.A.  
EVANS J.A.

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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

**Background**

[1] The appellant, formerly a proposed debtor under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*), is now deemed to have made an assignment in bankruptcy because the Canada Revenue Agency (CRA), his only creditor, has refused his proposal. This, he claims, is evidence of

bad faith on the part of the CRA and constitutes a breach of its duties as a public official, giving rise to a cause of action for damages.

[2] Therefore, he has commenced an action in the Federal Court against the CRA, the Superintendent of Bankruptcy (Superintendent) and the Trustee, seeking judgment against the CRA only. The appellant claims against the CRA:

- a) An order requiring this defendant to accept a proposal made by the plaintiff pursuant to the provisions of the *BIA*, in accordance with its terms;
- b) In the alternative to 1a), an order requiring this defendant to accept such further and other amended proposal as to This Honourable Court may seem appropriate and just;
- c) Damages in the amount of \$100,000.00 or, in the alternative, nominal damages;
- d) Special damages, the full particulars of which will be provided as soon as possible and prior to the trial of this action;
- e) Punitive damages in the amount of \$250,000.00;
- f) Costs of this action, including applicable goods and services tax, calculated on a solicitor and client basis or otherwise in the discretion of This Honourable Court;

[3] The CRA and the Superintendent have succeeded in having the statement of claim struck out. This is the appeal from the judgment of Mandamin J. (the Judge) striking the appellant's statement of claim on the basis that it disclosed no reasonable cause of action and denying his request for an interim stay [2008 FC 1306].

[4] Before reaching his conclusion, the Judge made the following findings, which are relevant to this appeal:

1. The appellant has failed to allege material facts that would sustain his claim for damages either in the tort of misfeasance or in the tort of negligence. Therefore, it was plain and obvious that the statement of claim disclosed no reasonable cause of action (*ibidem* at paragraphs 36, 37, 38 and 46).
2. There is no legal authority for a court to stay the operation of paragraph 57(a) of the *BIA* (*ibidem* at paragraphs 44 and 46).

### Analysis

[5] In ruling on a motion to strike a pleading, the Court is "narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial (*Macneil Estate v. Canada (Indian and Northern Affairs Department)*, 2004 FCA 50 at paragraph 38, *Aguonie v. Galion Solid Waste Material Inc.*, [1998] 38 O.R. (3d) 161). All allegations of fact, unless patently

ridiculous or incapable of proof, must be accepted as proved (*Giacomelli v. Canada (Attorney General)*, (2005) 78 O.R. (3d) 388 at paragraph 7). The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of such genuine issue (*Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, 2008 SCC 14 at paragraph 11).

[6] Applying these principles to the present appeal, I am of the view that it should be allowed in part as it was not “plain and obvious” that the appellant’s entire action failed to disclose a reasonable claim or that allowing this action to proceed would amount to an abuse of process. I shall now briefly discuss each claim.

[7] As for claims 1a) and 1b), I agree with the Judge that these orders cannot issue from the Federal Court (reasons for judgment, at paragraph 30).

[8] Claims c) d) and e), relate to the appellant’s allegations in the tort of negligence, as well as in the tort of misfeasance in public office.

[9] Unlike the Judge, I have not been persuaded that the CRA, as a creditor, could never owe a duty of care to an insolvent person in the context of the *BIA*. The CRA has failed to demonstrate a valid basis to exclude its duty of care or to shelter it completely from an action in the tort of negligence.

[10] As for the tort of misfeasance, I agree with the Judge that the appellant must show that the CRA engaged in deliberate and unlawful conduct and knew that its actions were unlawful and would likely harm the appellant (reasons for judgment, at paragraph 36 with reference to *Odhavji Estate v. Woodhouse*, [2003] S.C.J. No. 74; 2003 SCC 69; [2003] 3 S.C.R. 263). However, the Judge struck the statement of claim, also because the appellant “failed to allege material facts that would sustain his claim for damages in tort” (reasons for judgment, at paragraph 46d).

[11] In his statement of claim, the appellant alleges that the CRA acted “...in a high-handed, outrageous and scandalous manner designed to harass the plaintiff... [showing] reckless disregard for the interests of reasonableness and the lawful exercise of its discretion”. But the appellant failed to include the particulars of his complaint except by reference to on-going pleadings in an appeal at the Tax Court of Canada (statement of claim, appeal book, at paragraph 12).

[12] I am of the view that this is not fatal and that it can be cured through an amendment of pleadings using Rule 200 of the *Federal Courts Rules*, SOR/98-106.

[13] In his memorandum, the Superintendent has argued that an action in tort for damages cannot be brought by a plaintiff who is already bankrupt. This is incorrect. It has been decided that a cause of action that is personal in nature “does not become the property of the Trustee in bankruptcy and thus may be pursued by [the bankrupt] in his own right” (*Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701 at paragraph 38). Punitive damages such as those sought

by the appellant at paragraph 16 of his statement of claim are personal in nature (see also *Re Holley*, [1986] O.J. No. 165 (On. C.A.)).

[14] It might very well be that the pleadings reveal arguable, difficult or important points of law, but it does not justify the striking out of the statement of claim at this point.

[15] Finally, the Judge dismissed the appellant's request for an interim stay because the *BIA* does not grant "authority for a court to stay the operation of a receiving order or assignment on either an interim or permanent basis" (reasons for judgment at paragraph 45; *Kalau v. Dahl*, [1985] A.J. No. 572, 39 Alta. L.R. (2d) 156). Although the appellant challenged that conclusion in his Notice of Appeal, he did not renew his request at the hearing of his appeal. In any event, I agree with the Judge.

[16] There remains a last matter, that of the Superintendent and Trustee being parties to this action "for the stated purpose of providing them with notice of the proceedings and ensuring they would be bound by orders of the Court" (reasons for judgment, at paragraph 3). Section 215 of the *BIA* explicitly provides that except by leave of the Court that has jurisdiction in bankruptcy matters, no action lies against the Superintendent or Trustee. No such leave was obtained. Hence, the Superintendent and Trustee must be removed as defendants to the appellant's statement of claim.

**Conclusion**

[17] For these reasons,

- I would allow this appeal in part with costs here and below in favour of the appellant against the CRA only;
- I would set aside, in part, the judgment of the Federal Court and giving the judgment that the Federal Court should have given,
- I would strike out claims 1a) and 1b);
- I would, pursuant to Rule 104, order that the Superintendent in Bankruptcy and Risman & Zysman Inc. be removed as parties in the action, Docket T-290-08 and that the style of cause be modified accordingly so as to read;

**BETWEEN:**

**STEPHEN ANTHONY EDELL**

**Appellant**

**and**

**HER MAJESTY THE QUEEN (Canada Revenue Agency)**

**Respondent**



- I would allow the action to continue against Her Majesty the Queen (Canada Revenue Agency) on claims 1c) d) e) and f).
  
- I would allow the appellant to amend his statement of claim, in accordance with these reasons, within fifteen days of the Judgment.

"Johanne Trudel"

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J.A.

"I agree  
M. Nadon J.A."

"I agree  
John M. Evans J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-618-08

**STYLE OF CAUSE:** Stephen Anthony Edell v. Her Majesty the Queen  
(Canada Revenue Agency), the Superintendent of  
Bankruptcy and Risman & Zysman Inc.

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 21, 2010

**REASONS FOR JUDGMENT BY:** TRUDEL J.A.

**CONCURRED IN BY:** NADON J.A.  
EVANS J.A.

**DATED:** January 25, 2010

**APPEARANCES:**

Stephen Anthony Edell	ON HIS OWN BEHALF
Nancy Arnold	FOR THE RESPONDENT (HMQ- CRA)
Liz Tinker	FOR THE RESPONDENT SUPERINTENDENT IN BANKRUPTCY

**SOLICITORS OF RECORD:**

John H. Sims, Q.C. Toronto, Ontario	FOR THE RESPONDENT (HMQ- CRA)
John H. Sims, Q.C. Toronto, Ontario	FOR THE RESPONDENT SUPERINTENDENT OF BANKRUPTCY