Federal Court Cour fédérale

Date: 20220518

Docket: T-277-22

Citation: 2022 FC 732

Toronto, Ontario, May 18, 2022

PRESENT: Case Management Judge Trent Horne

BETWEEN:

JOHN TURMEL

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This is the plaintiff's second proceeding that challenges the constitutionality of the federal government's Covid-19 mitigation restrictions. The statement of claim in the first proceeding was struck, without leave to amend. An appeal of that decision was unsuccessful; a further appeal is pending.

[2] The defendant has brought a motion to strike the statement of claim in this proceeding on the basis that it is an abuse of process, and that it discloses no reasonable cause of action. For the reasons that follow, the motion is granted.

II. Background

[3] On January 19, 2021, the plaintiff filed a statement of claim that was assigned Court file no. T-130-21 (the "First Claim"). In general, the First Claim asserted that all of Canada's Covid-19 mitigation restrictions are arbitrary and unreasonable, and infringe rights that are guaranteed by sections 2, 6, 7, 8, 9 and 12 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("*Charter*").

[4] In addition to filing his own statement of claim, the plaintiff published a "kit claim" on the internet so that others could copy it and file their own. Approximately 75 other actions were commenced, each of them being almost identical to the one filed in T-130-21.

[5] The defendant brought a motion to strike the First Claim, and alternatively for security for costs. By order dated April 8, 2021, the "kit claim" actions were stayed pending the final determination of the proceedings in T-130-21, including any appeals.

[6] Prothonotary Aylen (as she then was) struck the First Claim, without leave to amend. In an unreported decision dated July 12, 2021, prothonotary Aylen reviewed the First Claim in detail, and concluded that it failed to plead the material facts to satisfy the essential elements of

any of the specific *Charter* infringements alleged, and did not allege or particularize how the plaintiff's *Charter* rights had been infringed (para 25). The statement of claim was struck for failure to disclose a cause of action, particularly because it contained bare assertions of *Charter* breaches without sufficient material facts to satisfy the criteria applicable to each of the *Charter* rights alleged to have been violated (para 28). The First Claim was also struck as an abuse of process because it pleaded bare assertions without the necessary material facts on which to base those assertions, and the defendant could not know how to answer it. Prothonotary Aylen also determined that the statement of claim was replete with lengthy diatribes, and made scandalous and extreme allegations that were unsubstantiated, such as alleged cover-ups and conspiracies. Given the nature of the deficiencies, and because the plaintiff did not suggest that his pleading could be cured by way of amendment, the statement of claim was struck without leave to amend (paras 29-30).

[7] Prothonotary Aylen's decision was upheld on appeal (*Turmel v Canada*, 2021 FC 1095). The plaintiff commenced a further appeal (Federal Court of Appeal file no. A-286-21) on October 27, 2021. That appeal remains pending. A requisition for hearing has been filed; a hearing date has not been fixed.

III. The Second Claim

[8] While the plaintiff's appeal to the Federal Court of Appeal was pending, he commenced this proceeding (the "Second Claim"). The material difference between the First Claim and the Second Claim is that the latter specifically challenges a January 15, 2022 decision of the Minister of Transport to make an interim order in the form of an *Interim Order Respecting Certain*

Requirements for Civil Aviation Due to Covid-19, No. 52 (“Interim Order No. 52”). The Second Claim seeks a declaration that certain sections of this decision violate the plaintiff's section 6 *Charter* rights, and that these violations are not demonstrably justified under section 1 of the *Charter*.

[9] Otherwise, the Second Claim is substantially the same as the First Claim. The Second Claim is lengthier than the First Claim (168 and 130 paragraphs, respectively). Other than narrowing the declaratory relief requested to a specific decision, paragraphs 1-124 of the Second Claim are essentially the same as the First Claim. The Second Claim includes the same lengthy diatribes, and unsubstantiated allegations of cover-ups and conspiracies, as the First Claim.

[10] Paragraphs 125-168 of the Second Claim are new, but are the in the same rambling style as the rest of the pleading, and the First Claim that preceded it. In addition to further assertions that Covid-19 vaccines cause blood clots, cause heart problems and are otherwise ineffective, the Second Claim includes further poetry at paragraph 157:

> Would you have taken jab if Crown Ben Wong had Trudeau told,
> Covid Mortality was over hyped by hundredfold?
> Would you have taken jab if Justice Crampton had us told,
> That Apple Orange were compared to hype by hundredfold
>
> Would you have taken clot shot if Judge Aylen said: Behold
> The CFR to IFR's too small by hundredfold
> Would you have taken jab if Justice Zinn had us all told,
> Comparing Apple Orange hyped the threat by hundredfold.
>
> Would you have taken jab if Randy Hillier had you told...
> Would you have taken clot shot if Max Bernier had you told...
> Would you have taken jab if MPPs had us all told...
> Would you have taken jab if those who knew had us told...

IV. The Second Claim is an Abuse of Process

[11] The primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. As the Supreme Court of Canada held in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, it is improper to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum (para 46).

[12] Since the First Claim challenged all federal Covid-19 mitigation restrictions, it would necessarily include the specific travel restrictions challenged in the Second Claim. Both the First Claim and Second Claim assert alleged violations of section 6 *Charter* rights. I therefore agree with the respondent's submissions that it is improper and abusive for the plaintiff to initiate a new claim while he concurrently pursues an appeal of the decision to strike the First Claim without leave to amend. The Second Claim should be struck on that basis alone.

V. Law on Motions to Strike

[13] The legal principles applying to motions to strike are well known. To strike a pleading, it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. It needs to be plain and obvious that the action is certain to fail because it contains a radical defect (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 17).

[14] It is incumbent upon a plaintiff to plead the facts which form the basis of his or her claim as well as the relief sought. These facts form the basis upon which the success of a claim is

evaluated. A plaintiff must plead with sufficient details the constituent elements of each cause of action or legal ground raised (*Pelletier v Canada*, 2016 FC 1356 at paras 8 and 10).

[15] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the Court has jurisdiction to grant (*Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5).

[16] To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the defendant's liability (*Al Omani v Canada*, 2017 FC 786 at para 14 ("*Al Omani*")).

[17] On a motion to strike, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19).

VI. Rules of Pleading

[18] Rule 174 requires that pleadings contain a concise statement of material facts. There are four basic requirements of a pleading to comply with this rule:

(a) Every pleading must state facts and not merely conclusions of law or arguments;

(b) It must include material facts satisfying each element of the cause of action with sufficient particularity;

(c) It must state facts and not the evidence by which they are to be proven; and

(d) It must state facts concisely and in summary form.

(*Carten v Canada*, 2009 FC 1233 at para 36 ("*Carten*"))

[19] Pleadings play an important role in providing notice and defining the issues to be tried; 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 v Canada (National Health and Welfare)*, 2015 FCA 227 at para 16 ("*Mancuso*")).

[20] *Charter* actions do not trigger special rules on motions to strike; the requirement of pleading material facts still applies. The Supreme Court of Canada has defined in the case law the substantive content of each *Charter* right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of *Charter* issues" (*Mancuso* at para 21).

[21] Section 6 of the *Charter* contains two sets of mobility rights. Pursuant to subsection 6(1), every Canadian citizen has the right to enter, remain in and leave Canada and pursuant to subsection 6(2) to 6(4), every Canadian citizen and permanent resident has the right to move in, live in and work in any province subject to certain limitations (*Divito v Canada (Public Safety and Emergency Preparedness*), 2013 SCC 47 at para. 17 ("*Divito*")).

VII. Regulatory Background

[22] Interim Order No. 52 was made on January 15, 2022 pursuant to subsection 6.41(1) of the *Aeronautics Act*, RSC 1985, c. A-2. Interim Order No. 52 was repealed and replaced with a new ministerial order on January 28, 2022 (*Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 53* ("Interim Order No. 53")). The most recent ministerial order, *Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 62* ("Interim Order No. 62"), contains provisions that are similar to those in Interim Orders No. 52 and 53.

[23] Paragraph 17.3(1) of Interim Order No. 62 sets out the same vaccination requirements for flights departing from an aerodrome in Canada as those in Interim Orders No. 52 and 53: a person is prohibited from boarding an aircraft for a flight or entering a restricted area unless they are a fully vaccinated person.

[24] While there is a general requirement to be vaccinated to board an aircraft, paragraph 17.3(2) of Interim Order No. 62 sets out several exceptions from this requirement, including where the individual:

(a) has a medical inability to be vaccinated;

(b) has a sincere religious belief opposing vaccination;

(c) is travelling for essential medical services and treatment;

(d) is accompanying a minor attending an appointment for essential medical services or treatment, a person with a disability, or a person requiring assistance to communicate; or

(e) is travelling for a purpose other than an optional or discretionary purpose.

[25] In such cases, a passenger who is recognized as being entitled to an exception will have to present a valid Covid-19 test in order to be permitted to board an aircraft (paragraph 17.3(2)).

VIII. The Second Claim

[26] While the Second Claim has been narrowed to a challenge of a single decision or series of interim orders, it suffers from the same fatal defects as the First Claim. The Second Claim, like the one that preceded it, contains bare assertions of *Charter* breaches without sufficient material facts to satisfy the criteria applicable to the *Charter* rights alleged to have been violated. The plaintiff has not even pleaded that he intends to board a flight departing in Canada.

[27] The plaintiff has stated that he does not qualify for any of the exemptions in paragraph 17(3) of Interim Order No. 52 (Second Claim, paragraph 144), however this conclusion is unsupported by any material facts capable of establishing that he would not be entitled to an exemption, that having to seek an exemption on specified grounds infringes his *Charter* rights, or that the existing exemptions are unconstitutionally vague or narrow.

[28] A similar matter was before the Court in *Zbarsky v Canada*, 2022 FC 195 ("*Zbarsky*"). In that proceeding, the plaintiff commenced an action in which he alleged that the Government of Canada's Covid-19 vaccination requirements relating to international air travel infringed his *Charter* rights. Among other things, he sought an order that would exempt him from those requirements so that he could continue to engage in development work in Guatemala and Mexico.

[29] In *Zbarsky*, Justice Norris granted a motion to strike the statement of claim, without leave to amend. In reviewing the fatal deficiencies in the statement of claim, Justice Norris stated:

> [34] The current mandate does impose a general requirement to be vaccinated to board an aircraft but it also includes several exemptions from this requirement, including travel for essential medical services and treatment, emergency and urgent travel, medical inability to be vaccinated, and sincere religious belief opposing vaccination: see paragraph 17.3(2) of *Interim Order No.54.* In such cases, a passenger who is recognized as being entitled to an exemption will have to present a valid COVID-19 molecular test in order to be permitted to board an aircraft.
>
> [35] Given this, it is not the case that the more stringent vaccine mandate currently in place prevents Mr. Zbarsky from boarding an international flight leaving Canada simply because he refuses to get vaccinated. At most it imposes a conditional obligation on him*: if* he wishes to board an international flight departing Canada *and* he does not qualify for an exemption, *only then* must he be fully vaccinated. And in any event, no such restrictions are placed on him returning to Canada: see paragraphs 11 to 17 of *Interim Order No. 54*. Mr. Zbarsky has failed to plead any material facts capable of establishing that his *Charter* rights are even engaged in these circumstances.
>
> [36] Furthermore, even if his *Charter* rights were engaged, Mr. Zbarsky has failed to plead any material facts capable of establishing that the vaccine mandate infringes those rights. Again assuming for the sake of argument that the statement of claim could be amended to refer to the vaccine mandate that is currently in force, Mr. Zbarsky has not pled any material facts capable of establishing that he would not be entitled to an exemption, that

> having to seek an exemption on specified grounds infringes his *Charter* rights, or that the existing exemptions are unconstitutionally vague or narrow. The alleged *Charter* breaches Mr. Zbarsky asserts are entirely hypothetical. In any event, Mr. Zbarsky has failed to plead the constituent elements of the legal tests for determining whether his rights under any of sections 2, 6(1) or 7 of the *Charter* have been infringed and, if so, the legal remedy to which he is entitled. In short, he has failed to plead, even in summary form, the constituent elements of the legal grounds he raises. All these deficiencies leave the defendant unable to know how to answer the claim.
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> [Emphasis in original.]

[30] The same analysis applies here. At best, the Second Claim advances hypothetical *Charter* breaches. It does not contain material facts to satisfy the essential elements of a claim under section 6 of the *Charter*. The Second Claim does not allege that the plaintiff has been personally prevented from entering, remaining in, or leaving Canada. The plaintiff does not allege that he has had any intention to travel internationally or domestically during this time, or that he plans to do so anytime in the near future.

[31] Further, the Second Claim does not allege that the plaintiff has been personally prevented from moving to, living in, or working in another Canadian province. Even if section 6 of the *Charter* encompassed a right to travel domestically, the Second Claim does not explain why the plaintiff must travel by air, and cannot travel by other methods to which the impugned order does not apply.

[32] I therefore conclude that, in addition to being an abuse of process, the Second Claim fails to disclose a reasonable cause of action. It must be struck.

[33] Striking a pleading without leave to amend is a power that must be exercised with caution. If a statement of claim shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment (*Al Omani* at paras 32-35).

[34] The plaintiff filed lengthy submissions in response to the motion, however these submissions did little to engage the substantive legal issues advanced by the defendant. In his written representations, the plaintiff highlights certain data and statistics in the statement of claim, and asserts that they are provable facts, not allegations. Whether these facts are provable does not overcome a fundamental flaw in the statement of claim – that the plaintiff has not alleged that he has been personally subject to the measures in the impugned interim order, nor has he established that his personal *Charter* rights have been breached.

[35] The plaintiff's written representations indicate a wish to visit a family member in Québec. The plaintiff acknowledges that air travel is not necessary between Ontario and Québec, and that other means of transportation (e.g. automobile) are presently available to him. A preference to travel domestically by air for pleasure (as opposed to automobile) is not a constitutionally protected right (*Divito*). Even if such leisure travel was a constitutional right, an expression of general interest to travel from one province to another is insufficient to properly plead an infringement of rights guaranteed by section 6 of the *Charter*.

[36] The plaintiff also points to applications for judicial review commenced by other parties that also challenge Interim Order No. 52 (T-168-22 and T-247-22). The fact that those proceedings are moving forward and have not been the subject of motions to strike is of no

assistance to the plaintiff. The existence of other proceedings seeking the same or similar relief does not give the plaintiff a ticket of entry to file and sustain a claim that does not engage the test for infringement of *Charter* rights, and is otherwise non-compliant with the rules of pleading. A similar issue was before prothonotary Aylen when she struck the First Claim. There, the plaintiff argued that other plaintiffs who used his "kit claim" to advance their own proceeding may have material facts to sustain an action. This argument was summarily dismissed; the plaintiff was unable to rely on facts applicable to other plaintiffs to support his own *Charter* breach allegations (para 27). Here, the plaintiff cannot rely on how other parties have framed their pleadings in other proceedings to overcome the numerous deficiencies in his own action.

[37] Based on the materials filed on the motion, I am satisfied that the plaintiff is unwilling or unable to cure the defects in the statement of claim by way of amendment. I therefore decline to exercise my discretion to grant the plaintiff leave to amend his statement of claim.

IX. Security for Costs

[38] Having concluded that the statement of claim should be struck without leave to amend, it is not necessary to determine the defendant's alternative request for security for costs. Had I been required to do so, I would have been inclined to grant an order for security for costs for at least the amount sought by the defendant in light of the plaintiff's numerous unpaid cost awards, and the absence of any demonstration of impecuniosity by the plaintiff.

X. Costs

[39] The Court has full discretion over the amount and allocation of costs (*Federal Courts Rules*, subrule 400(1)).

[40] The defendant was entirely successful, and is entitled to costs. The amount requested is $2,000.00. While not presented in this way, the amount is about what would be awarded at the high end of Column V of the Tariff for a contested motion. I find this amount to be reasonable in the circumstances. Had more been requested, it would have been awarded.

JUDGMENT in T-277-22

THIS COURT'S JUDGMENT is that:

1. The statement of claim is struck in its entirety, without leave to amend.

2. The defendant is awarded costs of the motion and the action, fixed at $2,000.00, payable forthwith.

"Trent Horne"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-277-22
STYLE OF CAUSE:	JOHN TURMEL v HER MAJESTY THE QUEEN

MATTER CONSIDERED AT TORONTO, ONTARIO WITHOUT PERSONAL APPEARANCE OF THE PARTIES

JUDGMENT AND REASONS:	CASE MANAGEMENT JUDGE TRENT HORNE
DATED:	MAY 18, 2022

APPEARANCES:

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Benjamin Wong	FOR THE DEFENDANT

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