IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***A. Bruun***,
EDWARD ANDREW DENNIS	)	***J. B. Goldblatt*** *and*
	)	***J. Brown***
	)	*for the Appellant*
(Plaintiff) Appellant	)	*(via videoconference)*
	)	
- and -	)	***S. D. Farlinger*** *and*
	)	***D. P. Grunau***
	)	*for the Respondent*
THE ATTORNEY GENERAL OF CANADA	)	*(via videoconference)*
	)	
	)	***L. E. Thacker***,
(Defendant) Respondent	)	***B. F. Morrison*** *and*
	)	***C. C. Boubalos***
- and -	)	*on a watching brief*
	)	*for G3 Global Grain Group*
	)	*and G3 Canada Limited*
G3 GLOBAL GRAIN GROUP and G3 CANADA LIMITED	)	*(via videoconference)*
	)	
	)	*Appeal heard:*
	)	***October 9, 2020***
(Defendants)	)	
	)	*Judgment delivered:*
	)	***December 2, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2019 MBQB 153

BURNETT JA

[1] The plaintiff appeals the judgment of a motion judge (the motion judge) who struck its amended statement of claim (the claim) against the Attorney General of Canada (the defendant) and others, without leave to amend, pursuant to r 25.11(1)(d) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, on the basis that it does not disclose a reasonable cause of action. The motion to strike had been previously dismissed by a Master (see *Dennis v Canada (AG) et al*, 2018 MBQB 88) and, as noted by the motion judge, the appeal of the Master's decision was a fresh hearing (see r 62.01(13)).

[2] The factual background to the claim is set out in both the decision of the Master and the Court below.

[3] The claim is a potential class action. The plaintiff and other members of the proposed class are farmers who sold grain to the Canadian Wheat Board (the CWB). The Master summarised the claim as follows (at paras 5-7):

> [The defendant's] activities relating to the contingency fund are at the heart of the allegations made in the . . . claim.
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> The plaintiff claims that he and the class plaintiffs suffered damages in relation to the crop years of 2010-11 and 2011-12. During that timeframe, and as part of the lead up to the privatization of the CWB, the claim alleges that [the defendant] put forward regulations that increased the upper limit of funds that could be credited to the contingency fund from $60 million to $200 million, following which it diverted to the contingency fund the sum of $145,248,000.00, that would have otherwise been paid to the class plaintiffs on account of grain sold and delivered to the CWB for the two crop years in question. The plaintiff alleges that [the defendant] took these steps in order to facilitate the sale of the

> CWB to private interests in 2011 and 2012. In other words, the allegation is that [the defendant] did not have the lawful authority to make the changes necessary to increase the limit of the contingency fund and to then divert funds from the pool account to the contingency fund.
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> The sole cause of action pursued by the plaintiff against [the defendant] is misfeasance in public office. The damages claimed by the plaintiff include $145,248,000.00 that would otherwise have been paid to them on account of grain sold, other debits from the pool account for the crop years in question to cover transition costs in the privatization of the CWB of $5,900,000.00, punitive damages of $10,000,000.00 and other relief.

[4] The test for striking a pleading and the standard of review on appeal are described in *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 (at paras 36-37, 39):

> The remedy of striking out a pleading, however, is to be used sparingly. It is reserved only for the "clearest of cases" (*Ellett and Kyte v. Qualico Securities (Winnipeg) Ltd. et al.* (1990), 64 Man.R. (2d) 318 at para. 6 (C.A.)). A claim or defence, or part thereof, should not be struck out unless the moving party demonstrates that it is "plain and obvious" that the cause of action or defence, as pleaded, is certain to fail (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, [2003] 3 S.C.R. 263).
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> On a motion to strike, the claim or defence should be read generously notwithstanding any imprecision in the language used in it. Factors such as the novelty of a claim or defence, the length or complexity of the issues raised by it, or the likelihood that the opposing party has a strong position that will likely defeat the claim or defence are not reasons alone to strike out the pleading (*Hunt* [*Hunt v Carey Canada Inc*, [1990] 2 SCR 959] at p. 980). If a claim or defence has a reasonable prospect of success, it should not be struck out (*Imperial Tobacco Canada Ltd.* [*R v Imperial Tobacco Ltd*, 2011 SCC 42] at para. 17; *Driskell v. Dangerfield et al.*, 2008 MBCA 60 at paras. 11-13, 228 Man.R. (2d) 116).

Standard of Review

> Whether a pleading discloses a reasonable cause of action or defence is a matter of judicial discretion that, absent a reversible error on fact or law, is entitled to significant deference on appeal unless the decision is so clearly wrong as to amount to an injustice (*Chrysler Canada Inc. v. Eastwood Chrysler Dodge Ltd. et al.*, 2010 MBCA 75 at para. 24, 262 Man.R. (2d) 1).

[5] On a motion to dismiss for failure to disclose a reasonable cause of action, it is well-established that the facts in the pleadings are assumed to be true "unless they are manifestly incapable of being proven" (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22).

[6] Here, the motion judge dismissed the claim on the basis that two elements of the tort in question, malfeasance in public office, had not been established. In particular, he found that there was no unlawful conduct by a public officer, stating that the defendant "did not act improperly, illegally or outside the scope of the *CWB Act*'s legislated authority" (at para 48) (see the *Canadian Wheat Board Act*, RSC 1985, c C-24 (the *CWB*) (since repealed)), that the regulations increasing the size of the contingency fund were statutorily authorised and in accordance with the purposes of the statutory scheme, and that, as a matter of law, the claim was bound to fail. He also found that the plaintiff had suffered no damages.

[7] At the appeal hearing, counsel for the defendant properly conceded that:

1. the plaintiff had pled that the regulations increasing the upper limit of the contingency fund were passed for an improper or unlawful purpose and that the plaintiff had suffered damages because the CWB credited money to the contingency fund that

would otherwise have been paid to the proposed class (the allegations); and

2. for the purposes of the motion, the allegations must be assumed to be true.

[8] There is nothing on the record before this Court to suggest that the allegations are bald conclusions, patently ridiculous or manifestly incapable of proof (see *Edell v Canada*, 2010 FCA 26 at para 5). As the Court in *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2013 ONCA 683, put it (at para 46):

> Once a plaintiff asserts a claim for bad faith in the context of a claim of misfeasance in public office that is at least plausible on the facts alleged, the motion judge is required to accept those facts as true for the purposes of a rule 21 motion, provided that they are not patently ridiculous or incapable of proof. . . . The legal issue is whether the Defendant's actions give rise to a claim in law, based on the facts as pleaded.

[9] Given the defendant's concessions, I am of the view that the test for striking out a statement of claim has not been met and that the motion judge's decision is not entitled to deference as it is so clearly wrong as to amount to an injustice. Simply put, this is not the "clearest of cases" where it is "plain and obvious" that the cause of action is certain to fail (*Grant* at para 36). The claim discloses a cause of action, and it cannot be said in the context of the law and the litigation process that the claim has no reasonable chance of succeeding (see *Imperial Tobacco* at para 25).

[10] I am also of the view that the motion judge made the same error in his approach to the motion as the motion judge in *Castrillo v Workplace Safety*

and Insurance Board, 2017 ONCA 121. In *Castrillo*, the Ontario Court of Appeal concluded that (at paras 13, 65):

> The motion judge's over-arching error is that he dealt with this matter more as a summary judgment motion under r. 20 than as a motion to strike the amended statement of claim as disclosing no cause of action under r. 21.01(1)(b) [Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194]. He did not interpret the pleading generously, as the cases require, but instead deconstructed it for the purpose of determining whether the privative clause in the WSIA applied to oust the court's jurisdiction. This was an error in principle.
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> . . . His determination amounts to a substantive legal decision that the appellant has no chance of success, based "on the facts of this case as pleaded", even if, as I have found, the claim of misfeasance in public office has been properly pleaded. With respect, this is not an available determination in a pleadings motion. It is an argument that could be made in the context of a motion for summary judgment, or perhaps in a motion under r. 21.01(1)(a), but that is not what happened here.

[11] I have serious reservations regarding the motion judge's interpretation of section 6(1)(c.3) of the *CWB Act*, but whether his interpretation is correct remains to be decided. As was the case in *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279, it is my view that issues as to the proper interpretation of the statutory provisions would be better determined at trial where a proper factual base can be laid. Accordingly, to the extent that the motion judge has interpreted the statutory framework, the scope of the Minister's power and the plaintiff's entitlement to damages, his interpretation, analysis and conclusions should not be considered binding on any future decision regarding the claim (see also *Pfizer Canada Inc v Apotex Inc*, 1999 CarswellNat 1115 at para 35 (FCA (TD)).

[12] For the foregoing reasons, I would allow the appeal with costs to the plaintiff in this Court and in the Court below.

"Burnett JA"

I agree: "Cameron JA"

I agree: "leMaistre JA"