Federal Court of Appeal

Cour d'appel fédérale

**Date: 20110110**

**Docket: A-237-10**

**Citation: 2011 FCA 6**

**CORAM:** **DAWSON J.A.**
**LAYDEN-STEVENSON J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**ZOLTAN ANDREW SIMON**

**Appellant**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Respondent**

Heard at Edmonton, Alberta, on December 2, 2010.

Judgment delivered at Ottawa, Ontario, on January 10, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

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## REASONS FOR JUDGMENT

**DAWSON J.A.**

[1] A Judge of the Federal Court struck out the statement of claim filed by Mr. Simon in Federal Court file T-639-10 without leave to amend. The Judge also decided that Mr. Simon should pay costs to the defendant Crown set in the amount of $500.00. The Judge's decision was based upon his conclusion that Mr. Simon's claim did not fall within the jurisdiction of the Federal Court. See: 2010 FC 617.

[2] Mr. Simon appeals from the order of the Federal Court. He asks this Court to set aside the order and to issue a number of declarations. The declarations sought by Mr. Simon are not available on appeal from the order striking out the statement of claim. Therefore, the sole issue for this Court is whether the Federal Court was correct in law when it struck out the statement of claim without leave to amend.

[3] For the reasons that follow, I would allow this appeal in part and vary the order appealed from so as to grant leave to Mr. Simon to file an amended statement of claim or, alternatively, to seek an extension of time in order to bring an application for judicial review.

**The Facts**

[4] The relevant facts are set out in paragraphs 2 to 4 of the Judge's reasons. There he wrote:

> 2. In January 1999 the plaintiff sponsored Margarita Reyes, his then wife, and her two sons as permanent residents of Canada. He signed a sponsorship agreement with her whereby he undertook to provide her essential needs. He is adamant that he had no such agreement with Canada.
>
> 3. In June 2000, she and her sons left him and they began to receive social assistance benefits from the Province of British Columbia. Mr. Simon was unaware of these payments or that the Province of British Columbia held him as their sponsor liable to repay them until some time in 2007.
>
> 4. In 2008 and again in 2009 the Province of British Columbia garnisheed funds standing to his credit in his tax account with Revenue Canada.

**The Decision Under Appeal**

[5] The defendant's motion to strike the statement of claim was brought on four grounds. The defendant asserted that:

1. The statement of claim did not sufficiently disclose the material facts.

2. The statement of claim did not disclose a reasonable cause of action.

3. The statement of claim was frivolous, vexatious or constituted an abuse of process.

4. The statement of claim mirrored an action the plaintiff had commenced in the Supreme Court of British Columbia.

[6] The Judge characterized Mr. Simon's claim in the following terms:

> 8. Mr. Simon argues that there is no "effective debt" owed by him because there was no agreement between him and the Government of Canada to repay the payments that were made by British Columbia, that the payments to Mrs. Reyes were excessive and improper, and that, in any event, the amounts claimed from him are statute barred. In short, his position is that he has never owed anything to the Province of British Columbia on account of its payments to Mrs. Reyes and that it improperly garnisheed his tax account with Revenue Canada.

The Judge found the action the plaintiff had commenced in British Columbia to be irrelevant.

[7] On this basis, the Judge reasoned as follows:

> 10. What is critical is that the plaintiff's financial dispute is not directly with Canada and the real dispute he has does not fall within the jurisdiction of this Court. In my view, he should be seeking his declaration and repayment of the funds taken illegally, in his view, against the Provincial authorities in the B.C. Superior Court, either in the action already commenced or in a new one.

**Was the Federal Court wrong to strike the statement of claim without leave to amend?**

[8] Motions to strike are governed by Rule 221 of the *Federal Courts Rules* which provides that a pleading may be struck out with or without leave to amend. For such a motion to succeed it must be plain and obvious or beyond reasonable doubt that the action cannot succeed. See:

*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at paragraphs 30 to 33. To this I would add that to be struck without leave to amend any defect in the statement must be one that is not curable by amendment. See: *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.) cited by the Supreme Court in *Hunt v. Carey Canada Inc.* at paragraph 28 and *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (C.A.) cited by the Supreme Court in *Hunt Carey Canada Inc.* at paragraphs 23 and 24.

[9] Without doubt, the Federal Court was correct in striking Mr. Simon's statement of claim for reasons including that:

1. Contrary to Rule 174, the statement of claim did not contain a concise statement of the material facts on which Mr. Simon relied.
2. Contrary to Rule 174, the statement of claim extensively pleaded evidence.
3. Contrary to Rule 221(1)(*a*), the statement of claim did not disclose a reasonable cause of action.
4. Contrary to Rule 221(1)(*c*), the statement of claim was frivolous or vexatious because it was so deficient that the defendant could not know how to answer the claim. As well, the Court would be unable to regulate or manage the proceeding. See: *Kisikawpimootewin v. Canada*, 2004 FC 1426, [2004] F.C.J. No. 1709, citing *Ceminchuk v. Canada*, [1995] F.C.J. No. 914 (Proth.).
5. Finally, while a party may raise any point of law in a pleading (Rule 175), a statement of claim cannot consist of legal argument. The extensive legal submissions contained in the statement of claim violate Rule 174 because

> Mr. Simon's submissions, including the extensive references to case law and hypothetical cases, are not concise statements of material fact.

[10] However, the Judge did not strike the claim on this basis. Instead, he found that the matters set out in the statement of claim did not fall within the jurisdiction of the Federal Court.

[11] I agree that large aspects of Mr. Simon's narrative do not fall within the jurisdiction of the Federal Court because they relate solely to the propriety of British Columbia's claim to reimbursement for social assistance benefits paid to Mr. Simon's former wife. For the Federal Court to have jurisdiction the three-stage test articulated by the Supreme Court of Canada in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 (ITO) must be met. Neither the *Federal Courts Act* nor other federal legislation grants jurisdiction to the Federal Court to adjudicate upon the existence or extent of any liability owed by Mr. Simon to the government of British Columbia in respect of social assistance benefits. The absence of such legislation is fatal to the first stage of the ITO test.

[12] That said, in my view the Judge overlooked an important aspect of Mr. Simon's claim: whether the Canada Revenue Agency improperly paid monies owing to Mr. Simon under the *Income Tax Act* to the government of British Columbia, without any notice or explanation to Mr. Simon. There is no suggestion that any garnishment order issued from a court of competent jurisdiction. It may be that monies otherwise owing to Mr. Simon were applied to Mr. Simon's alleged sponsorship debt pursuant to subsection 164(2) of the *Income Tax Act*, R.S.C. 1985,

(5th Supp.), c. 1. The propriety of the Canada Revenue Agency's treatment of monies otherwise owing to Mr. Simon unquestionably falls within the jurisdiction of the Federal Court. It follows, in my respectful view, that the Federal Court erred in law by concluding that none of the matters complained of by Mr. Simon fell within its jurisdiction.

[13] The Federal Court was correct to strike the statement of claim, but not on the ground that the Court lacked jurisdiction.

[14] After determining that a pleading will be struck, Rule 221 requires consideration of whether a pleading is struck with or without leave to amend.

[15] It is not plain and obvious that if amended Mr. Simon's claim that the Canada Revenue Agency erred in its treatment of monies he was otherwise entitled to would not disclose a reasonable cause of action. Therefore, the Federal Court erred in striking the statement of claim without leave to amend.

[16] Three points should be made concerning Mr. Simon's right to amend, or file a further pleading.

[17] First, it is important to caution Mr. Simon that any further pleading must comply with all of the rules of the Federal Court governing pleadings. Failure to comply with those rules would expose the pleading to the risk of being struck out.

[18] The requirement that a pleading contain a concise statement of the material facts relied upon is a technical requirement with a precise meaning at law. Each constituent element of each cause of action must be pleaded with sufficient particularity. A narrative of what happened and when it happened is unlikely to meet the requirements of the Rules. Mr. Simon would be well advised to seek legal advice, at least with respect to the elements that must be contained in any pleading he may wish to file.

[19] Second, materials relating to the propriety of the claim to reimbursement advanced by authorities in British Columbia are unlikely to fall within the jurisdiction of the Federal Court. Any claim not within the jurisdiction of the Federal Court will again be liable to be struck out.

[20] Third, as a matter of law, certain relief sought against federal entities may only be claimed by way of a notice of application seeking judicial review. This is a legal issue of some complexity where Mr. Simon would again benefit from legal advice.

**Conclusion**

[21] For these reasons, I would allow the appeal in part and vary the order of the Federal Court so as to grant leave to file an amended statement of claim, or, alternatively, to seek an extension of time to file an application for judicial review.

[22] In the circumstances, I would make no award of costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Carolyn Layden-Stevenson J.A."

"I agree.
Robert M. Mainville J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-237-10 |
| **STYLE OF CAUSE:** | ZOLTAN ANDREW SIMON v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA |
| **PLACE OF HEARING:** | Edmonton, Alberta |
| **DATE OF HEARING:** | December 2, 2010 |
| **REASONS FOR JUDGMENT BY:** | DAWSON J.A. |
| **CONCURRED IN BY:** | LAYDEN-STEVENSON J.A.<br>MAINVILLE J.A. |
| **DATED:** | January 10, 2011 |

**APPEARANCES:**

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|---|---|
| Zoltan Andrew Simon<br>Self-represented | FOR THE APPELLANT |
| Camille N. Audain | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Zoltan Andrew Simon<br>Self-represented | FOR THE APPELLANT |
| Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Edmonton, Alberta | FOR THE RESPONDENT |