NOVA SCOTIA COURT OF APPEAL

Citation: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36

Date: 20120411
Docket: CA 350439
Registry: Halifax

Between:

Daniel Innocente

Appellant

v.

Attorney General of Canada

Respondent

Judges:	MacDonald, C.J.N.S., Fichaud and Bryson, JJ.A.
Appeal Heard:	March 21, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed in part, with costs of $500 payable by the appellant to the respondent, per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Bryson, J.A. concurring
Counsel:	Daniel Joseph Innocente in person Sarah Drodge for the respondent

Reasons for judgment:

[1] The chambers judge summarily dismissed Mr. Innocente's damages claim on the pleadings under Rule 13.03(1)(c). Mr. Innocente appeals from that summary judgment. The appeal raises two questions. First, did the judge err by determining that Mr. Innocente's cause of action, as pleaded, was "clearly unsustainable"? Second, before summary judgment should Mr. Innocente have another (his second) opportunity to amend his Statement of Claim by incorporating allegations that would survive a Rule 13.03 challenge? This latter question raises a subsidiary issue respecting this Court's standard of review from a discretionary order**.**

Background

[2] I assume the facts alleged in the Amended Statement of Claim. Under Rule 13.03(3), in a motion for summary judgment on the pleadings the court assumes the pleaded facts, and no affidavit may be filed in support or opposition. Nothing in this decision fetters a judge's fact finding at a future stage of this proceeding.

[3] In June 1996, Mr. Innocente was charged with several drug and weapons charges under the former *Narcotic Control Act,* R.S.C. 1985, c. N-1 and the *Criminal Code*. In May 1997, Mr. Innocente was charged with possession of proceeds of crime (trafficking) and possession of a narcotic for the purpose of trafficking contrary to those statutes.

[4] On June 24, 1996 the Attorney General of Canada obtained from the Supreme Court of Nova Scotia a search warrant and a restraint order under ss. 462.32 and 462.33 of the *Criminal Code*. The restraint order prohibited Mr. Innocente from dealing with his residential property at 47 Granite Cove Drive, Five Island Lake, Nova Scotia. The Attorney General undertook to comply with any court order for damages to Mr. Innocente from the execution of the restraint order.

[5] Mr. Innocente was convicted that he conspired to commit the indictable offence of trafficking in *cannabis resin* contrary to s. 4(1) of the *Narcotics Control Act*, and thereby committed an offence contrary to s. 465(1) of the *Criminal Code*. In 1999 he was sentenced to seven years incarceration.

[6] In October 2000, on a ***Rowbotham*** application, Provincial Court Judge Digby ordered that the other charges be stayed unless the federal Crown committed to guarantee $80,000 toward Mr. Innocente's defence costs. The Crown did not give the guarantee. So those charges were stayed. The Attorney General applied to quash the stay. In October 2002, by an unreported decision, Justice Richard of the Supreme Court of Nova Scotia dismissed that application. The Attorney General appealed and on February 4, 2004, the Court of Appeal dismissed the appeal (2004 NSCA 18).

[7] In August 2004, the Attorney General applied for and received a court order that revoked the restraint order of June 24, 1996 and released what remained of Mr. Innocente's property.

[8] After Mr. Innocente served his sentence, he sued the Attorney General for damages. Mr. Innocente pleaded that he was forced to sell his residence at a loss, and that his personal property was returned "in a dilapidated state".

[9] The Attorney General applied for summary judgment on the pleadings to dismiss the action. On March 25, 2010, Justice LeBlanc granted the motion, concluding that the Statement of Claim "as presently framed, does not make out a cause of action" (2010 NSSC 111, para 53). Justice LeBlanc dismissed Mr. Innocente's action, without prejudice to Mr. Innocente's right to file an Amended Statement of Claim. Mr. Innocente did not appeal.

[10] In January 2011, Mr. Innocente filed an Amended Statement of Claim. The amendment added: (1) particulars respecting the history of the criminal proceedings; (2) an allegation that the Attorney General had repeatedly opposed his motions to dispose of his property; and (3) an allegation that his net worth of $750,000 in 1995 was zero when the restraint order was released. The amendment gave no particulars of his initial pleading that his "personal property seized pursuant to the above named process was eventually returned to Mr. Innocente, but in a dilapidated state".

[11] The Attorney General then applied again for summary judgment on the pleadings. Justice Coady granted the motion, this time without leave to amend, and dismissed Mr. Innocente's action. Justice Coady said that "the amendments

add nothing to the statement of claim that was before Justice LeBlanc" (2011 NSSC 184, para 27) and concluded:

> [30] *Civil Procedure Rule* 13.03(1) states that a statement of claim must be set aside for "any" of the three enumerated grounds. I rely on the third ground to conclude that this action must be set aside because it is "clearly unsustainable when the pleading is read on its own".

Mr. Innocente's counsel requested the opportunity to further amend the Amended Statement of Claim. The chambers judge's reasons did not mention this request. Later I will recite Justice Coady's reasons and comments from the chambers hearing (paras 30 and 44).

[12] Mr. Innocente appealed to the Court of Appeal. He reiterated his submissions against summary judgment that his counsel made to Justice Coady. He also cited to this Court several specific allegations of damage to, or loss of personal property that were not pleaded in either his original or his Amended Statement of Claim.

Issues

[13] When these reasons refer to the chambers judge, I mean Justice Coady, not Justice LeBlanc.

[14] The first issue is whether the chambers judge committed an appealable error in his conclusion that the Amended Statement of Claim does not disclose a sustainable cause of action. The second issue is whether, at this stage, Mr. Innocente should be permitted to amend his Statement of Claim yet again to establish a pleading that would withstand a challenge under Rule 13.03.

Standard of Review

[15] This appeal involves a close examination of the standard of review.

[16] In *Frank v. Purdy Estate* (1995), 142 N.S.R. (2d) 50 (C.A.), para 9, Justice Roscoe relied on *MacCulloch v. McInnes*, *Cooper & Robertson* (1995), 140 N.S.R. (2d) 220 (C.A.), Nova Scotia's leading authority on the appellate standard

of review of a discretionary order. In *MacCulloch*, Justice Matthews reviewed the earlier caselaw and said:

> [56] The order issued by the chambers judge is discretionary. As this Court has repeatedly said: we will not interfere with a discretionary order, especially an interlocutory one unless wrong principles of law have been applied ***or a patent injustice*** would result... [emphasis added]
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> [57] In **Minkoff** [**Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143], Chipman, J.A., after citing the above noted cases at p. 145-146 remarked:
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> " ... The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations." [Justice Matthews' underlining]

The principle in *MacCulloch*, para 56 derived from earlier decisions of this Court, including *Exco Corporation Limited v. Nova Scotia Savings and Loan* et al. (1983), 59 N.S.R. (2d) 331 (A.D.), para 6, per MacKeigan, C.J.N.S. and *MacIntyre v. Canadian Broadcasting Corporation* (1985), 70 N.S.R. (2d) 129 (A.D.), at para 29, per Macdonald, J.A.. In *Frank v. Purdy Estate*, para 9, Justice Roscoe quoted and adopted these passages from *MacCulloch*, paras 56-57. Justice Roscoe then said:

> [10] In this case, as in **MacCulloch**, the order appealed from had a terminating effect and plainly disposes of the rights of the parties. Therefore the usual test applied to discretionary orders of an interlocutory nature does not apply. Rather the issue is whether there was an ***error of law resulting in an injustice***. [emphasis added]

[17] A line of later decisions of this Court has taken para 10 of *Frank v. Purdy Estate* to mean that an interlocutory discretionary order without a terminating effect is reviewable for an error of law ***or*** a patent injustice, while an interlocutory discretionary order with a terminating effect is reviewable for an error of law ***that results*** in a patent injustice: e.g - *Binder v. Royal Bank of Canada*, 2005 NSCA 94, para 21; *MacNeil v. Bethune*, 2006 NSCA 21, para 14; *Gillis v. New Glasgow (Town)*, 2009 NSCA 66, para 7; *AMCI Export Corporation v. Nova Scotia Power Inc.*, 2010 NSCA 41, para 10; among others.

[18] This Court recently has noted that the distinction deriving from para 10 of *Frank v. Purdy Estate* appears to be illogical. In *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, Justice Saunders said:

> [35] The distinction seems counterintuitive. One would suppose that if the ruling were seen as putting an end to the proceeding, the threshold would be lower, thereby permitting the appellant to argue either an outcome caused by an error in principle, or leading to an injustice. Yet that lesser standard is only applied when the interlocutory discretionary ruling is not seen to have produced such a terminating result. A comprehensive analysis of this apparent anomaly may be found in Mike Madden's recent study, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review", (2010) 36 The Advocate's Quarterly 269. [Justice Saunders' underlining]
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> [36] That is not a matter I need to resolve for the purposes of this appeal. Whether it ought to be addressed by the Court on some future occasion can be left for another day.

To similar effect: *Mahoney v. Cumis Life Insurance Company,* 2011 NSCA 31, para 11.

[19] Occasionally this Court has simply stated, without discussion, the intuitively logical view that a discretionary ruling with terminating effect should be reviewed under the same standard (error of law *or* patent injustice) that applies to discretionary rulings generally: *e.g. Maritime Travel Inc. v. Go Travel Direct. Com Inc.,* 2007 NSCA 11, para 3; *Nova Scotia (Attorney General) v. Brill,* 2010 NSCA 69, para 170*; 2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para 14.

[20] Counsel appearing in this Court sometimes suggest that "error of law or patent injustice" be the standard for an appeal from an order with terminating effect. In this appeal, for instance, the Attorney General's factum said:

> It is well established that on an appeal from an order granting summary judgment on the pleadings, the Court of Appeal will intervene only if the chambers judge committed an error of law or if the decision causes a patent injustice.

The Attorney General's factum then separately addressed error of law and patent injustice.

[21] In my view, the restless place of "patent injustice" as an appellate standard of review should be settled. The circumstances of this appeal focus that issue.

[22] As Justice Matthews said in *MacCulloch* (para 56), the standard of review for patent injustice applies only to discretionary rulings. Non-discretionary rulings, including those that are interlocutory, are subject to the Court of Appeal's normal standard of review: correctness for extractable issues of law, and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[23] Whether to grant an order for summary judgment on the pleadings usually is not discretionary. It is a matter of law, premised on assumed facts, and involves analysis and comparison of the written pleadings and the legal prerequisites for the cause of action that is advanced. Rule 13.03 confirms this:

> (1) A judge ***must*** set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways ...
>
> (2) The judge ***must*** grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances ...
>
> (3) A motion for summary judgment on the pleadings ***must*** be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion. [emphasis added]

Justice Coady's reasons that are under appeal cited Rule 13.01(1)'s requirement that he "must" set aside the Statement of Claim (para 30 of decision - quoted below, para 30). Justice Coady did not purport to exercise a discretion.

[24] On the other hand, whether the party whose pleading is challenged under Rule 13.03 may amend to meet the challenge, is discretionary. Rule 13.03(4) says:

> A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

Rule 83.11(1) says:

> A judge may give permission to amend a court document at any time.

[25] With that background, I will turn to the standard of review here.

[26] I adopt Justice Matthews' 1995 statement from *MacCulloch*:

> As this Court has repeatedly said: we will not interfere with a discretionary order, especially an interlocutory one unless wrong principles of law have been applied ***or*** a patent injustice would result. [emphasis added]

This passage was drawn from *Exco*, para 6 and *MacIntyre*, para 29. I also adopt Justice Chipman's 1991 statement in *Minkoff*:

> The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations.

[27] From those passages, it follows that a discretionary ruling with a terminating effect should be no less reviewable in the Court of Appeal than is a discretionary ruling without a terminating effect. It makes no sense, for instance, that patent injustice alone and without legal error may overturn a chambers judge's order that a witness answer a further discovery question, while patent injustice would not enable this Court to overturn a discretionary ruling that results in that same action being dismissed outright.

[28] This approach is a departure from the authorities (above para 17) that have interpreted *Frank v. Purdy Estate* literally to review for an error of law that "results in a patent injustice". As I will discuss in the Analysis (paras 48-56), this adjustment to the standard of review would result in one aspect of Mr. Innocente's appeal being allowed. The submissions of the respondent Attorney General are not affected by the adjustment to the standard of review. The Attorney General argued the appeal based on the standard of review that I have adopted (factum quoted above, para 20).

[29] In summary, I will review for error of law the chambers judge's non-discretionary ruling that Mr. Innocente's claim be dismissed by summary judgment on the pleadings under Rule 13.03(1)(c). But I will consider whether the chambers judge's denial to Mr. Innocente of a further opportunity to amend his Statement of Claim either was an error in law *or* resulted in a patent injustice.

First Issue - Summary Judgment

[30] Justice Coady's reasoning appears in the following extracts from his decision:

> [15] Mr. Innocente acknowledges that the charges laid against him may sustain a seizure and restraint order under the **Criminal Code**. He further acknowledges, for the purpose of this action, that the 1999 seizure and warrant were properly obtained and does not challenge the process by which they were authorized.
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> ...
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> [17] ... While the undertakings are founded in the **Criminal Code**, they amount to a contract between the [C]rown and the offender. Section 462.32(4) of the [C]ode imposes a duty on the [C]rown to take "reasonable care to ensure that the property is preserved". This is an indication of the will of [P]arliament to provide the citizen with some protection when the state seizes property before conviction.
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> [18] I have not been provided with the details of these undertakings. I have no evidence as to whether they are standardized or vary from case to case. Nonetheless, it seems clear to me that the undertaking creates a cause of action. This does not suggest that Mr. Innocente's cause of action has any merit, only that it exists.
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> ...
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> [20] I have concluded that Mr. Innocente has a cause of action arising from the statutory undertakings given by the AGC in 1996. While this is a significant factor, it does not necessarily defend against this summary judgment application based on the pleadings.
>
> ...

> [22] The AGC submits that the amended statement of claim gives no indication as to how they allegedly caused damages in respect to his real and personal property.
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> ...
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> [25] I now must look at the amended statement of claim to determine whether it offers any more detail than the original. I have reviewed the amendments in paragraph 4 through 12. I find these paragraphs to be nothing more than a history of the 1996-2004 legal proceedings. These paragraphs add nothing about the alleged real estate loss or the dilapidation of the personal property.
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> ...
>
> [30] *Civil Procedure Rule* 13.03(1) states that a statement of claim must be set aside for "any" of the three enumerated grounds. I rely on the third ground to conclude that this action must be set aside because it is "clearly unsustainable when the pleading is read on its own".

[31] First, the chambers judge's characterization of the cause of action. The amendments to ss 432.32 and 433.33 since 1996 would not materially affect the Attorney General's duty of reasonable care and undertaking in this case. The duty of reasonable care under s. 462.32(4)(a), cited by the chambers judge, applies to property seized under a warrant further to s. 462.32. Section 432.32(6) prescribes an undertaking as to damages from the Attorney General as a condition of the warrant. The restraint order derives from s. 462.33, and requires the Attorney General to give an undertaking under s. 462.33(7). The facts respecting the relationship between the seizure of Mr. Innocente's property and the ongoing restraint are not clear from the pleadings. The wording of the Attorney General's undertaking is neither pleaded nor in the record. So it is also unclear whether the undertaking indemnifies for any loss - a cause of action in itself - or just promises to satisfy a judgment that is based on an independent cause of action. The Attorney General has not filed a Notice of Contention to challenge the chambers judge's characterization of Mr. Innocente's cause of action. The Amended Statement of Claim pleads that the search warrant and the restraint order were issued on the same day, June 24, 1996. For the purpose of this appeal, I will assume that the property seized under the warrant remained in the Attorney General's control, and that a duty to exercise reasonable care applied at the time when the alleged damage occurred to Mr. Innocente's property. Based on that

assumption, there is no error in the chambers judge's conclusion that Mr. Innocente has a nominal cause of action. If this matter proceeds to trial, the accuracy of that assumption is for the trial judge.

[32] The chambers judge issued summary judgment because Mr. Innocente's Statement of Claim did not plead sufficient facts to connect the cause of action - the Crown's alleged failure to take reasonable care, under s. 462.32(4)(a) of the *Criminal Code*, or the Crown's alleged breach of its undertaking under ss. 432.32(6) and 462.33(7) - causally to the alleged losses of Mr. Innocente's property value and the "dilapidation" of his personal property.

[33] Given the nominal cause of action, did the chambers judge's reasons for the summary judgment err in law? I will discuss separately Mr. Innocente's claims for loss to his realty value and damages respecting his personal property.

[34] According to the allegations in the Amended Statement of Claim, reiterated by Mr. Innocente's characterization of his claim at the hearing in the Court of Appeal, the reduced market value of Mr. Innocente's home and real estate did not result from any failure of the Crown to exercise "reasonable care" under s. 462.34(3) of the *Criminal Code* to preserve the restrained realty. Rather the loss of market value stemmed from (1) the fact of the restraint order which inhibited Mr. Innocente's freedom to sell, (2) the reputational damage to the restrained property associated with the criminal proceedings, and (3) Mr. Innocente's financial difficulties after he endured the long criminal process. These factors culminated in a virtual forced sale at a distress price.

[35] That alleged loss of market value is not causally connected to the cause of action - *ie.* the Crown's undertaking and its duty to exercise reasonable care under s. 462.32(4). Rather, the alleged damage results from the facts of the seizure and restraint during the criminal process. The search warrant and restraint order were authorized by court order. The restraint order was renewed and rested legally in place until, on the Attorney General's motion, the Court released it in August 2004. The associated criminal process resulted in Mr. Innocente's conviction and incarceration.

[36] The judge correctly concluded that the claim for reduced realty value is clearly unsustainable.

[37] The consideration of summary judgment to dismiss Mr. Innocente's claim for loss to his personal property follows a different analytical path.

[38] Rules 38.02(2) and (3) say:

> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

[39] Mr. Innocente's Amended Statement of Claim says that his "personal property seized pursuant to the above named process was eventually returned to Mr. Innocente, but in a dilapidated state". Neither the items of damaged property nor the damage to them is identified. Without that information, it would be impossible for the Attorney General to "know the case the party has to meet" under Rule 38.02(a). Identification of the allegedly damaged items and the alleged damage to those items are material facts and, in their absence, the pleaded claim was unsustainable. There was no error in the judge's ruling that the Amended Statement of Claim, as it read, should be dismissed summarily.

[40] I would dismiss Mr. Innocente's ground of appeal that challenges the summary judgment which dismissed his claims as pleaded in the existing Amended Statement of Claim.

Second Issue - Further Amendment

[41] There has been no suggested amendment that might establish a sustainable claim for the lost market value to Mr. Innocente's home and realty. My comments on this Second Issue relate only to Mr. Innocente's claim for physical damage to the personal property that he pleads was returned in a "dilapidated state".

[42] There are three sets of material facts that are absent from Mr. Innocente's Amended Statement of Claim: (1) identification of the items of personal property that were damaged or lost while under the care of the Crown, (2) description of the damage, and (3) particulars of what the Crown did or failed to do that Mr. Innocente contends was a contravention of the Crown's duty to take "reasonable care to ensure that the property is preserved", thereby causing the damage. Each is necessary so the Attorney General can know the case it has to meet under Rule 38.02(2)(a). Each is a material fact that must be pleaded under Rule 38.02(3).

[43] The third point - what the Crown did or failed to do - is a topic within the personal knowledge of the Crown, and not within Mr. Innocente's knowledge before discovery. Before Mr. Innocente has had a reasonable opportunity for discovery, his claim may not be dismissed by summary judgment, simply for failure to particularize that topic.

[44] The first and second sets of material facts - identifying the damaged items and describing the damage - are within Mr. Innocente's knowledge. At the chambers hearing, Mr. Innocente was represented by counsel. Justice Coady questioned Mr. Innocente's counsel on why these topics were not particularized:

> And so if he's advancing a claim and he wants some money for the damages that he claims he's got, why wouldn't he tell us what it is? Why doesn't he say, "Okay, they took my 1996 Chevrolet, and it came back and it was all beat up, and I've had it appraised, and this is the damage"? "They took my furniture out of my living room and it's got - the mice got in it, and the mice - this is the quote I got to get it fixed"?

Mr. Innocente's counsel replied:

> I mean it's a matter which, in counsel's drafting, thought would come out as a matter of Discovery.

To another similar question from Justice Coady, Mr. Innocente's counsel responded:

> And the particulars of that will be made available through the ordinary course of Discovery, and the Crown could have availed itself of a demand for particulars if it was - if it felt itself to be embarrassed by that.

Justice Coady asked:

> I mean if he had the list, why wouldn't he just staple them to it?

Mr. Innocente's counsel replied:

> Oh he, no doubt, My Lord, could have done - had a very extensive Statement of Claim. ... To the extent that it's faulty in that regard, I should bear the responsibility for that, My Lord.
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> ...
>
> As the Court suggested, I mean, the list is there, you know? And you're right, I mean it - the Court can - these could have been submitted".

Mr. Innocente's counsel concluded with a request to further amend:

> Well perhaps he should have, or perhaps I should have. If the Court feels that that's a particular problem, I'd be - I'd beg the Court's indulgence to, again, amend. I mean we can do all of this.

The chambers judge did not comment, either at the hearing or in his reasons, on counsel's request to further amend. I take that as a denial of the request to amend.

[45] Rules 83(11)(1) and 13.03(4) give the judge a discretion to amend or adjourn and hear a motion for an amendment. No specific amendment was proposed to Justice Coady. Neither was there a request for an adjournment so that a specific amendment could be proposed. In those circumstances, Justice Coady did not err in law by failing to order that Mr. Innocente was entitled to another amendment.

[46] In the Court of Appeal, Mr. Innocente appeared without counsel. He identified specific items of personal property and, for each, described the damage or loss. He did this in response to the Court's questions. The Court's questions were an effort to better understand his claim given that he was unrepresented in this Court. In these reasons there is no need to repeat the particulars of damage that Mr. Innocente mentioned at the appeal hearing. These were just allegations,

neither in the record before Justice Coady nor in the form of evidence. But I can say this. Had those same particulars appeared in the Amended Statement of Claim, then the first and second sets of material facts that I mentioned above - identification of the items and description of the damage - would have been sufficiently pleaded to withstand this motion for summary judgment on the pleadings. I reiterate that I am referring only to the claim for damage to personal property.

[47] The question is whether the Court of Appeal should permit Mr. Innocente to amend his Statement of Claim again, to plead the particulars that he recited orally at the hearing before this Court.

[48] As I discussed earlier, a discretionary ruling under the *Civil Procedure Rules,* including one that terminates a proceeding, is reviewable if it results in a patent injustice, even without an associated error of law. Would the chambers judge's denial of Mr. Innocente's request to further amend his claim result in a patent injustice?

[49] My view is Yes.

[50] "Injustice" has a flexible meaning for which guidance may be deduced from the *Rules*. Rule 1.01 describes the "Object of these Rules" as:

> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[51] The *Rules* offer litigants the opportunity to shepherd a claim, that is sustainable on its face, toward a proper resolution by settlement or trial. That is a "just determination". The denial of the amendment withdrew that opportunity from Mr. Innocente.

[52] Rule 1.01 directs that the determination also be "speedy, and inexpensive". The Attorney General points out that Justice LeBlanc already gave Mr. Innocente one opportunity to amend, Mr. Innocente was represented by counsel for a period thereafter, and he filed an amendment. Enough is enough, says the Attorney General. Pleading by drawing lines in the sand is neither speedy nor inexpensive.

[53] Rule 1.01 cites "just, speedy, and inexpensive" as guiding principles. When the quest for immaculate justice adds inordinately to the litigation's time and expense, the Rule expects the three factors to be balanced proportionately. A proportionate balance employs a less intrusive judicial tool, like costs, before the ultimate remedy of dismissing the claim. Unless there is bad faith or irreparable prejudice, judicial discretion over amendments should prefer the sting of costs to the guillotine of dismissal.

[54] In *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182, (C.A.), Chief Justice Clarke endorsed that approach:

> [5] A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated in costs.

Similar principles apply to amendments on appeal: *Scott Maritimes Pulp Limited v. B. F. Goodrich Canada Limited and Day & Ross Limited* (1977), 19 N.S.R. (2d) 181 (C.A.), paras 39-40; *Jeffrey v. Naugler*, 2006 NSCA 117, paras 12-16.

[55] Mr. Innocente has not acted in bad faith. His counsel informed the chambers judge that the list of damaged items existed, but was not pleaded because, in counsel's view, those particulars were disclosable on discovery rather than in the Statement of Claim. Mr. Innocente's counsel said that, if his view was mistaken, the error was with counsel, not Mr. Innocente. (quoted above, para 44)

[56] In these circumstances, to deny the requested amendment would be a patent injustice. Rule 83.12 says:

> The Court of Appeal may amend a court document, ... to the same extent as a judge may do so.

I would exercise that discretion in this case.

Conclusion

[57] I would permit Mr. Innocente to further amend his Amended Statement of Claim to (1) identify the items of his personal property that he alleges were damaged or lost while in the care of the Crown, and (2) give the particulars of the damage or loss involving those items. The summary judgment should be set aside for his claim respecting that particularized loss or damage to those identified items of personal property. He should have until April 30, 2012 to file and serve the amendment. In all other respects, I would dismiss his appeal and affirm the dismissal of his claim by summary judgment. Notwithstanding his partial success on this appeal, Mr. Innocente should pay to the Attorney General $500 costs of this appeal, in any event of the cause, in addition to the costs that were ordered by the chambers judge.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Bryson, J.A.