COURT OF APPEAL FOR ONTARIO

CITATION: Toussaint v. Canada (Attorney General), 2023 ONCA 117
DATE: 20230223
DOCKET: COA-22-CV-0101

Huscroft, Coroza and Favreau JJ.A.

BETWEEN

Nell Toussaint

Plaintiff (Respondent)

and

Attorney General of Canada

Defendant (Appellant)

and

Charter Committee on Poverty Issues, Canadian Health Coalition, FCJ Refugee Centre, Amnesty International Canada, International Network for Economic, Social, and Cultural Rights, the Colour of Poverty/Colour of Change Network, the Black Legal Action Centre, the South Asian Legal Clinic of Ontario, and the Chinese and Southeast Asian Legal Clinic and Canadian Civil Liberties Association

Interveners[1]

David Tyndale and Asha Gafar, for the appellant

Andrew C. Dekany and James Yap, for the respondent

Heard: December 2, 2022

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[1] Interveners were involved in the proceedings before Perell J. but did not participate in the appeal.

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated August 17, 2020, with reasons reported at 2022 ONSC 4747.

REASONS FOR DECISION

[1] This is an appeal from the order of the motion judge dismissing the appellant's motion to strike the proceedings under r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge found it was not plain and obvious that the respondent's action was doomed to fail. In addition, the motion judge declared that the respondent's claims were timely, not statute barred pursuant to the *Limitations Act,* 2002, S.O. 2002, c. 24, Sched. B ("*Limitations Act*"), and within the jurisdiction of the Ontario court.

[2] The appellant argues that the motion judge exceeded his jurisdiction, erred by making declarations as to the rights of the parties, and violated procedural fairness by granting relief, without notice, that the parties had not requested. We agree that the motion judge erred in declaring that the respondent's claim was timely, rather than simply dismissing the appellant's motion to strike the claim. We do not agree that the motion judge erred in declaring that the respondent's claim was within the jurisdiction of the Ontario court.

[3] The appeal is allowed, in part, for the reasons that follow.

BACKGROUND

[4] The respondent, Ms. Toussaint, lawfully entered Canada as a visitor from Grenada in 1999. Her action arises out of a decision to deny her healthcare

coverage pursuant to the Interim Federal Health Program between 2009 and 2013. She brought an application for judicial review to the Federal Court of Canada, appealed to the Federal Court of Appeal, and sought (and was refused) leave to appeal to the Supreme Court of Canada. Throughout this legal process, the respondent suffered serious and irreversible health consequences.

[5] In 2013, the respondent made a submission to the United Nations Human Rights Committee ("UNHRC") alleging that Canada had violated several obligations under international law including her right to life and non-discrimination under the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47. 6 I.L.M. 368 (entered into force 23 March 1976) ("*ICCPR*"). In 2018 the UNHRC stated that Canada had violated the respondent's right to life recognized in the *ICCPR* and that Canada was required to provide the respondent with an effective remedy, including compensation and taking all steps necessary to prevent similar violations in the future. Canada disagreed with the UNHRC's views and stated that it would not follow its recommendations.

[6] The respondent commenced an action against the federal government on October 14, 2020. Her action includes several causes of action grounded in the *Canadian Charter of Rights and Freedoms*, customary international law, and administrative law. She seeks several forms of relief, including general and special damages in the amount of $1,200,000.

DISCUSSION

[7] Canada challenged the respondent's claim in many respects and its position was the subject of critical comment by the motion judge. The motion judge variously describes Canada's position as a "land, sea, air, submarine, and celestial procedural attack" on the respondent's position; "a dog whistle argument that reeks of … prejudicial stereotype"; and "pejorative arguments" that he did "not propose to dignify further".

[8] It suffices to say that these comments are gratuitous.

[9] Canada challenges the motion judge's order concerning only the limitations and jurisdiction issues. These issues are addressed below.

The motion judge erred in precluding the appellant from raising the limitations defence in their Statement of Defence

[10] The motion judge did not simply dismiss the motion on the basis that it was not plain and obvious that the limitations defence could not succeed; he ordered that the claim was *not* statute barred pursuant to the *Limitations Act* and precluded the appellant from raising a limitations defence at the trial. He erred in doing so.

[11] We begin by reiterating that limitations issues can rarely be decided on pre-trial motions to strike under r. 21.01 of the *Rules of Civil Procedure*. Factfinding is required to assess whether a claim is discovered under s. 5 of the *Limitations Act*, but factfinding is not contemplated on a pleadings motion. Thus, this court has in

several cases discouraged the use of r. 21.01(1)(a) to determine limitation issues: see e.g., *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587, at para. 31; *Kaynes v. BP p.l.c.*, 2021 ONCA 36, 456 D.L.R. (4th) 247, at para. 81; *Clark v. Ontario (Attorney General)*, 2019 ONCA 311, at paras. 42-48, rev'd on other grounds 2021 SCC 18, 456 D.L.R. (4th) 361; *Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 19-21; *Salewski v. Lalonde*, 2017 ONCA 515, 137 O.R. (3d) 750, at paras. 45-46, 50; and *Ridel v. Goldberg*, 2017 ONCA 739, at paras. 11-12. In general, it is appropriate to address limitations issues on a pleadings motion only "where pleadings are closed and the facts relevant to the limitation period are undisputed": *Beaudoin Estate*, at para. 31; see also *Clark*, at para. 44, *Salewski*, at para. 45. This is true whether the motion is brought under r. 21.01(1)(a) or (b).

[12] In this case, the motion judge's determination that the action is not statute barred is even more problematic than in the cases referred to above because the determination was made in the context of a r. 21 motion brought by Canada. The motion raised the issue of whether it was plain and obvious based on the statement of claim that the action was statute barred. Instead of confining himself to this issue, the motion judge went beyond the confines of the relief sought on the motion and made a finding against Canada that the action was not statute barred. It is difficult to conceive of a case where it would ever be appropriate to make such a finding against a moving party on a r. 21 motion.

[13] Without the benefit of a statement of defence from Canada or any evidence, the motion judge found that it is plain and obvious that the respondent did not have the knowledge necessary to advance her claims against Canada until after Canada indicated that it did not accept the views of the UNHCR or, alternatively, the UNHCR released its decision. However, this was not conceded by the appellant, which argued that the limitations issue involved factual and legal issues regarding discoverability. Thus, the facts surrounding the limitations issue are disputed and the motion judge was not in a position to make binding determinations of fact on a pleadings motion.

[14] The limitations issue in this case is complicated by the nature of the claims. The motion judge acknowledged the complexity of the claims and characterized the respondent's legal theory as "extraordinarily complex" and "a solution for three partial differential equations that impose relations between the various partial causes of action of a multivariable cause of action." The complexity of the claims augments the difficulty of determining the limitations issue on a r. 21.01(1)(b) motion, particularly given the factual discoverability issues.

[15] In summary, although it was open to the motion judge to dismiss the r. 21.01(1)(b) motion, he erred in going further by ordering that the claim was *not* statute barred pursuant to the *Limitations Act* and precluding the appellant from raising a limitations defence at the trial. The motion judge's conclusion that it was not plain and obvious that Ms. Toussaint's action was statute barred pursuant to

the *Limitations Act* does not entail the further conclusion that the action is timely.

[16] Accordingly, this ground of appeal must be allowed.

The motion judge did not err in concluding the Ontario court has jurisdiction

[17] The motion judge rejected the appellant's argument that the action was in essence a matter of judicial review within the exclusive jurisdiction of the Federal Court. He noted, first, that the Ontario court has concurrent jurisdiction with the Federal Court with respect to *Charter* claims against the federal government; and second, that the Minister's decision on whether to implement a recommendation of the UNHRC was an exercise of a Crown prerogative, and thus was outside the exclusive jurisdiction of the Federal Court.

[18] The appellant argues that the motion judge was asked only to dismiss the claim under r. 21.01(3)(a) of the *Rules of Civil Procedure* but went further by ruling that the action was within the jurisdiction of the Ontario court. We do not agree.

[19] Jurisdiction is an either/or concept: the decision not to dismiss the claim on the basis that it was beyond the jurisdiction of the Ontario court necessarily means that it is within the jurisdiction of the Ontario court. The order allows the action to proceed in the Superior Court of Justice in Ontario, and consequently the appellant is precluded from continuing to dispute the Ontario court's jurisdiction over the subject matter of the action: see *Skof v. Bordeleau*, 2020 ONCA 729, 456 D.L.R.

(4th) 236, at para. 8, leave to appeal refused, [2021] S.C.C.A. No. 17. It is well settled that this is a final order: see e.g., *Hopkins v. Kay*, 2014 ONCA 514, at para. 12.

[20] It cannot be said that the motion judge's order was made unfairly because it granted relief that the parties did not request. If the appellant did not contemplate this result, it should have. The appellant offers no basis to conclude that the motion judge's decision is erroneous as a matter of law and we see none. Accordingly, this ground of appeal must be rejected.

Conclusion

[21] The appeal is allowed in part.

[22] The order requiring filing of the appellant's Statement of Defence within 40 days, without raising a limitations period defence, is struck.

[23] Unfortunately, prior to the release of this decision the court was informed that Ms. Toussaint has passed away. The court sought submissions from the parties as to the appropriate course of action. The parties agreed that the decision should be released but disagreed on the status of the action and the steps that may need to be taken for the action to continue.

[24] Counsel for the respondent informed the court that the respondent's mother intends to bring a motion for an order appointing her as representative of her daughter's estate so that she can continue the action in the public interest. An

application for funding from the Court Challenges Program is pending.

[25] In these circumstances, we make no further orders. Should the action continue, the timing of any further steps in the litigation is left to the court below.

[26] The appellant is not seeking costs on the appeal or on the stay below, and none are ordered.

Grant Huscroft J.A.

S. Coroza J.A.

C. Fairlie J.A.