

SUPREME COURT OF YUKON

Citation: *McDiarmid v. Canada (Public
Prosecution Service of Canada –
Yukon)*, 2014 YKSC 61

Date: 20141118
S.C. No. 13-A0093
Registry: Whitehorse

Between:

MARK LEE MCDIARMID

Plaintiff

And

PUBLIC PROSECUTION SERVICE OF CANADA - YUKON

Defendant

Before: Madam Justice C.L. Kenny

Appearances:

Mark McDiarmid
Paul Battin

Appearing on his own behalf
Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Plaintiff, Mark Lee McDiarmid (“McDiarmid”) has brought a civil action against the Defendant, Public Prosecution Service of Canada-Yukon (“PPSC”) with respect to alleged delay in disclosure in ongoing criminal proceedings in which McDiarmid is charged with certain offences.

[2] The PPSC brings applications to have the Statement of Claim struck in its entirety without leave to amend and seeks costs of this application and the proceedings as a whole.

Pleadings and Proceedings

[3] The Statement of Claim was filed October 17, 2013. A Statement of Defence was filed March 21, 2014.

[4] A case management conference was held on September 3, 2014. As a result of that conference, Justice Veale ordered that PPSC deliver its application to strike to McDiarmid by September 12, 2014. The order then set out other timelines and directed a hearing on the application to strike for October 24, 2014.

Amended Statement of Claim (the Claim)

[5] McDiarmid filed an Amended Statement of Claim on September 12, 2014. An unfiled copy was provided to PPSC on September 10, 2014. PPSC points out that Rule 24(1)(a) of the *Rules of Court* require McDiarmid to obtain leave before making any amendments less than 90 days before trial or a hearing. No leave was obtained. PPSC asks the court not to accept the Amended Statement of Claim.

[6] PPSC filed its application to strike the Statement of Claim on September 10, 2014. Their entire application is based on the Statement of Claim as filed. I am of the view that Rule 24(1)(a) which requires leave before making any amendments to the pleadings refers to a substantive hearing on the merits and would therefore not apply to a motion to strike. Since the application of PPSC was based on the Statement of Claim and not on the Amended Statement of Claim, counsel for PPSC was given an opportunity to adjourn their application or reconsider their position in light of the Amended Statement of Claim. They decided that there was no need to delay the matter further as their argument on the merits of the application to strike was the same for the Amended Statement of Claim as it was for the Statement of Claim.

Affidavit Evidence on Application

[7] McDiarmid filed two affidavits in response to the application brought by PPSC. Affidavit evidence is not allowed in an application to strike. The first affidavit was struck in its entirety. In the second affidavit, the exhibits were struck but that part of the affidavit which was in the form of argument was allowed and renamed "Argument".

Rules

[8] Rule 20(26) allows an application to strike. It reads as follows:

20(26) At any stage of a proceeding the Court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court....

Position of McDiarmid

[9] The Claim revolves around an ongoing criminal proceeding in which McDiarmid stands as an accused person. It is alleged that certain disclosure was not given to McDiarmid in a timely fashion in the criminal proceedings by PPSC. As a result, McDiarmid says that his criminal case is being delayed. In particular, he alleges that his trial date was adjourned because of late disclosure by PPSC and as a result, he spent 15 more months in custody than he should have. He equates this with unlawful confinement and says he is entitled to damages for the time he has spent in custody

awaiting disclosure. It should be noted that McDiarmid has never made an application for bail with respect to the criminal charges he is facing.

[10] McDiarmid says that although he knows he may be entitled to *Charter* remedies and /or costs in the criminal proceedings if a breach of his *Charter* rights to timely disclosure is proven, he says this will not compensate him adequately. He is seeking substantial damages in civil proceedings for the extra time he has remained in custody, he alleges, due to delay in disclosure.

Position of PPSC

[11] PPSC says that the Claim does not disclose any recognized claim at law. Lack of diligence in disclosure in criminal proceedings is not, on its own, an actionable tort. Even if there was evidence of improper conduct regarding disclosure in the criminal proceedings (which is denied by PPSC), that conduct is not actionable. (*Miazga v. Kvello Estate*, [2009] S.C.J. No. 51; *McCreight v. Canada (Attorney General)*, [2012] O.J. No. 1996; *Dempsey v. Envision Credit Union*, [2006] B.C.J. No. 1073). As such, PPSC argues that the Claim discloses no reasonable claim and therefore has no chance of success and should be struck pursuant to Rule 20(26)(a).

Disclosure Issues in Criminal Proceedings

[12] PPSC says that any issues with respect to disclosure obligations of the Crown in criminal proceedings are to be resolved by the trial judge and are to be raised before the trial judge at the earliest opportunity (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at paras. 23 and 24; *R. v. O'Connor* [1995] 4 S.C.R. 411, at paras. 178-184; *R. v. McNeil*, [2009] S.C.J. No. 3, at para. 44). The trial judge in the criminal proceedings has the

jurisdiction to deal with these procedural issues and provide an appropriate remedy, if any.

[13] McDiarmid relies on *R. v. Egger*, [1993] 2 S.C.R. 451; *Kreiger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; and *R. v. Fach*, [2004] O.J. No. 4637, for the proposition that a civil action can be brought when there are underlying criminal proceedings. As PPSC points out however, both *Egger* and *Kreiger* confirm that decisions of the Crown prosecutor with respect to disclosure, tactics or conduct are to be dealt with by the trial judge who has inherent jurisdiction to control court processes.

[14] McDiarmid says the only way he can obtain damages for alleged disclosure violations is to bring a civil claim and relies on *Fach* for that proposition. As pointed out by PPSC, the Supreme Court of Canada decision of *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, confirms that the court seized with the criminal matters has the jurisdiction to remedy any breach of rights that may arise from improper or delayed Crown disclosure including costs awards. It is therefore unnecessary and an abuse of the courts' processes and limited judicial resources, PPSC argues, to allow duplicitous processes where there is no prospect of success.

DECISION

[15] The Amended Statement of Claim is struck in its entirety pursuant to Rule 20(26) of the *Rules of Court*. This Court finds, based on the case law cited by both McDiarmid and PPSC, that the Amended Statement of Claim discloses no reasonable claim in law, and that it is unnecessary and an abuse of the process of the court given that the trial judge in the criminal proceedings not only has the jurisdiction but is also the proper

person to deal with any issues arising with respect to Crown disclosure and conduct in those proceedings.

[16] There will be no costs ordered with respect to this application or the action as a whole.

KENNY J.