Federal Court  Cour fédérale

Date: 20161208

Docket: T-431-16

Citation: 2016 FC 1356

Ottawa, Ontario, December 8, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DAN PELLETIER

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The Court is being asked, on a motion in writing by the Defendant (the Federal Crown) under rule 221 of the *Federal Courts Rules*, SOR/98-106 (the Rules), to strike the Plaintiff's Statement of Claim, without leave to amend, on the basis that it discloses no reasonable cause of action and it is "scandalous, frivolous or vexatious".

[2] The Plaintiff's Statement of Claim was filed on March 11, 2016 as a "Proposed Class Proceeding" within the meaning of part 5.1 of the Rules. The Plaintiff is seeking various

declaratory and injunctive relief as well as compensatory damages against the Federal Crown in relation to the discharge of allegedly "trails of white particulate like matter" comprised of toxic "minute particles" (Arial Discharges) into Canadian airspace which, by dissipating in lower altitudes, affect the environment, including the air he and his family, as well as potential members of the Proposed Class, breathe.

[3] The Plaintiff alleges that Aerial Discharges can easily be absorbed by the human body and the environment and are therefore dangerous to both. He blames the Federal Crown and/or its agents or instrumentalities for performing Aerial Discharges over Canadian air space while knowing - or supposed to be knowing - that they are dangerous. The Plaintiff claims that the liability of the Federal Crown is engaged as its actions – or inactions – with respect to Arial Discharges contravene the *Canadian Environmental Protection Act*, SC 1999, c 33 [CEPA] as well as the *Canadian Charter of Rights and Freedoms* [the *Charter*], amount to negligence and trespass and impede on the quiet enjoyment of his property and that of the potential members of the Proposed Class.

[4] As indicated previously, the Defendant moves to strike out the Plaintiff's Statement of Claim. It contends that the causes of action alleged by the Plaintiff either do not exist at law or are unaccompanied by the necessary material facts to disclose a cause of action. It further contends that the Applicant's claim is scandalous, frivolous and vexatious as it is so replete with vague assertions and conclusions and is so devoid of factual material that it remains impossible to meaningfully plead a defence.

[5] The test applicable on a motion to strike for not disclosing a reasonable cause of action is well known: a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action or, put it another way, that it has no reasonable prospect of success (*R. v Imperial Tobacco Canada Ltd*, [2011] 3 SCR 45, at para 17 [*Imperial Tobacco*]; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, at p. 980; *Sivak v Canada*, 2012 FC 272, at para 15 [*Sivak*]).

[6] As is well-settled too, no evidence outside the pleadings may be considered on such motions and although allegations that are capable of being proven must be taken as true, the same does not apply to pleadings which are based on assumptions and speculation and to those that are incapable of proof (*Imperial Tobacco*, at para 22; *Operation Dismantle v The Queen*, [1985] 1 SCR 441, at p. 455 [*Operation Dismantle*]; *AstraZeneca Canada Inc. v Novopharm Ltd.*, 2009 FC 1209 at paras 10-12).

[7] In this regard, while the Statement of Claim must be read as generously as possible with a view to accommodating any inadequacies due to drafting deficiencies (*Operation Dismantle*, at p. 451), it is incumbent on the claimant to clearly plead the facts at the basis of its claim:

> [22] [...] It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted". (*Imperial Tobacco*) (*My emphasis*)

[8] Recently, in dismissing the appeal of a Judgment of this Court granting a motion to strike, the Federal Court of Appeal stressed the fundamental importance to the trial process that a claimant "plead material facts in sufficient detail to support the claim and relief sought" (*Mancuso v Canada (Minister of National Health and Welfare)*, 2015 FCA 227 at para 16 [*Mancuso*]). In that case, the Plaintiffs, who were consumers, distributors and producers of natural health products, were challenging Parliament's legislative authority, or in the alternative, Health Canada's statutory authority under the *Food and Drugs Act*, RSC, 1985, c F-27 to regulate these types of products. They were also claiming that the regulation of these products was violating a number of provisions of the *Charter* and that those in charge within the Government of Canada of implementing and enforcing this regulatory scheme had committed various torts in relation to the exercise of state authority (*Mancuso* at paras 5-7).

[9] Quoting from the motion judge's decision, the Federal Court of Appeal first endorsed the principle that "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (*Mancuso* at para 16). Reminding that this requirement is embodied in Rule 174 of the Rules, it then discussed the underpinnings of the obligation on a party to plead sufficient material facts in support of a claim:

> [17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

[10] Acknowledging that there is "no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence", the Federal Court of Appeal held that what constitutes a material fact is determined "in light of the cause of action and the damages sought to be recovered", a matter for the motion judge to assess. Ultimately, the claimant "must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised" so as to ensure that the pleadings "define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair". In sum, the pleading must tell the defendant "who, when, where, how and what gave rise to its liability" (*Mancuso* at paras 18-19).

[11] The requirement for adequate material facts is therefore mandatory and is applicable as much to pleadings of *Charter* infringement than it is to causes of action rooted in common law. In other words, whatever the basis of the claim, "Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars" (*Mancuso*, at para 20-21).

[12] It is with these principles in mind that the Defendant's motion to strike and the Plaintiff's pleadings must be assessed in the present case.

[13] In my view, the core of the Plaintiff's claim holds in the following three allegations:

a. On various dates, Arial Discharges comprised of minute toxic particles have been discharged in Canadian airspace by certain aircrafts;
b. As Arial Discharges dissipate in lower altitudes, they affect the air the Plaintiff, as well as potential members of the Proposed Class, breathe and are therefore dangerous to both the

human body and the environment, something the Federal Crown and/or its agents or instrumentalities knew or ought to have known;

c. In such context, to the extent the Federal Crown and/or its agents or instrumentalities were engaged in "performing" the Aerial Discharges over the Canadian airspace, their liability is engaged for statute and *Charter* breach and for common law torts, namely negligence, nuisance and trespass.

[14] The Plaintiff claims he is entitled in these circumstances to various forms of remedy, namely, (i) statute and *Charter* infringement declarations, (ii) interlocutory and permanent injunction directing the Federal Crown to comply with the *Charter* and the CEPA and appurtenant regulations as well as to cease and desist the ongoing Arial Discharges, (iii) general damages, including pecuniary and non-pecuniary damages for serious injury, including death, emotional and psychological trauma and loss of income; (iv) punitive, aggravated and exemplary damages; and (v) costs, including the costs of administrating the plan of distribution of the action.

[15] I agree with the Defendant that the Plaintiff's Statement of Claim only consists of bald allegations and mere conclusory statements of law and falls well short, as a result, of pleading with sufficient detail the constituent elements of each cause of action raised. In particular, it fails to tell the Defendant "who, when, where, how and what gave rise to its liability" and to define the issues with sufficient precision to make the trial process both manageable and fair (*Mancuso* at paras 18-19).

[16] The allegations of statute and *Charter* infringement are as bald, general and vague as they can be: they (i) do not specify which *Charter* rights or which provision(s) of the CEPA have been infringed; (ii) do not tell the Defendant who, how and what gave rise to the alleged infringement; (iii) remain vague as to where and when exactly the alleged infringement took place; (iv) do not tell the Defendant in what way the Federal Crown or its agents and/or instrumentalities "perform" Arial Discharges in Canadian airspace so as to trigger the application of the CEPA and the *Charter*; and (v) are silent on the identity of the Federal Crown's agents and/or instrumentalities which are allegedly infringing the CEPA and the *Charter*.

[17] As indicated previously, there are no separate rules of pleadings for *Charter* cases. The requirement of material facts applies in the same way it does for other causes of actions (*Mancuso*, at para 21). In *Mancuso*, in what was otherwise found to be inadequate pleadings, there was at least reference to the *Charter* provisions that had been allegedly infringed. Again, here, there is no such reference. With respect to the alleged breach of the CEPA not only is the Plaintiff's pleading devoid of any supporting material facts but that particular claim is bound to fail as it is now firmly established that no action lies against a public authority for negligent breach of statute (*Holland v Saskatchewan*, [2008] 2 SCR 551, at para 8-9).

[18] The same pleading deficiencies affect the common law causes of action raised by the Plaintiff, which are based on the exact same bald allegations and conclusory statements of law. As stated in *Mancuso*, a properly pleaded tort claim "identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort" (*Mancuso*, at para 26). The essential elements of the tort of negligence include a duty of care, a specific

breach of that duty, a causal connection between the breach of the duty and the injury, and an actual loss. A Statement of Claim need therefore to include sufficient facts providing details about each of these elements (*Sivak*, at para 26).

[19] In matters involving the Federal Crown's liability, it must also be bore in mind that liability, as per sections 3 and 10 of the *Crown Liability and Proceedings Act*, RSC 1985 c C-50, can only be vicarious, which requires the claimant to identify, as a material fact, the particular individuals who have allegedly engaged in tortious actions, or, when this is not possible, to identify at least a particular group of individuals, an organizational branch or even job positions which dealt with the actionable matter (*Merchant Law Group v. Canada (Revenue Agency)* 2010 FCA 184 at paras 36-38 [*Merchant Law Group*]). Also, as the Court indicated in *Sivak*, the requirement to plead sufficient material facts in such matters is particularly important to ground negligence claims since key issues such as whether the conduct in question constitute (non-actionable) policy or (actionable) operational decisions often arise (*Sivak*, at para 48).

[20] As the Defendant correctly points out, the Plaintiff's Statement of Claim merely recites the steps in a generic negligence analysis: it does not identify the individuals, group of individuals or organizational branch involved in the alleged negligent conduct, let alone, as indicated previously, the Crown agents and/or instrumentalities allegedly responsible for such conduct; it does not provide either any type of details of the alleged negligent conduct itself - the "performance of Arial Discharges" - as it does not tell anything about the who, how and what gave rise to the Defendant's liability in this regard or about the link between the Federal Crown, its agents and/or instrumentalities and the aircrafts that are actually discharging the Arial

Discharges; also, it is vague as to when and where such conduct may have occurred to a point where it does not give fair notice to the Defendant of the case to be met.

[21] All of this equally applies to the Plaintiff's claim for nuisance and trespass. There are no supporting material facts to establish a non-trivial, substantial and unreasonable interference with the use or enjoyment of the Plaintiff's land due to the alleged performance of Arial Discharges (*Antrim Truck Center Ltd v Ontario (Transportation)*, [2013] 1 SCR 594 at para 19). There are no such facts either capable of establishing a claim for trespass, that is a direct and physical intrusion onto land in possession of the Plaintiff resulting from the alleged misconduct. In particular, the Plaintiff has failed in both instances to plead material facts capable of establishing the nature of the interference or intrusion.

[22] For these reasons, I find that the Plaintiff has failed to plead facts in sufficient details to support the claim and relief sought. Both the Defendant and the Court are left to speculate as to what might support, from a material factual standpoint, the causes of action raised by the Plaintiff (*Mancuso* at para 16). As the Supreme Court of Canada stated in *Imperial Tobacco*, at paragraph 22, "[t]he facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted". That is the case here.

[23] The Plaintiff's Statement of Claim simply does not meet the minimum threshold of an adequate pleading. In other words, in its current configuration, it fails to disclose the constituent elements of each cause of action and to define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair. In sum, it does not provide the essential

facts grounding the causes of action. As we have seen, this is sufficient basis to strike the Plaintiff's claim as not disclosing a reasonable cause of action. It is also sufficient basis to strike the Plaintiff's claim as being "scandalous, frivolous or vexatious" within the meaning of Rule 221(1)(c) of the Rules since a pleading replete with bare allegations and mere conclusory statements of law, as is the case here, will normally also amount to a scandalous, frivolous or vexatious pleading (*Kisikawpimootewin v Canada*, 2004 FC 1426 at para 9; *Ceminchuk v Canada*, [1995] FCJ No 914 at para 10).

[24] The Plaintiff's contention that the Defendant is in reality seeking particulars to an otherwise adequate pleading and that such request is somehow premature as his claim will only be able to be assessed in this respect once the common issues to the Class Proceeding have been determined as those issues speak to the systemic and centralized behavior of the Defendant and are the ones the Defendant will ultimately be called upon to defend, cannot stand.

[25] This approach ultimately suggests that there is a different standard for pleadings in a Proposed Class Proceeding and that such pleadings should be looked at as how they could be drafted as opposed to how they have been drafted. In *Merchant Law Group*, the Federal Court of Appeal made it clear that there is not such a different standard, noting that there was no authority to support such a proposition :

> [40] Finally, in an overarching submission, the appellants suggest that this Court should relax the rules of pleading whenever it has a proposed class action before it. The appellants submit that any deficiencies in the amended statement of claim can be addressed in the motion to certify the action as a class action. Related to this, the appellants suggest that this Court should view the pleading not as it has been drafted but rather "as how it might be drafted." The appellants cite no authority in support of these propositions. I reject them. A motion to strike may be brought at

> any time against a statement of claim in a proposed class action for failure to comply with the rules of pleading or for failure to state a viable cause of action: *Pearson v Canada*, 2008 FC 62, [2008] 4 FCR 373 *per* Prothonotary Aalto. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; mandatory and essential it truly is.

[26] As a result, the case of *Baroch v Canada Cartage*, 2015 ONSC 40, which was decided in the context of a class proceeding certification motion, is of no assistance to the Plaintiff. Complying with the Rules of pleading, even in the context of a Proposed Class Proceeding, is essential and non-compliance is ample justification for a motion to strike. As the Defendant points out, it is trite law that a Proposed Class Proceeding which fails to disclose a reasonable cause of action may be the subject of a motion to strike, irrespective of the fact that this issue can also be argued on the certification motion (*Merchant Law Group v Canada (Revenue Agency)*, 2008 FC 1371 at paras 17, 18 and 28).

[27] Having found that the Plaintiff's Statement of Claim should be struck out in its entirety, I must now decide whether leave to amend should be granted or not, as contemplated by Rule 221(1) of the Rules. Another option would be to strike out the Statement of Claim without leave to amend but without prejudice to the Plaintiff instituting a new action, as was done in *Baird v Canada*, 2006 FC 205 [*Baird FC*].

[28] Leave to amend should normally be denied where the defect in the pleading is one that cannot be cured by amendment (*Simon v Canada*, 2011 FCA 6, at para 8 [*Simon*]). In *Baird v Canada*, 2007 FCA 48, the Federal Court of Appeal, in confirming *Baird FC*, ruled, at

paragraph 3, that amendments to the Statement of Claim were simply not possible since, as drafted, "it was beyond redemption". In that case, the Plaintiff had filed "an 18-page closely typed statement of claim" claiming damages of over 30 billion dollars from the Federal Crown (*Baird FC*, at para 2). In particular, this Court found that another fundamental reason for striking the Statement of Claim without leave to amend was that it contained "so many different allegations without specifics, and so many different types of relief, that it would be near impossible for the Court to regulate the trial". In another words, this Statement of Claim was also an abuse of process (*Baird FC*, at para 12).

[29] Is the Plaintiff's Statement of Claim in the present case "beyond redemption" as was the case in *Baird FC*? I do not believe so. Since the power to strike must be used with care (*Imperial Tobacco*, at para**21**), I would allow the Plaintiff the opportunity to attempt to salvage his pleading by amending it within 40 days of the date of this Order, the Christmas Recess within the meaning of rule 2 of the Rules, being included in the computation of that delay. In so doing, I would caution the Plaintiff, as did the Federal Court of Appeal in *Simon*, that any further pleading will have to be compliant with all of the Rules governing pleadings and that non-compliance with those Rules could expose the pleading to the risk of being struck out again. As the Federal Court of Appeal stated in that case:

> [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. [...]

[30] I would also caution the Plaintiff that allegations of breach of statute as a basis for claiming damages against the Federal Crown is unlikely to succeed as "the law to date has not recognized an action for negligent breach of statutory duty" (*Holland v Saskatchewan*, above, at para 9).

[31] Given its outcome, costs of the motion are awarded to the Defendant.

ORDER

THIS COURT ORDERS that:

1. The motion is granted in part;
2. The Statement of Claim is struck out, with leave to amend within 40 days of the date of the present Order, the Christmas Recess being included in the computation of that delay; and
3. Costs of the motion to the Defendant.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-431-16
STYLE OF CAUSE:	DAN PELLETIER v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JULY 27, 2016
JUDGMENTAND REASONS:	LEBLANC J.
DATED:	DECEMBER 8, 2016

APPEARANCES:

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Cynthia Koller	FOR THE RESPONDENT

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