Court File No.

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

NELL TOUSSAINT

Plaintiff
(Respondent)

and

ATTORNEY GENERAL OF CANADA

Defendant
(Appellant)

FACTUM OF THE APPELLANT
MOTION FOR A STAY PENDING APPEAL

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. This is an appeal from a decision of the Honourable Justice Perell, dated August 17, 2022.

2. On a motion to strike the Plaintiff's Statement of Claim, the Motions Judge granted relief in the nature of a motion to strike parts of the Statement of Defence, without notice to the Defendant, before a Defence had been filed. The Motions judge made final determinations regarding the merits of the Plaintiff's claim; the merits of the Defendant's defences; and the credibility of facts alleged in the Statement of Claim.

3. The Motions Judge exceeded his jurisdiction on a motion to strike; erred in law by making final orders and declarations on a pleadings motion; and

violated procedural fairness by granting relief, without notice, that the parties had not requested.

4. Specifically, the Motions Judge ordered the Defendant to file a Statement of Defence on or before September 26, 2022, without relying on a limitations defence. The effect of the Motions Judge's order is also that the Defendant is precluded from raising jurisdictional issues.

5. If the Defendant is forced to file a Defence that has been unfairly limited, the Defendant will suffer irreparable harm, since the pleadings will determine the scope of discovery and trial. These errors should be corrected before the pleadings are closed, and before the parties proceed to discovery.

6. The balance of convenience lies in favour of granting a stay.

B. BACKGROUND

7. The Plaintiff commenced an action by Amended Statement of Claim issued October 14, 2020, further amended on May 25, 2021 (the "Statement of Claim").[1]

8. The Plaintiff seeks damages, Charter declarations and other related relief. In very brief summary, the Statement of Claim alleges that:

(a) The Plaintiff entered Canada as a visitor in 1999, and remained and worked in Canada after her status had expired. She suffered serious medical issues while in Canada;

(b) In 2009, the Plaintiff applied for, and was denied medical coverage under Canada's Interim Federal Health Program. Through 2009 – 2012, the Plaintiff sought judicial review of this decision in the Federal Courts and the Supreme Court, without success;

[1] Statement of Claim, Affidavit of Charlene Cho, sworn September 9, 2022, Exhibit "A", Appellant's Motion Record, Tab 3A

(c) In 2013, the Plaintiff filed a complaint with the Unsuited Nations Human Rights Committee (UNHRC). In 2018, the UNHRC released its views, in which it found that Canada had violated the Plaintiff's rights under the International Convene ton Civil and political Rights, and that Canada should compensate the plaintiff;

(d) The Plaintiff sought compensation from Canada following the UNHCR's decision. Canada refused to compensate the Plaintiff. The Plaintiff commenced the underlying action.[2]

9. The Defendant brought a motion to dismiss the action or strike all or parts of the Statement of Claim. The grounds for the motion included:

(a) That the Statement of Claim discloses no reasonable cause of action;

(b) That the action is statute barred by the *Limitations Act, 2002*;

(c) That the action is frivolous and vexatious, and an abuse of process;

(d) That the court has no jurisdiction over parts of the relief claimed in the Statement of Claim.[3]

10. There was no evidence filed on the motion.[4]

11. The Plaintiff did not argue on the Motion that the Defendant should be precluded from raising a limitations defence. The Plaintiff's position on the motion was that the action should not be struck because of any limitations issue, and that limitations issues should be left to be decided as a defence in the action.[5]

12. The Defendant accepted the facts in the Statement of Claim as true for the purposes of the motion to strike only.[6]

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[2] Statement of Claim, Cho Affidavit, Exhibit "A", Appellant's Motion Record, Tab 3A
[3] Notice of Motion, Cho Affidavit, Exhibit "B", Appellant's Motion Record, Tab 3B
[4] Cho Affidavit, Paragraph 4, Appellant's Motion Record, Tab 3
[5] Cho Affidavit, paragraph 5; Plaintiff's Factum, Cho Affidavit, Exhibit "C", Appellant's Motion Record, Tabs 3, 3C
[6] Cho Affidavit, paragraph 6; Defendant's Factum, Cho Affidavit, Exhibit "D"; Defendant's Reply Factum, Cho Affidavit, Exhibit "E", Appellant's Motion Record, Tabs 3, 3D, 3F

13. The motion to strike was heard on June 13, 2022, by video conference. On August 17, 2022, the Motions Judge released Reasons For Decision (the "Decision"), dismissing the motion.[7]

14. In his decision, the Motions Judge:

(a) Declared that the Plaintiff's claim was within the jurisdiction of the Ontario Court;[8]

(b) Declared that the Plaintiff's claim timely, and not barred by the *Limitations Act*;[9]

(c) Ordered that the Defendant could not rely on a limitations defence;[10]

(d) Made findings of fact regarding the discoverability of the Plaintiff's cause of action.[11]

15. The Motions Judge ordered that the Appellant deliver a Statement of Defence on or before September 26, 2022, without raising a limitations period defence.[12]

16. To date, the parties have been unable to settle the wording of the Motions Judge's Order.[13]

PART II – POINTS IN ISSUE

17. A stay of the Decision should be granted:

(a) the appeal raises serious issues as to whether the Motions Judge erred in law and exceeded his jurisdiction;

(b) the Defendant would suffer irreparable harm pending this appeal if the Defendant is precluded from pleading important defences, and is bound by the declarations and findings of fact of the Motions Judge;

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[7] Decision, Appellant's Motion Record, Tab 2
[8] Decision at paragraph 10, 90, 206, Appellant's Motion Record, Tab 2
[9] Decision at paragraph 10, 90, 206, Appellant's Motion Record, Tab 2
[10] Decision at paragraph 10, 90, 208, Appellant's Motion Record, Tab 2
[11] Decision at paragraph 114, Appellant's Motion Record, Tab 2
[12] Decision at paras. 10, 208, Appellant's Motion Record, Tab 2
[13] Cho Affidavit, paragraph 9, Appellant's motion Record, Tab 3

(c) the balance of convenience lies in favour of granting a stay.

18. In the alternative, if this motion cannot be disposed of before September 26, 2022, an interim stay of the Decision should be granted, pending a full hearing of this motion.

PART III – SUBMISSIONS

A. TEST FOR A STAY

19. The test for the granting of a stay is that the moving party must establish each of the following elements on a balance of probabilities:

a) that there is a serious question to be determined;

b) that the party seeking the stay will suffer irreparable harm should the stay not be granted; and

c) that the balance of convenience and public interest considerations favour a stay.[14]

20. The three requirements are to be considered as interrelated considerations. The strength of one criterion may compensate for the weakness of another.[15] However, the overarching consideration is whether the interests of justice call for a stay.[16]

B. THE APPEAL RAISES SERIOUS ISSUES

1) Motions Judge intended to make final orders

21. A decision to dismiss a motion to strike is typically an interlocutory order. The judge finds that the claim is *not* devoid of any chance of success. The

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[14] *Bedford v Canada (AG)*, 2010 ONCA 814 (Rosenberg J.A. in Chambers) at para. 9
[15] *Longley v. Canada (Attorney General)*, 2007 ONCA 149 at para. 15
[16] *Longley v. Canada (Attorney General)*, 2007 ONCA 149 at para. 15; *Bedford v. Canada (Attorney General)*, 2010 ONCA 814 (Rosenberg J.A. in Chambers) at para. 22

action continues – there has been no ruling made on the actual merits of any claim or defence.

22. This Court has noted that in the absence of an express indication by the motion judge that any conclusions expressed in dismissing a motion for summary judgment are intended to be binding on the parties, it should be presumed that they are not.[17]

23. In this case, the Motions Judge stated in his Reasons that he was making final determinations of the rights of the parties:

> *[90] Because, as foreshadowed above, Ms. Toussaint's Amended Amended Statement of Claim is not being struck out and this action will be proceeding to the completion of the pleadings and to the interlocutory stages of the proceeding, which might include a motion for summary judgment by either side,* ***apart from my conclusions that: (a) this court has jurisdiction; (b) Ms. Toussaint's claims are timely and not statute-barred;*** *and (c) Ms. Toussaint has not contravened the rules of pleading****, nothing that I shall say is meant to be a determination of the merits of Ms. Toussaint's claim or Canada's defence.***[18]

24. In plain English, the Motions Judge has said that his findings about jurisdiction, "timeliness" and limitations are meant to be determinations about the merits of the claim and defence, and to have effect beyond the pleadings stage.

2) <u>Legal error – limiting defences before Defence filed</u>

25. The Motions Judge exceeded his jurisdiction and erred in law by making an order which precludes the Defendant from raising a limitations defence.

26. The Motions Judge exceeded his jurisdiction and erred in law by declaring that the Plaintiff's claim was within the jurisdiction of the Ontario Court.

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[17] *Salewski v. Lalonde*, 2017 ONCA 515 at para. 38, *Skunk v. Ketash*, 2016 ONCA 841 at para. 58.

[18] Reasons, at paragraph 90; see also Reasons at paragraph 206

27. A motion to strike is brought under Rule 21.01, which states that "A party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence", and that "the judge may make an order or grant judgment accordingly".[19] The plain wording of the Rule suggests that there are two possible outcomes: that the motion is struck or that it is not:

> *The principles that inform the determination of a defendant's motion to strike under Rule 23.01(1)(b) are well settled and can be summarized as follows: (1)* ***the only question for judicial resolution is whether it is plain and obvious that the Statement of Claim fails to disclose the essential elements of a cause of action tenable at law.*** *There is no suggestion in the relevant Rules that the judge may also, without notice, make determinations of the legal issues to be raised in the balance of the action.*[20]

28. This Court has held, in the context of a motion for summary judgement, that

> *[50] … the motion judge could not properly have made a final determination of the limitations issue in favour of the appellants prior to the close of pleadings and without the benefit of a more fulsome record. In these circumstances, his reasons for dismissing the appellants' motion should not be read as a final determination of the limitations issue in favour of the respondent giving rise to res judicata or issue estoppel.*[21]

29. In this case, the reasons cannot be read otherwise than as a final determination of various issues against the Defendant.

30. The Motions Judge exceeded his jurisdiction by going well beyond the relief appropriate on the Defendant's motion.

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[19] *Rules of Civil Procedure*, Rule 21.01
[20] *Sewell v. ING Insurance Company of Canada*, 2007 NBCA 42 at para. 26
[21] *Salewski v. Lalonde*, 2017 ONCA 515 at para. 50

3) <u>Legal error – effectively granting a motion to strike parts of the Defence before defence filed</u>

31. The Motions Judge erred by granting relief in the nature of a motion to strike parts of the Statement of Defence, before a Statement of Defence had been filed.

32. There are a number of cases involving summary judgment motions where the relief ultimately granted is colloquially known as "boomerang summary judgement". A party moves for summary judgment, the evidence and arguments are exchanged, and at the hearing, the judge grants summary judgment – for the responding party. This Court has held that a motions judge is entitled to grant such relief, *provided that the parties are on notice* that it is a possible outcome. If the parties are not on notice, it is an unfair result, and will be overturned on appeal:

> *[12] The motion judge's grant of judgment in favour of Mr. Drummond was not a fair and just determination on the merits on the motion…*
>
> *[13] The lack of procedural fairness on the motion is a sufficient basis to allow the appeal and set aside the Judgment in favour of Mr. Drummond.*[22]

33. The Motions Judge in this case has granted a "boomerang motion to strike" two of the Defendant's possible defences, on jurisdiction and limitations. The Defendant had no notice of this. It is especially unfair since the judge is pronouncing on the merits of the defence before the Statement of Defence has been filed.

34. The Motions Judge's decision could also be characterized as relief in the nature of summary judgment in favour of the Plaintiff, or determination of an

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[22] *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447 at paras.12-13

issue of fact or law before trial. None of that relief was in issue on the motion. It is unfair for the judge to have decided motions that were not before him, without evidence, and without notice.

> *[37] …where a party claims that a motion judge has made binding determinations of fact or law, this court has said that a court proposing to exercise its powers to make such determinations under either rule 20.04(4) or (5) should specifically invoke the rule and that, reference to the rule, as well as the particular determination made, should form part of the formal order: Ashak, at paras. 8, 11, 13; Skunk v. Ketash, 2016 ONCA 841, 94 C.P.C. (7th) 141, at paras. 35-36.*[23]

4) Legal error – granting relief without notice

35. The Motions Judge acted unfairly and erred in law by granting relief, without notice, which prejudices the Defendant's defence of the action, when neither party had requested the relief.

36. It is well established where a Motions judge makes an order that the parties did not contemplate, there has been procedural unfairness, and the order should be set aside on appeal.[24]

5) Legal error – making findings of fact on a motion to strike

37. The Motions Judge erred by making orders and declarations based on findings of fact regarding the discoverability of the Plaintiff's cause of action on a pleadings motion, without evidence, before the Defendant had responded to the factual allegations in the Statement of Claim.

38. This Court has held that a judge on a pleadings motion is in no position to make determinations of fact:

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[23] *Salewski v. Lalonde*, 2017 ONCA 515 at para. 37

[24] *Abdullahi v. C.A.S. of Toronto*, 2021 ONSC 5832, at paras. 29, 32, citing *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447 at paras.13 and 14; see also *Marshall v. Reid*, 2018 ONSC 648, at paras. 28-29 (appeal from a Family Court order)

> *[33] The appellants' position on the motion was that the unjust enrichment claims could be struck as statute-barred under rule 21.01(1)(a) because it is plain and obvious from a review of the statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period has expired. If the motion judge accepted that position, it was the appellants' assertion that he could properly find the unjust enrichment claims were statute-barred.*
>
> *[34] However, even assuming that assertion is correct, it does not follow that, if he rejected the appellants' submissions**, the motion judge could make a binding declaration that the limitation period had not expired. That is because the motion judge was not in a position, on a pleadings motion, to make binding determinations of fact. At best, he could posit circumstances in which the limitation period would not have expired**. His reasons must be read in this context.*[25]

39. On the issue of the "discoverability" of the cause of action, the Motions Judge found that:

> *It is plain and obvious that Ms. Toussaint did not have the knowledge necessary to advance her claims against Canada until after Canada unequivocally indicated that it disagreed with the Views of the United Nations' Human Rights Committee and that occurred on September 15, 2020.*[26]

40. This Court has held that it is not appropriate for a Motions Judge to make rulings in a pleadings motion on potentially disputed issues of fact, and specifically the discoverability of ta cause of action:

> *[33] Thus, a factual dispute about the discovery date of a cause of action precludes the use of rule 21.01(1)(a) to determine whether a limitation period subject to discoverability has expired, because this rule is limited to determining questions of law raised by a pleading. If the parties have joined issue on disputed facts on the limitations issue, the preferable procedure might be a motion for summary judgment under Rule 20, which provides the court with certain fact-finding powers: Kaynes, at para. 80; Brozmanova v. Tarshis, [2018] O.J. No. 3097, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 21, 23 and 35; and rule 20.04(2.1).*[27]

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[25] *Salewski v. Lalonde*, 2017 ONCA 515 at paras. 33-34
[26] Decision, paragraph. 114, Appellant's Motion Record, Tab 2
[27] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 at para. 33; see also *Kaynes v. BP p.l.c.*, 2021 ONCA 36, at para. 74

41. The “plain and obvious” test on a motion to strike applies to the law, and whether the legal causes of action alleged are supportable. The Motions judge improperly applied the “plain and obvious” threshold to the facts set out in the Statement of Claim. What the Motions Judge has done, effectively, before the Defendant has filed a Defence, is to say that “this fact alleged by the Plaintiff cannot be gainsaid or denied”.

42. After a motion to strike, it is possible that a Defendant will deny every fact pleaded in a Claim. A Defendant may eventually show that some or all of the facts are entirely inaccurate. In this case, the Defendant certainly did not concede that the Plaintiff did not know she could seek *any* remedies until September, 2020.[28]

C. THE APPELLANT WOULD SUFFER IRREPARABLE HARM

43. Unless the Decision is stayed, the Defendant is foreclosed from discovery relating to any limitations issue, pending this appeal. In the period before this appeal is heard, the Appellant would be required to file a Statement of Defence without pleading a limitations defence.

44. The pleadings define the scope of permissible discovery, and the issues at trial.

45. The Motions Judge found, as a fact that the Plaintiff could not have discovered her cause of action before September, 2020. Firstly, the Appellant disputes the Motion Judge’s particular finding about any claim discovered in September 2020. Further, the Appellant’s position is that the Plaintiff is raising

[28] Cho Affidavit, paragraph 6, Exhibits “D” and “E”

several causes of action, and that many of them were discoverable long before 2020. It would appear that the Defendant is foreclosed from discovery relating to the date that the Plaintiff discovered *any* cause of action, pending the appeal.

46. The Appellant argued that *some* of the relief claimed by the Plaintiff was actually in the nature of judicial review within the exclusive jurisdiction of the Federal Court. The Motions Judge made a final, categorical order that all of the action is within the jurisdiction of the Ontario Court. Unless the Decision is stayed, the Defendant is foreclosed from discovery going to this jurisdictional issue, pending this appeal.

47. If a stay is not granted, and the Appellant is successful, the Statement of Defence could be amended. The Defendant would presumably recover the right to discovery that had been foreclosed. In the meantime, the parties will have spent unnecessary time and resources on pleadings and discoveries that were unfairly restrictive to the Defendant.

D. THE BALANCE OF CONVENIENCE FAVOURS A STAY

48. The balance of convenience must be determined by assessing which of the parties would suffer greater harm from the granting or refusal of the remedy pending the decision on the merits.[29]

49. The benefits of correcting the errors of the Motions Judge, and of permitting the Defendant to plead and proceed to discoveries without unfair limits, weigh heavily in favour of granting a stay.

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[29] *Longley v. Canada (Attorney General)*, 2007 ONCA 149 at para. 14, applying *RJR MacDonald v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at p. 334

50. If the stay is granted, there will be some delay while the Defendant's right to raise certain defences is determined. Any intervening delay is outweighed by the benefits of granting a stay.

51. Any delay is not due to any action of the Defendant. This should be taken into account in determining the balance of convenience. Any delay is, with respect, due to the issues created by the Motions Judge when he decided to go well beyond the appropriate relief on a motion to strike. As this court noted i*n Drummond*:

> *[14] Apart from the fairness concerns, the outcome in this case demonstrates the practical problems and inefficiencies that can arise when a judge chooses to go beyond the issues raised by the parties and make orders that no one requested or had an opportunity to speak to in the course of their submissions… Because counsel did not have an opportunity to address the issue on the motion, an appeal, with its inevitable delay and added cost, became necessary regardless of the merits of the rest of the motion judge's analysis.*[30]

[30] *Drummond v. Cadillac Fairview Corporation Limited*, 2019 ONCA 447 at para. 14

PART IV – ORDER SOUGHT

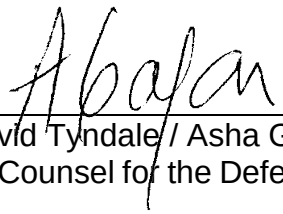
52. The Defendants request an Order:

(a) Granting a stay of the Decision of the Motions Judge, pending the determination of the Appellant's appeal.

(b) If necessary granting an interim stay of the Decision of the Motions Judge, pending the determination of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, September 9, 2022.



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