

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110418

Docket: A-90-10

Citation: 2011 FCA 140

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

BETWEEN:

R. MAXINE COLLINS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 30, 2011.

Judgment delivered at Ottawa, Ontario, on April 18, 2011.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**EVANS J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The appellant, R. Maxine Collins, appeals from a decision of a Judge of the Federal Court striking out, with costs, the amended statement of claim filed by Ms Collins. The Judge's order was silent as to whether the pleading was struck out with or without leave to amend. The reasons in support of the Judge's order are cited as 2010 FC 254, 366 F.T.R. 40.

[2] Paragraph 1(a) of the amended statement of claim set out Ms Collins' claim for general damages against the Crown on account of:

- i. misfeasance in public office;
- ii. negligence in deliberately failing to enforce statutory provisions; and
- iii. violation of the *Canadian Charter of Rights and Freedoms* (Charter).

[3] The main issue to be determined on this appeal is whether the Judge erred in striking out the amended statement of claim.

The Nature of Ms Collins' Claim

[4] Ms Collins' claim arises from her assertion that while she was employed by the Canada Revenue Agency (CRA), her co-workers violated subsection 241(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act) by improperly looking at her personal income tax information. Although subsection 239(2.2) of the Act makes contravention of subsection 241(1) an offence, Ms Collins asserts that, aside from firing one employee, the CRA failed to provide any effective redress to her.

The two subsections of the Act referred to by Ms Collins state as follows:

239. (2.2) Every person who
 (a) contravenes subsection 241(1), or
 (b) knowingly contravenes an order made under subsection 241(4.1) is guilty of an offence and liable on summary conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months, or to both.

[...]

241. (1) Except as authorized by this section, no official or other

239. (2.2) Commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 \$ et un emprisonnement maximal de 12 mois, ou l'une de ces peines, toute personne :
 a) soit qui contrevient au paragraphe 241(1);
 b) soit qui, sciemment, contrevient à une ordonnance rendue en application du paragraphe 241(4.1).

...

241. (1) Sauf autorisation prévue au présent article, il est interdit à un

representative of a government entity shall	fonctionnaire ou autre représentant d'une entité gouvernementale :
(a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;	a) de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;
(b) knowingly allow any person to have access to any taxpayer information; or	b) de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;
(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the <i>Canada Pension Plan</i> , the <i>Unemployment Insurance Act</i> or the <i>Employment Insurance Act</i> or for the purpose for which it was provided under this section.	c) d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du <i>Régime de pensions du Canada</i> , de la <i>Loi sur l'assurance-chômage</i> ou de la <i>Loi sur l'assurance-emploi</i> , ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.

[5] Ms Collins alleges that the CRA has made a planned and deliberate policy decision not to enforce subsection 239(2.2) of the Act. Ms Collins further asserts that she wanted the CRA to tell its employees “that what they were doing was not only morally and ethically wrong, but also a criminal offence for which they could be prosecuted” (emphasis deleted). However, it did not, and after she requested that the CRA investigate the unauthorized access to her personal tax records CRA employees retaliated against her in a manner that created a toxic work environment. Subsequent requests for assistance from the Public Service Human Resources Management Agency of Canada, the Public Service Integrity Commissioner and the RCMP, an attempted complaint under the *Canada Labour Code*, and requests for access under the *Privacy Act* and the *Access to Information Act* did not result in any assistance being provided to Ms Collins.

The Issues

[6] On this appeal Ms Collins raises a number of arguments, including her assertions that the Judge ignored misconduct by counsel for the respondent, restricted oral argument and showed “a blatant bias” against her in her reasons. In my view, the issues to be decided on this appeal are:

- i. Has the appellant made out her allegations of bias against the Judge?
- ii. If not, what is the standard of review to be applied by this Court to the Judge’s decision to strike out the amended statement of claim?
- iii. Did the Judge err by striking out the amended statement of claim?
- iv. Should the appellant be given leave to re-amend the amended statement of claim?

Consideration of the Issues

- i. Have the allegations of bias been made out?

[7] As we explained in our reasons dismissing Ms Collins’ three motions that asked the members of the panel hearing this appeal to recuse themselves on account of real or apprehended bias, there 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 (*R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paragraph 32).

[8] Ms Collins acknowledges that she cannot substantiate any allegation of bias arising from the conduct of the hearing before the Judge. This is because she alleges a conspiracy involving the court reporter and others that resulted in a falsified and fabricated transcript.

[9] Turning to her other allegations of bias, there is no merit in Ms Collins' submission that the Judge acted improperly in accepting the Crown's re-amended motion to strike the claim.

Justice Campbell allowed Ms Collins to amend her claim so as to withdraw those portions of the claim that related to a proposed class action and he stated that this amendment was without prejudice to the Crown's right to pursue its pending motion to strike the claim in its entirety. The Crown's motion to strike had been filed, but not served (see page 94 of the appeal book). Nothing in Justice Campbell's comments could, or did, prohibit the Crown from amending its motion record in order to advance further grounds for striking the pleading.

[10] Finally, many of Ms Collins' imputations of bias stem from the Judge's interpretation of the amended statement of claim. Ms Collins says that the Judge did not construe the claim as Ms Collins intended. From this, Ms Collins infers that the Judge was biased. However, during the hearing of this appeal we advised Ms Collins that it was not clear to us that the amended statement of claim can fairly be construed as Ms Collins submits. Ms Collins acknowledged both that she was "not an artful pleader" and that the statement of claim "was not perfect". The fact that the Judge interpreted the allegations in the amended claim in a different manner from Ms Collins' intended interpretation is not evidence of bias.

[11] In my view, the Judge's reasons demonstrate a careful and thorough review of a long (123 paragraphs) and difficult pleading. Nothing in the Judge's reasons supports any reasonable apprehension of bias on the part of the Judge. No convincing evidence of real or apprehended bias has been provided by Ms Collins.

ii. The Standard of Review to be Applied to the Judge's Decision

[12] In *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, 370 N.R. 336 this Court considered the test to be applied when reviewing a decision of a judge on a motion to strike a pleading. At paragraph 15 the test was described as follows:

The respondents correctly point out that the decision to grant or refuse a motion to strike is a discretionary one. When the lower court judge has made a discretionary decision, it will usually be afforded deference by the appellate court. However, the latter will be entitled to substitute the lower court judge's discretion for its own if the appellate court clearly determines that the lower court judge has given insufficient weight to relevant factors or proceeded on a wrong principle of law: *Elders Grain Co. v. Ralph Misener (The)*, [2005] F.C.J. No. 612, 2005 FCA 139 at paragraph 13. This Court may also overturn a discretionary decision of a lower court where it is satisfied that the judge has seriously misapprehended the facts, or where an obvious injustice would otherwise result: *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, [2005] F.C.J. No. 215, 2005 FCA 50, 38 C.P.R. (4th) 1 at paragraph 9. [emphasis added]

[13] The burden is on Ms Collins to demonstrate an error that justifies this Court's interference with the order under appeal (*j2 Global Communications, Inc. v. Protus IP Solutions Inc.*, 2009 FCA 41, 387 N.R. 135 at paragraphs 4-5).

iii. Did the Judge err in striking out the amended statement of claim?

[14] As set out above, the amended statement of claim sought damages on account of:

- a. misfeasance in public office;
- b. negligence in deliberately failing to enforce statutory provisions; and
- c. Charter violations.

Each cause of action will be considered in turn.

a. Misfeasance in public office

[15] The Judge understood the amended statement of claim to base the claim of misfeasance upon the failure of the CRA and the RCMP to lay charges and prosecute offences under subsection 239(2.2) of the Act. The Judge correctly found that law enforcement officers and prosecutors possess discretion as to the laying of charges and their prosecution, so that a failure to lay charges cannot be an unlawful act as required in order to establish the tort of misfeasance in public office.

[16] Ms Collins does not take issue with that analysis. Rather, she states that the amended statement of claim does not base the claim of misfeasance in public office upon any failure to enforce the statutory provision.

[17] However, paragraphs 4, 29, 36, 37, 42 and 43 of the amended statement of claim allege that:

4. In written policy consistent with statements on the Canada Revenue Agency [CRA] website, the CRA has made a planned and deliberate decision not to enforce subsection 239(2.2) of the ITA by characterizing unauthorized access as unlawful, i.e., not authorized by law, rather than illegal, i.e., expressly forbidden by statute, or an offence liable to a fine or imprisonment.

[...]

29. The Plaintiff's experience in laying information and making a complaint pursuant to subsection 244(1) of the ITA is that the RCMP acts in concurrence with the CRA with respect to the non-enforcement of subsection 239(2.2) of the ITA.

[...]

36. The failure on the part of the CRA to call a spade a spade with respect to offences committed by CRA employees, indicates the clear priority of

protecting the employees of the CRA in order to protect the reputation of the CRA even at the expense of failing to adequately protect the confidentiality of taxpayer information.

37. The Plaintiff states that the CRA owes Canadian taxpayers a statutory duty to ensure the protection of personal information from unauthorized disclosure to CRA employees, and through these individuals to the general public; and, the CRA is deliberately negligent in performing this duty through failing to enforce provisions enacted for the purpose.

[...]

42. The Plaintiff has in her possession documents supporting the involvement of many federal government entities, including documents which confirm the agreement of the RCMP with the policy of the CRA with respect to the plan not to enforce subsection 239(2.2) of the ITA.
43. The Plaintiff asserts that the aforesaid deliberate conduct of the CRA and the federal government in denying taxpayers, and the Plaintiff in particular, the protection of statutory law, case law, and the Charter of Rights and Freedoms constitutes misfeasance in public office, negligent statutory administration, abuse of power, and disregard for the principles of fundamental justice under the rule of law which has resulted in loss and damage to the Plaintiff.

[18] In my view, the Judge's interpretation of the claim as framed by Ms Collins was reasonable, and her analysis of that claim was appropriate. Ms Collins has not demonstrated that in striking the pleading relating to misfeasance in public office the Judge seriously misapprehended the pleadings, proceeded on a wrong principle of law or otherwise erred so as to warrant intervention by this Court.

- b. Negligence in the enforcement of a statutory provision

[19] Ms. Collins argues that:

46. It is under the negligence cause of action that the claim reaches out beyond the CRA to those other federal government entities who were made aware of violations of section 241 of the *Income Tax Act* and did nothing to protect taxpayer information choosing instead to act to protect the CRA.
47. This cause of action is not based on a statutory duty to enforce subsection 239(2.2) of the *Income Tax Act*, but rather on the necessity of enforcing this provision in order to meet the requirements of a statutory private law duty of care to protect taxpayer information. This is clearly established in paragraphs [5] and [6] of the Amended Statement of Claim.

[...]

52. The Appellant specifically established the statutory law duty of care in paragraphs [10] and [12] of the Amended Statement of Claim.
53. Throughout the Amended Statement of Claim, the Appellant pleaded that subsection 239(2.2) of the *Income Tax Act*, being a criminal offence provision, was enacted for the purpose of deterring unauthorized access to taxpayer information.

[20] Paragraphs 5, 6, 10 and 12 of the amended statement of claim referred to in argument by

Ms Collins allege the following:

5. In the Plaintiff's experience, employees of the CRA are not advised by the CRA, either verbally or through written policy, that violations of subsection 241(1) of the ITA constitute an offence pursuant to subsection 239(2.2) of the ITA.
6. This policy deprives Canadian taxpayers of the protection of section 241 which has been interpreted by the Federal Court of Appeal [*Diversified Holdings Ltd. v. Canada*, [1991] 1 C.T.C. 118] as being for the protection of taxpayers.

[...]

10. The CRA is required, under the provisions of the *Privacy Act*, to keep a record of all authorized and unauthorized uses of a taxpayer's personal information.

[...]

12. The Federal Court of Appeal found the legislative intent of section 241 to be for the protection of the confidentiality of information given to the Minister for the purposes of the ITA. The Federal Court of Appeal further found privilege to be established in favour of the taxpayer who gives information to Revenue Canada on the understanding such information will remain confidential.

[21] Relying upon the decision of the Supreme Court of Canada in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, the Judge found the failure to follow a statutory provision does not by itself constitute negligence. The Judge also found that no positive common law duty lies upon the Crown to bring forth charges and prosecute under subsection 239(2.2) of the Act.

[22] Ms Collins has not demonstrated any error in the Judge's analysis. No common law or private duty of care arises from the facts as pleaded in the amended statement of claim. It follows from this failure that the amended statement of claim does not plead any proper cause of action in negligence. That portion of the pleading relating to alleged negligence was properly struck.

c. Charter violations

[23] As the Judge correctly noted, the amended statement of claim neither identified which rights were said to be violated nor pled material facts that might support such a claim. On this appeal, Ms Collins argues as follows with respect to this aspect of the claim:

59. Do civil servants, or Ministers of the federal government, have the authority to create and implement a policy which enforces section 239 of the *Income Tax Act* against taxpayers but does not enforce section 239 against federal government employees?

60. The Amended Statement of Claim pleads “they” do not possess the requisite authority due to the operation of the rule of law enshrined in the Constitution.

61. Is the undisputed policy of never enforcing subsection 239(2.2) of the *Income Tax Act*, an issue which comes within the tests established in *Anns* as referenced in paragraph [20] of the Amended Amended Written Representations of the Responding Party?

[...]

66. The Respondent has a statutory private law duty of care to protect taxpayer information. The Respondent was negligent in exercising this duty of care in that a powerful tool provided by Parliament went unused and ignored.

67. The failure to use this powerful tool against government employees while regularly filing criminal offence charges against taxpayers, violates the rule of law. A policy that violates the rule of law is a policy made in bad faith and under the influence of extraneous considerations.

[...]

71. The Appellant is not claiming damages pursuant to subsection 24(1) of the *Charter*.

[...]

73. The Appellant established a prima facie private law duty of care under section 241 of the *Income Tax Act* and also through reference to the statutory duty to keep records of all access to taxpayer information as provided under the relevant provisions of the *Privacy Act*.

[24] In my view, these paragraphs fail for the same reasons the claim in negligence failed. The submission that any failure to follow the law is actionable is contrary to the jurisprudence of the Supreme Court of Canada in cases such as *Saskatchewan Wheat Pool*, cited above, and *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551.

iv. Should Ms Collins be given leave to re-amend the amended statement of claim?

[25] As noted above, the Judge's order did not specify whether the claim was struck out with or without leave to amend. Rule 221 of the *Federal Courts Rules* requires consideration of this issue.

[26] In order to strike a pleading without leave to amend, any defect in the pleading must be one that cannot be cured by amendment. See *Simon v. Canada*, 2011 FCA 6, 410 N.R. 374 at paragraph 8. In my view, the claim in negligence and the claim based upon violation of the Charter cannot be cured by amendment. However, I believe the claim based upon misfeasance in public office can be cured.

[27] The elements of the cause of action of misfeasance in public office are:

1. A public officer must engage in deliberate and unlawful conduct in his or her capacity as a public officer.
2. The public officer must have been aware that his or her conduct was both unlawful and likely to harm the plaintiff. This requirement establishes a required nexus between the parties. There must be a conscious disregard for the interests of those who will be affected by the misconduct in question.

[28] Insofar as the nature of the misconduct is concerned, the essential question is whether the alleged misconduct is deliberate and unlawful. A plaintiff must also show damage which was caused by the alleged misconduct and that the damage was of sufficient magnitude to warrant

compensation. See *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at paragraph 22 and following.

[29] Turning to the current pleading, the amended statement of claim alleges the following:

- a. Paragraph 241(1)(c) of the Act prohibits an official from knowingly using any taxpayer's information otherwise than in the course of the administration or enforcement of the Act.
- b. The plaintiff worked at the CRA from November 2005 to November 2007.
- c. Two employees of the CRA accessed the plaintiff's personal income tax account and this access was unauthorized.
- d. Following an investigation by the CRA that found unauthorized access, co-workers made remarks to the plaintiff based on personal knowledge of her personal income tax returns.
- e. The plaintiff suffered retaliation and public embarrassment.
- f. As a result of the breach of privacy, the plaintiff sought professional help and suffered from depression, thoughts of suicide and anxiety attacks. As well, she had to resign from what was a toxic workplace, thus suffering financial hardship.

[30] I conclude that with appropriate amendments a cause of action could properly be pleaded alleging the Crown to be vicariously liable for the misfeasance of officials who improperly accessed and disseminated confidential information concerning Ms Collins. It follows that I would clarify the Judge's order by specifying that Ms Collins is given leave to re-amend her

pleading so as to allege the tort of misfeasance in public office. No leave would be given to amend any other cause of action.

[31] It may well be helpful to remind Ms Collins that any further pleading must comply with all of the rules of the Federal Court governing pleadings. Any failure to comply with those rules could result in the re-amended pleading being struck out.

[32] To illustrate, the amended statement of claim pleads evidence extensively and does not contain a concise statement of the material facts as is required by Rule 174. Further, while a party may raise any point of law in a pleading (Rule 175), a statement of claim cannot consist of legal argument.

[33] 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 the cause of action must be pled with sufficient particularity. What is required when pleading the tort of misfeasance in public office was discussed by this Court in *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184, 405 N.R. 160 at paragraph 29 and following. A narrative of what happened is unlikely to meet the requirements of the *Federal Courts Rules*. Ms Collins would be well advised to seek legal advice with respect to the elements that must be contained in any re-amended pleading she may wish to file.

Conclusion

[34] For these reasons I would dismiss the appeal, but I would clarify the order appealed from to specify that Ms Collins is given leave to re-amend the amended statement of claim to allege the tort of misfeasance in public office.

[35] I would award the costs of this appeal in the cause.

“Eleanor R. Dawson”

J.A.

“I agree

John M. Evans J.A.”

“I agree

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-90-10

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TRUDEL J.A.

DATED: April 18, 2011

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