COURT OF APPEAL FOR ONTARIO

CITATION: Guergis v. Novak, 2013 ONCA 449
DATE: 20130628
DOCKET: C56052

Weiler, Sharpe and Rouleau JJ.A.

BETWEEN

Helena Guergis

Applicant (Appellant)

and

V. Raymond Novak, Arthur Hamilton, Cassels Brock & Blackwell LLP, The Right Honourable Stephen Harper, Guy Giorno, Shelly Glover, The Honourable Lisa Raitt, Axelle Pellerin, Conservative Party of Canada and Derrick Snowdy

Defendants (Respondents)

Stephen Victor, Q.C. and David Cutler, for the appellant

Robert W. Staley, Derek J. Bell and Jonathan G. Bell, for the respondents, The Right Honourable Stephen Harper, V. Raymond Novak, Shelley Glover and The Honourable Lisa Raitt

Wendy J. Wagner, for the respondent Axelle Pellerin

Peter N. Mantas, for the respondent, Guy Giorno

Paul D'Angelo, for the respondent, Conservative Party of Canada

Heard: April 17, 2013

On appeal from the order of Justice Charles T. Hackland of the Superior Court of Justice, dated August 24, 2012, with reasons reported at 2012 ONSC 4579.

By the Court:

A. OVERVIEW

[1] The appellant is a former Minister of State for the Status of Women, member of the Conservative Party of Canada ("CPC") caucus, and Member of Parliament for the Electoral District of Simcoe-Grey.

[2] She alleges that on April 9, 2010, following a conversation with the Prime Minister, she was pressured to resign from Cabinet and did so under duress. On the same day, the Prime Minister issued a public statement; Novak wrote a letter to the RCMP; and Giorno wrote a letter to the Conflict of Interest and Ethics Commissioner. Ultimately, Guergis was removed from caucus and denied a further candidacy in her riding.

[3] On March 31, 2011, the appellant complained to the Canadian Human Rights Commission against the Prime Minister and the CPC. The Commission decided not to deal with the appellant's complaint on the basis that her removal from Cabinet was protected by Crown prerogative and her removal from caucus by parliamentary privilege making her complaints non-justiciable. In addition, the Commission held her complaint against the CPC did not satisfy the statutory requirements of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[4] Approximately one month later, the appellant brought this action seeking general damages of $800,000 and aggravated and punitive damages of $250,000 each from the defendants, who include:

- The Conservative Party of Canada;
- The Right Honourable, Stephen Harper, the Prime Minister of Canada;
- Guy Giorno, the Prime Minister's Chief of Staff, at the relevant time;
- Raymond Novak, the Prime Minister's Principal Secretary, at the relevant time;
- The Honourable Lisa Raitt, a federal Cabinet minister;
- Axelle Pellerin, an official on Minister Raitt's staff, at the relevant time;
- Shelly Glover, a Conservative Member of Parliament;
- Arthur Hamilton, a lawyer with the firm Cassels Brock & Blackwell LLP, who was the lawyer for the Prime Minister and the CPC, at the relevant time;
- Cassels Brock, the law firm of the Prime Minister and the CPC, at the relevant time; and
- Derrick Snowdy, an individual.

[5] Snowdy did not participate in the motion nor is he a respondent in this appeal. Hamilton and Cassels Brock are not respondents in this appeal.

[6] The tort claims the appellant advanced against the respondents to this appeal include defamation against all of the respondents other than the CPC, as well as the torts of conspiracy, negligence, intentional infliction of mental suffering, misfeasance in public office, and alleged breach of a duty of care.

[7] The respondents' brought a motion to strike pursuant to Rule 21.01(1)(b) on the basis that the claim disclosed no reasonable cause of action. They submitted that (i) the tort claims arising from the appellant's no longer being in Cabinet and caucus were not justiciable because such claims related to the exercise of Crown prerogative and parliamentary privilege; (ii) the alleged defamatory statements were either not defamatory or protected by absolute privilege or both; and (iii) the CPC and Prime Minister had authority to refuse the plaintiff's nomination. The respondents' motion was also based on the plaintiff's action being an abuse of process pursuant to rules 21.01(3)(d) and 25.11(c). They submitted the plaintiff was estopped from pursuing her claim because of the holding in the earlier administrative proceeding before the CHRC.

[8] The motion judge granted the respondents' motion. While he held that the action was an abuse of process, he independently assessed the statement of claim and concluded that it was plain and obvious that the action could not succeed. He struck the claims without leave to amend, with the exception of the

claims made against Hamilton and Cassels Brock for which he granted leave to amend on terms.

[9] The appellant appeals the motion judge's conclusion that she is estopped from bringing her action and that it is an abuse of process. In relation to whether her statement of claim discloses a cause of action, the appellant submits that Crown prerogative and the Parliamentary privilege do not prevent an action in tort for the *manner* in which they were exercised and that it is not plain and obvious that her tort actions could not succeed. She seeks to have the motion judge's order striking the claims against the respondents set aside. Alternatively, the appellant seeks an order granting her leave to amend the statement of claim against them.

[10] For the reasons that follow, we would dismiss this appeal with the exception of the pleading in relation to the respondent Glover.

[11] In relation to the other respondents, quite apart from the question of whether the appellant is estopped from pursuing her action against them on the basis of her prior CHRC claim, we agree with the motion judge that it is plain and obvious that the tort claims, including alleged defamatory statements, cannot succeed.

[12] We first will address the motion judge's holding that the appellant's claim is an abuse of process and second, will turn to whether the claim discloses a reasonable cause of action.

B. THE MOTION JUDGE'S HOLDING THAT THE ACTION IS AN ABUSE OF PROCESS

[13] As we conclude that, with the exception of the claim against Glover, the motion judge correctly concluded that the statement of claim should be struck under Rule 21.01(1)(b), we find it unnecessary to decide this issue. However, for the sake of completeness, we offer the following comments.

[14] The CHRC's decision was that Guergis's core complaints were not justiciable. The motion judge held that it was an abuse of process for her to seek to have such determinations re-litigated.

[15] It is a fundamental principle that where any judicial tribunal having proper jurisdiction gives judgment, then that judgment will be *res judicata* not only as to the point actually decided but also with respect to any other issues necessary to the decision. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79,* 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37, the Supreme Court held that Canadian courts ought to apply the doctrine of abuse of process to preclude litigation in circumstances where the strict requirements of issue estoppel are not met but where allowing the litigation to proceed would violate

the principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

[16] Before us, the respondents submitted that the fact Guergis elected to add additional defendants and derivative tort claims did not make less abusive her effort to re-litigate issues determined in the CHRC proceeding.

[17] Since the decision of the motion judge, the legal landscape has changed with the Supreme Court of Canada's decision in *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19. In that case a majority of the Court held that Penner, who had complained about the conduct of certain police officers, could not reasonably have contemplated that their acquittal at a disciplinary hearing would be determinative of the outcome of his civil action against them. The court held that a party's decision to commence an administrative proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings. The parties' reasonable expectations are shaped by the scope and effect of the administrative proceedings. The text and purpose of the legislative scheme must be considered.

[18] Where there is a significant difference between the purposes, processes, or stakes involved in the administrative proceeding and the action, a court must decide whether it is fair to use the results of the administrative proceeding to preclude a civil action. In *Penner*, the majority of the court determined that it

would be unfair to apply the discretionary remedy of estoppel and held it should not be granted.

[19] The motion judge's decision of whether or not estoppel should apply would have to be reconsidered in the way the law has now evolved under *Penner*. In relation to the respondents other than Glover, It is not necessary for us to do so, because, as we have indicated, we would dismiss the appeal against them.

[20] Glover's statement would not have been estopped under the law as it existed prior to *Penner*. The statement was not within the ambit of Guergis's complaint to the CHRC and the issue raised by the complaint was not necessary to the CHRC's decision. The complaint has a factual foundation that is independent of the facts forming the basis of the CHRC complaint. The motion judge erred in lumping Glover in with the other respondents on the issue of whether it would be an abuse of process for her claim to proceed.

C. WHETHER THE STATEMENT OF CLAIM DISCLOSES A CAUSE OF ACTION

[21] For the purposes of both the motion before the motion judge and this appeal, the facts pleaded in Ms. Guergis's statement of claim must be taken as true and assumed to be proven. We will briefly summarize one chain of allegations of fact in the pleading. The alternative pleadings will be discussed at a later point in these reasons.

(a) The Statement of Claim

[22] The facts pleaded in the statement of claim may be summarized as follows.

[23] On or after September 2009, certain of the defendants began excluding the appellant from meetings and activities taking place within caucus and Cabinet and acting without regard to the appellant. "This conduct was the result of negative media coverage respecting the Plaintiff's spouse and constituted a deliberate and calculated attempt to marginalize the Plaintiff…" (para.30). The respondents entered into a conspiracy to engage in unlawful acts to remove and/or justify the appellant's removal from her positions.

[24] In or about December 2009 or early 2010, Minister Raitt made a statement to Pellerin, a person on her staff that she had seen the appellant using cocaine in the bathroom of an Ottawa restaurant. In or about December 2009 or early 2010, Pellerin advised Giorno, the Prime Minister's chief of staff, what she had been told by Raitt regarding the appellant's conduct.

[25] On or about April 8, 2010, Snowdy, an individual, told Hamilton, a lawyer for the CPC at Cassels Brock, of serious criminal allegations about the appellant's conduct. Hamilton told Novak, the Prime Minister's principal

secretary, Giorno, the Prime Minister, and/or others of Snowdy's allegations about the appellant's conduct.

[26] On April 9, 2010, the Prime Minister, Novak, and Giorno sent a letter to the RCMP Commissioner and a letter to the Conflict of Interest and Ethics Commissioner that reported on allegations received by the Prime Minister's Office without vouching for their truth. They discussed the contents of the RCMP letter with each other. The same day, the Prime Minister had a discussion with the appellant in which he told her that he had received allegations about her conduct and had communicated those allegations to the RCMP. He accepted the veracity of those allegations without conducting an investigation or waiting for the result of a third-party investigation. The Prime Minister told the appellant that she would not be permitted to remain in caucus pending an investigation of the allegations by the RCMP. She resigned from Cabinet as a result of the Prime Minister's advice.

[27] The Prime Minister also made a public statement on April 9, 2010 that his office had become aware of the allegations against the appellant and had referred the allegations to the RCMP and the Conflict of Interest and Ethics Commissioner.

[28] On or about May 5, 2010, the appellant was removed as a candidate for the CPC. It was effected at the direction of the Prime Minister and in furtherance

of the conspiracy. The appellant was not re-elected as the Member of Parliament for the Electoral District of Simcoe-Grey in the federal election of 2011.

[29] During a May 16, 2010 CTV interview with Craig Oliver, Glover, a Conservative MP, stated, " I can assure you that there is far more to come out," and "This isn't finished" in reference to the appellant and the allegations of her having been engaged in criminal conduct.

[30] Though the RCMP's investigation that resulted from Novak's letter was ultimately terminated in the appellant's favour, she suffered damages. The statements in the letter resulted in injury to the appellant's reputation, political career, health, and well-being.

[31] Against all of the respondents to this appeal, except the CPC, the statement of claim alleges that their statements were false, defamatory, and in pursuance of the conspiracy pleaded. They engaged in "intentional infliction of mental suffering and negligence". The appellant also claims that the Prime Minister, Novak, and Giorno are guilty of misfeasance in public office. As against, the CPC the appellant claims against it for conspiracy, breach of duty of good faith, and negligence.

[32] “Certain of the respondents” are alleged to have aggravated the appellant’s damages by not advising her of the particular allegations against her, not providing her with a forum or process to respond to the allegations in breach of the principles of due process and natural justice, and making further public comment and statements in a tone of language intended to discredit and belittle her. Exemplary damages are also claimed to ensure the defendants are appropriately punished and to deter such conduct in the future.

(b) The Motion Judge’s Decision

[33] The motion judge’s main conclusions on this issue are summarized below.

> i. The removal of the appellant as a Cabinet Minister was an exercise of the Crown prerogative. The Court lacked the jurisdiction to review the tort allegations related to the Prime Minister's actions. (para. 22)
>
> ii. The removal of the appellant from the CPC caucus was protected by parliamentary privilege and the Court lacked the jurisdiction to review the tort allegations related to such removal. (para. 21)
>
> iii. The Prime Minister's refusal to endorse the appellant as a candidate for the CPC was contemplated by statute and could not be tortious in and of itself. (para. 28)
>
> iv. The complained of conversations between the Prime Minister and his senior advisors Giorno and Novak, the RCMP Letter, and Raitt's alleged defamatory statements "fall squarely within [the] absolute privilege accorded to officers of state and their senior advisors" and accordingly cannot give rise to a defamation claim. (para. 32)

v. The alleged defamatory statements by Pellerin to Giorno are also protected by absolute privilege. They relate to state matters and were within the scope of her duties as a federal public servant. (para. 33)

vi. The additional tort claims are "'dressed up' defamation claims, inserted in the pleading for the purpose of avoiding the application of the absolute privilege defence otherwise available" to the defendants. (para. 34)

vii. The RCMP Letter, the Conflicts Letter and the Prime Minister's public statement of April 9, 2012 "are neither defamatory on their face nor are they reasonably capable of bearing the implications of criminal activity suggested". (para. 36)

viii. Given that the RCMP Letter and the Conflicts Letter are protected by absolute privilege and are not defamatory on their face, then it naturally follows that sending the letters cannot constitute a misfeasance in public office. (para. 39)

ix. Glover's statements "cannot reasonably bear the implications pleaded". (para. 37)

x. The Conservative Party of Canada is an unincorporated association and is not an entity capable of being sued in tort. (paras. 44-45)

xi. Significant portions of the pleading are "incomprehensible as pleaded". (para. 48)

xii. The claims against the Prime Minister's counsel, Hamilton, and his law firm, Cassels Brock, were struck because they were contradictory and lacked particularity but with leave to amend on terms. (para. 51)

(c) General Principles

[34] The purpose of rule 21.01(1)(b) is to strike a pleading that does not have a chance of succeeding. The well-known test for determining whether a pleading should be struck is set out in *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959: assuming that the facts alleged in the statement of claim can be proven, is it plain and obvious that no reasonable cause of action is disclosed? In *Hunt*, the court stated, at p. 980:

> Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential of the defendants to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail….should the relevant portions of the plaintiff's statement of claim be struck out.

[35] As the authors of *Ontario Superior Court Practice 2013* point out, rule 21.01(b) may be used to strike a pleading because there is an unanswerable defence to the claim: Todd Archibald, Gordon Killeen and James C. Morton, *Ontario Superior Court Practice 2013* (Toronto.: LexisNexis Canada, 2013). The authors note at p. 908:

> The rule in *Hunt* does not preclude a court from striking out a claim on the basis that it discloses no cause of action because of the existence of an unanswerable defence. The issue is whether, assuming the alleged facts to be true, the action is nevertheless certain to fail. [Citation to *Louie v. Lastman* (2002) 61 O.R. (3d) 459 (Ont. C.A.).]

[36] In making the determination under rule 21.01(b), the principle of equality before the law requires that the court not give extra scrutiny to the statement of claim because of who the parties are: *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.), at para. 21. The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations. With these general principles in mind, we will now deal with the claims advanced.

(d) The Defamation Claims

[37] In *Color Your World Corp. v. C.B.C.* (1998), 156 D.L.R. (4th) 27 (Ont. C.A.), at p. 36, Abella J.A. defined defamation as follows:

> A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one...

[38] When considering a reasonable or ordinary member of the public, the bar should be set in a middle ground: "[i]t should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation" (p. 36). The meaning of a particular communication should be considered from the perspective of a reasonable person who is reasonably

thoughtful and informed. “A degree of common sense must be attributed to viewers”: *Color Your World*, at pp. 36-37.

[39] A defamation claim requires the plaintiff to prove three elements: 1) the defendant made a defamatory statement, in the sense that the impugned words would tend to lower the plaintiff’s reputation in the eyes of a reasonable person; 2) the words in fact referred to the plaintiff; and 3) the words were communicated to at least one person other than the plaintiff: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28.

[40] Whether or not a statement is capable of being defamatory is a question of law whereas the issue of whether the statement actually conveyed the defamatory meaning is a question of fact: *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680 (C.A.), at para. 68. “In ruling on meaning, the court is not determining the actual meaning of the words but delimiting the outside boundaries of the possible range of meanings and setting the ‘ground rules’ for the trial.”: *Gatley on Libel and Slander,* 10th ed. (UK: Sweet & Maxwell, 2008), at para. 3.13.

[41] When a defendant seeks to strike a pleading on the basis that the statement in issue is not capable of a defamatory meaning, the court will only strike the pleading in the clearest of cases; otherwise, the court will leave it to the trier of fact to decide the question at trial: *Halsbury’s Laws of Canada-Cumulative*

Supplement, April 20, 2012 - Defamation - "Elements of the Cause of Action – Preliminary Rulings" (Toronto: LexisNexis: 2012), at HDE-36.

[42] In this case, in addition to the issue of whether the alleged statements are capable of being defamatory, a further issue in relation to some of the respondents is whether privilege attaches to the communications made. Each defamation claim must be analyzed separately.

(i) Raitt and Pellerin

[43] In the statement of claim, at paras. 91 and 98, the appellant alleges that in or about December 2009 or early 2010, Raitt, a Cabinet Minister, advised Pellerin that she saw the appellant using cocaine with two other people in the bathroom of an Ottawa restaurant and that Pellerin advised Giorno of what she had been told by Raitt.

[44] These statements are defamatory on their face. The motion judge held that the statements were protected by the absolute privilege recognized in *Dowson v. The Queen* (1981), 124 D.L.R. (3d) 260 (F.C.A.). As stated in *Dowson,* at p. 269, "there are three conditions for this category of absolute privilege: (a) the statement must have been made by one officer of state to another officer of state; b) it must relate to state matters; c) it must be made by an officer of state in the course of his official duty." A person who makes a statement as the agent of another takes the benefit of the absolute privilege: *Dowson*, at pp. 271-2.

[45] After citing *Dowson,* the motion judge held at para. 33:

> The alleged statements were made by Ms. Pellerin, an employee of the Government of Canada, working at the direction of a Minister of the Crown, to the chief of staff to the prime minister. Therefore, the statements satisfy the *Dowson* requirement of a communication from one officer of state to another. The alleged defamatory statements related to state matters and were made by Ms. Pellerin within the scope of her duties as a federal public servant. It was in the ordinary course of affairs for Ms. Pellerin, as an employee of the Government of Canada, working at the direction of a Minister of the federal Crown, to report to Mr. Giorno criminal conduct allegedly engaged in by another Minister of the Crown.

[46] The appellant submits that the motion judge incorrectly made what amounted to a factual finding that Raitt made her statement to senior officials in the Prime Minister's Office when there was no basis in the statement of claim for doing so. Nor is there an allegation that Raitt's statement to Pellerin was part of her official duties. On a rule 21.01(1)(b) motion to strike a claim, a motion judge is restricted to the facts as pleaded and is prohibited from finding facts not pleaded in the statement of claim. As a result, the appellant argues that, as pleaded, the requirement of a communication from one officer of state to another is not satisfied.

[47] Instead of reading the paragraphs in the statement of claim in isolation, as the appellant would have us do, we must read the statement of claim as a whole. Paragraphs 17, 19, and 20 are of particular note:

> 17. Giorno is an individual who, at all material times, was the Chief of Staff to the Prime Minister of Canada, working closely with and at the direction of Harper.
>
> …
>
> 19. Raitt is an individual who, at all material times, was the Member of Parliament for the Electoral District of Halton and the Minister of Labour, working closely with Pellerin and working under the direction of Harper.
>
> 20. Pellerin is an individual who, at all material times, was an employee of the Government of Canada, working closely with and at the direction of Raitt.

[48] When these paragraphs are read together with the pleading alleging what Raitt told Pellerin and what Pellerin told Giorno, the pleading clearly alleges that Pellerin, at the direction of Raitt, made the statement to Giorno, who as Chief of Staff to the Prime Minister of Canada was working under his direction. The motion judge did not go beyond his function and find facts outside the statement of claim. He did what he was entitled to do; he considered the claim as a whole and assessed the pleading on the basis of all the facts pleaded.

[49] The appellant also submits that Raitt's statement to Pellerin was merely a statement to an employee and not a "high officer of state" as required by *Dowson*. However, *Dowson* did not definitively decide whether the privilege was limited to "high officers of state" because the court had no need to do so. There, as here, the government employee was entitled to the benefit of the Minister's privilege because the communication in issue was made at the direction of a

Minister, a high officer of state. Here, the statements made were made by, and then at the direction of, Raitt in her capacity as a Minister.

[50] The communication allegedly made by Raitt and Pellerin claimed criminal conduct by a Minister of the Crown, namely the consumption of cocaine. Possession of cocaine is a criminal offence and consumption of cocaine has an effect on a person's mental state. The communication was important to the effective functioning of government, a matter of state.

[51] The motion judge properly found that the communication was made by one officer of state to another officer of state and that the conditions for absolute privilege, including that the communication relate to a matter of state, were met.

[52] Further, the appellant alleges in paragraph 98 of her statement of claim that Pellerin "spoke defamatory words about the Plaintiff" not only to Giorno but "and/or others". The right to plead that a defamatory statement was made to certain unnamed persons is restricted to the case where a plaintiff has made out a *prima facie* case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons: *Jaffe v. Americans for International Justice Foundation,* [1987] O.J. No. 2370 (H. Ct. J.), at para.10. These two requirements have not been met. No prima facie case exists that the defamatory statements were made against named persons as that pleading has been struck. Nor are the facts to support publication to other

persons pleaded. All that remains is a bald allegation of publication to "others". Accordingly, the pleading against "others" is also properly struck.

(ii) The Prime Minister

[53] The statement of claim alleges that Hamilton told the Prime Minister of the allegations on or about April 8 or 9, 2010. The Prime Minister then told the appellant of the allegations in his telephone call with her and obtained her resignation from Cabinet.

[54] The statement made by the Prime Minister on April 9, 2010 to the public was as follows:

> Last night, my office became aware of serious allegations regarding the conduct of the Honourable Helena Guergis. These allegations relate to the conduct of Ms. Guergis and do not involve any other minister, MP, senator or federal government employee, I've referred the allegations to the Conflict of Interest and Ethics Commissioner and to the RCMP. Under the circumstances, I will not comment on them further.

[55] The appellant submits that the statement is capable of a defamatory meaning and would be understood to mean that she was involved in fraudulent activity and/or other criminal conduct.

[56] As indicated, in determining whether a statement is defamatory, the words are to be construed in context, according to the meaning they would be given by reasonable persons of ordinary intelligence, knowledge, and experience. The

question is whether the impugned words might tend to expose the plaintiff to hatred, contempt, or ridicule or whether they lower the plaintiff in the estimation of reasonable persons who have common sense and who are reasonably thoughtful and well-informed but who do not have an overly fragile sensibility. They should not be given some unusual meaning that persons might succeed in extracting from them: *Color your World*. See also *Mantini v. Smith Lyons, LLP (No. 2)* (2003), 64 O.R. (3d) 516 (C.A.), at paras. 10 and 13-18, leave to appeal dismissed, [2003] S.C.C.A. No. 344; *Myers v. C.B.C.* (1999), 47 C.C.L.T. (2d) 272, var'd on other grounds (2001), 54 O.R. (3d) 626, leave to appeal dismissed [2001] S.C.C.A. No. 433.

[57] A reasonably thoughtful and informed reader would understand the difference between allegations and proof of guilt. Such a person would bear in mind that an accused person is presumed innocent until proven guilty: *Miguna v. Toronto (City) Police Services Board,* [2004] O.J. No. 2455 (S.C.), at paras. 4-6, aff'd [2005] O.J. No. 107 (C.A.), at para. 4. In this case, the motion judge did not err in holding that, as a matter of law, the public statement was not capable of bearing the defamatory meaning alleged by the appellant. The same is true of the Prime Minister's conversation with the appellant.

[58] The Prime Minister's public statement is one step further removed than the situation in *Miguna.* In that case, the plaintiff was charged; here, the appellant

was never charged. The statement makes it clear that allegations of criminal conduct about the appellant had been made and that those allegations had been referred to the Conflict of Interest and Ethics Commissioner as well as to the RCMP. These were the appropriate authorities to deal with the allegations. Although the appellant submits that, in assessing whether the statements were capable of having a defamatory meaning, the motion judge should have taken into account as true her pleading that the statements resulted in injury to her reputation, political career, health and wellbeing, the test is not a subjective one. As indicated by Abella J.A. in *Color Your World,* it is an objective one – that of the reasonable person.

(iii) Novak and Giorno

[59] The appellant alleges that the statements between Novak and Giorno and the letters drafted by them at the direction of the Prime Minister on April 9, 2010 were defamatory. The claim alleges that Giorno defamed Guergis because he participated in the drafting and delivery of the letter by Novak to the RCMP Commissioner. The contents of the letter from Novak to the RCMP Commissioner is as follows:

> Dear Commissioner:
>
> The Prime Minister has asked me to provide the following information on his behalf.

> Late last night our office became aware of the specifics of allegations made by Mr. Derrick Snowdy, a private investigator, concerning the conduct of Mr. Rahim Jaffer and the Hon. Helena Guergis. The allegations are numerous and include fraud, extortion, obtaining benefits by false pretences and involvement in prostitution. The extent of the allegations makes it impossible for me to summarize them completely in this brief letter.
>
> Our office has no first-hand knowledge of these allegations and our office has not communicated directly with Mr. Snowdy. Communication was conducted through the Conservative Party's legal counsel, Mr. Arthur Hamilton of Cassels Brock, Toronto.
>
> I have been informed that Mr. Snowdy states that he has collected evidence to corroborate his allegations and that he can be reached by telephone at ... I understand that Mr. Snowdy says the information was already shared with the RCMP and the OPP, but I want to ensure that you are aware of it.
>
> Mr. Hamilton is also available to be contacted by members of the RCMP. He can be reached at…
>
> If there is any more assistance that we can provide, please let me know.

The content of the letter from Giorno to the Conflict of Interest and Ethics Commissioner is as follows:

> Dear Commissioner:
>
> I have been instructed by the Prime Minister to provide you with the following information on his behalf.
>
> Late last night our office became aware of the specifics of allegations made by Mr. Derrick Snowdy, a private investigator, concerning the conduct of the Hon. Helena Guergis. In particular, Mr. Snowdy alleges that Ms Guergis attended meetings at which she promised to

> advance private business interests. Mr. Snowdy makes additional allegations about the MP's conduct, allegations that may or may not be relevant to her responsibilities under the Conflict of Interest Act and/or the Conflict of Interest Code for Members of the House of Commons.
>
> Our office has no first-hand knowledge of these allegations and our office has not communicated directly with Mr. Snowdy. Communication was conducted through the Conservative Party's legal counsel. However, I am aware that Mr. Snowdy states that he has collected evidence to corroborate his allegations. I believe that Mr. Snowdy can be reached by telephone at ...

[60] The motion judge held that the April 9, 2010 communications between the Prime Minister and his senior advisors, Novak and Giorno, fall within the doctrine of absolute privilege accorded to officers of state and their senior advisers when communicating on matters within their official duties. He applied the same rationale to the letter from Novak to the RCMP commissioner. The RCMP Commissioner is appointed by the Governor in Council and is under the direction of the Minister of Public Safety and Emergency Preparedness: *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10, s. 5. (1). Thus, the RCMP Commissioner is an officer of state. We agree with the motion judge. Novak is an officer of state communicating with respect to a matter of state to the RCMP Commissioner, another officer of state.

[61] A second reason the motion judge struck these paragraphs is that each of the April 9, 2010 letters – by Novak to the RCMP commissioner and by Giorno to

the Ethics Commissioner[1] – was not defamatory on its face. The letters were not capable of bearing the implications asserted by the appellant in her statement of claim. Again, we agree with motion judge. The tenor of the two letters is the same as the public statement by the Prime Minister. The rationale respecting the public statement by the Prime Minister applies to these two letters.

(iv) Glover

[62] The issue in respect of Glover is whether it is plain and obvious that her comments during a CTV interview on May 16, 2010, that "I can assure you that there is far more to come out" and "This isn't finished" do not constitute defamation.

[63] The appellant pleads that the words complained of were intended to mean and would be understood to mean that she was involved in criminal conduct and that further evidence would be made public in the future confirming this. Counsel for Glover submits that when the context of the statements is considered, Glover was supporting the plaintiff rather than disparaging her because, immediately

[1] Defamation with respect to Giorno's letter to the Ethics Commissioner was not specifically pled in the appellant's statement of claim. However, the appellant's amended factum asserts that it was defamatory. Assuming that the omission in the statement of claim was an oversight for which leave to amend could be granted, we have addressed the point. The Conflict of Interest and Ethics Commissioner is appointed pursuant to the *Parliament of Canada Act,* R.S.C. 1985 c. P-1, s. 81(1), by the Governor in Council after consultation with the leader of every recognized party in the House of Commons and approval of the appointment by resolution of that House. As such, the Conflict of Interest and Ethics Commissioner is also an office of state. The same reasoning would apply.

after making this statement, she added, “It’s unfortunate this family has been…they have suffered enough.”

[64] The motion judge reviewed the video and transcript of the interview and concluded that Glover’s statements could not possibly bear the implication pleaded, namely, that evidence Guergis was involved in criminal conduct would be made available in the future.

[65] The words in issue must be considered in the context of the entire CTV interview.

[66] The interviewer, Craig Oliver, was speaking to three members of a Parliamentary committee studying whether there was undue influence by lobbyists into a multi-million dollar green infrastructure fund. Siobhan Coady, a Liberal Member of the committee, said that Snowdy brought forward allegations that Guergis’s husband, Jaffir, offered and was able to provide back door access to the Conservative government. The Committee was “trying to figure out what part of the allegations related to the green fund.” Craig Oliver then pressed Glover as to whether the Prime Minister had gone too far on “very thin information” in removing Guergis from her positions without giving her a chance to defend herself. Glover replied, “Well there has been evidence that has been brought forward that Mr. Jaffer did in fact use the cabinet minister’s office for personal business. Our government turned over that information. “

[67] Pat Martin, an NDP Member of the Parliamentary committee commented that the Prime Minister had ruined Guergis's life and he added, "I ask people to, you know, stay tuned for a few more weeks because on June 9th we intend to wrap up this study. We are going to invite Mr. Jaffer and Ms. Guergis to the committee and one last time they will be able to at least justify some of the inconsistencies in testimony and explain perhaps so we can close this file and move onto other things."

[68] Coady then responded to Craig Oliver's question about whether Guergis, her husband, and Snowdy could be believed. Coady commented that Canadians have a right to know what criminal behaviour may have occurred. She stated, "We have witnesses coming forward saying that Mr. Giorno, the Chief of Staff has probably misrepresent[ed] some or the things that are happening here."

[69] Craig Oliver then gave Glover the last word. She stated that what the committee was doing was not right and not fair. She argued that there is no justice to be found in the way that the committee functions:

> …in the way that you are limited to [interruption and comment by Coady]…the amount of questioning. I can assure you I lived in a just and fair system when I was a police officer. This is far from what I would expect a member of parliament to suggest. I can assure you that there is far more to come out…[interruption and comment by Coady] there is far more to come out because this isn't finished. It's unfortunate this family has been….[interruption by Craig Oliver: 'It is and there is more to come for sure'] they have suffered enough.

[70] The sentence “There is far more to come out” is incomplete because Glover was interrupted. The complete sentence is, “There is far more to come out because this isn’t finished.”

[71] Depending on the interpretation given to the word, “this” Glover’s statements are capable of being interpreted in two different ways. One interpretation takes as its context that Glover’s response to Oliver was critical of the way committees run their affairs. The word “this” refers to the committee and properly interpreted, her statement is, “there is far more to come out because [the committee’s investigation into illegal lobbying] isn’t finished. Glover’s next statement, “It’s unfortunate this family has been …they have suffered enough” would mean “it‘s unfortunate this family has been [put through the committee’s process] they have suffered enough.”

[72] The other interpretation takes as its context that Glover was defending the Prime Minister’s actions in removing Guergis from her positions. In this context, ”this” refers to the evidence that has come out against Guergis so far and “there is far more to come” means more evidence against her would come out in the following weeks.

[73] The possible range of meanings in relation to the statement in issue includes one that is defamatory. Because the statement in question has two possible meanings, one defamatory and one not, this is not a clear case enabling

the pleading to be struck, and the motion judge erred in doing so. The matter should be allowed to proceed to trial where the question of the actual meaning will be determined as a matter of fact.

(e) Conspiracy and the other tort claims; alternative pleading

[74] In addition to defamation, the appellant pleaded other tort claims against the respondents, namely, conspiracy, negligence, intentional infliction of mental suffering, misfeasance in public office, and breach of a duty of care.

[75] In doing so, she pleaded on the one hand, at para. 67, that the Prime Minister had not received information as to allegations of the appellant's criminal activity and then, at para. 69, "in the alternative" that he had. In essence, she alleged that the Prime Minister made up his statement that he had received information alleging criminal wrongdoing by her as part of a conspiracy to obtain her resignation.

[76] The motion judge held that this "alternative" pleading was incomprehensible as pleaded. In addition, the motion judge held that the other tort claims were based entirely on the alleged defamatory communications and, as such, were "dressed up" defamation claims. He struck them.

[77] The appellant submits that she is entitled to make inconsistent allegations in a pleading. Indeed, rule 25.06(4) provides:

> A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

[78] Relying on this rule and its application in such cases as *Royal Bank of Canada v. Société Générale (Canada),* [2007] O.J. No. 2262 (S.C.), the appellant submits that her pleading should be allowed to stand.

[79] In our opinion, the motion judge did not err in dismissing the other tort claims for three reasons.

[80] First, viewed as a whole, the alternative pleadings do not succeed in achieving a key purpose of the statement of claim: to enable the defendants to know what facts are alleged so as to be able to respond to them. Having regard to the statement of claim as a whole, the alternatives presented in it are:

- Mr. Snowdy either did or did not report allegations of misconduct to Mr. Hamilton;
- Mr. Hamilton either did or did not report allegations of misconduct to Mr. Giorno, Mr. Novak, and the Prime Minister;
- The Prime Minister either was not informed of any allegations made against the appellant or he was told of allegations but failed to investigate them;
- The Prime Minister's Office either was not informed of the allegations of misconduct or it was informed and the allegations were not of such seriousness that they merited investigation by the RCMP; and

- Minister Raitt either did or did not communicate allegations relating to cocaine use to Ms. Pellerin.

[81] With the alternatives taken together, the statement of claim does not clearly set out the facts on which the case is asserted. There is no indication of how the various alternatives interact with one another. The pleadings serve to confuse rather than clarify what exactly is being pleaded.

[82] The present pleadings are distinguishable from *Royal Bank* on the basis that, in that case, the motion judge specifically held the defendants knew the precise allegations against them, in part, due to the long history in the proceedings.

[83] Where, as here, portions of a pleading contain bare allegations, including unfounded attacks on the integrity of a party and unsupported allegations of defamation, those portions of the pleading may be struck: *Ontario Superior Court Practice,* at p. 98; Linda Abrams and Kevin McGuinness, *Canadian Civil Procedure Law,* (Toronto: LexisNexis, 2010), at p. 753. See also *McCarthy Corp PLC v. KPMG LLP,* [2006] O.J. No. 1492 (S.C.) in which Spies J. struck the statement of claim in part on the basis that it was internally inconsistent.

[84] Second, the other torts pleaded are derivative of the defamation allegation and are not based on independent facts. For example, as pleaded, the conspiracy claim against the Prime Minister and other respondents relies on their

committing an unlawful act. The purported unlawful act relates to the alleged defamatory statements and letters. As we have held that the statements and letters in issue were not capable of being defamatory or are protected by privilege, they are not unlawful and thus a required element for the tort of conspiracy is lacking.

[85] Third, in seeking to pursue tort claims, such as negligence, based on the manner of her removal from Cabinet and caucus, while acknowledging that the Prime Minister's decision to remove her is not justiciable because it is protected by the exercise of Crown privilege and parliamentary prerogative, the appellant is attempting a distinction without a difference.

[86] The Prime Minister's exercise of the Crown prerogative and Parliamentary privilege extends not only to the fact of removal from office but also to how it was exercised. As Laskin J.A. held at para. 65 of *Black:*

> Once [the Prime Minister's] exercise of the honours prerogative is found to be beyond review by the courts, *how the Prime Minister exercised the prerogative is also beyond review*. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review. [Emphasis added.]

[87] The motion judge did not err in dismissing the other tort claims and in striking the so-called alternative pleadings.

(f) Claims based on denial of the appellant's candidacy

[88] The appellant further alleges that the CPC's committee removed her as the candidate for the CPC in the electoral district of Simcoe-Grey and that such removal was effected at the direction of the Prime Minister in furtherance of the conspiracy.

[89] The motion judge, relying on existing jurisprudence, including this court's decision in *Longley v. Canada (Attorney General)*, 2007 ONCA 852, 88 O.R. (3d) 408, held that, as an unincorporated association, the CPC could not be sued in tort. Accordingly, he struck the claims against the CPC. We agree with him.

[90] Even if the allegation regarding the Prime Minister's involvement is read as proven, s. 67(4)(c) of the *Canada Elections Act,* S.C. 2000 c.9, gives the leader of a political party the authority to refuse to endorse a candidate. As it is statutorily allowed, it therefore cannot be an unlawful act.

[91] The claims of conspiracy were properly struck

(g) Leave to Amend

[92] The appellant submits that the motions judge erred in not allowing her leave to amend the statement of claim in respect of the respondents. She relies on jurisprudence indicating that it is uncommon for the court to strike portions of a statement of claim without granting leave to amend and that it is even rarer for

the court to strike a statement of claim in its entirety without granting leave to amend.

[93] An opportunity to amend a pleading should be granted unless the claim clearly has no chance of success. That is the situation here. The alleged defamatory statements were either not defamatory or are protected by absolute privilege. Subsidiary torts pleaded to evade defamation law defences are also to be struck without leave to amend: see *Byrne v. Maas,* [2007] O.J. NO. 4457 (S.C.), at paras. 8-10; *Baker v. Poser,* 2004 CarswellOnt 4983 (S.C.), at paras. 28-31. Complaints that are untenable as a matter of law are not amenable to amendment.

[94] With the exception of the paragraphs in relation to Glove, the motion judge correctly struck the appellant's claim without leave to amend. We realize, however, that in relation to Glover, it may be necessary for the plaintiff to amend the pleading to provide proper context.

D. CONCLUSION

[95] With the exception of the statement by Glover during the CTV interview, we agree with the motion judge that the statements and letters upon which the allegations of defamation are based are either not capable of being defamatory or are protected by absolute privilege. The other tort claims are simply "dressed-

up" defamation claims. The factual basis and elements necessary to sustain these claims are not present in the pleading.

[96] Furthermore, the tort claims arise from the appellant's removal from Cabinet and from caucus. They are an attempt to get around the non-justiciability of the Prime Minister's exercise of prerogative power and Parliamentary privilege. The torts based on the denial of the appellant's candidacy for election are also certain to fail on the basis that the leader of a political party has the statutory authority to refuse to endorse a candidate and the CPC, as an unincorporated body, cannot be sued.

[97] Accordingly, with the exception of the paragraphs relating to Glover in the statement of claim, the appeal is dismissed.

E. COSTS

[98] Although the respondents have been largely successful on this appeal, the appellant has achieved a measure of success.

[99] The respondents seek costs totalling in excess of $100,000. Had the appellant been entirely successful, she would have sought costs in the order of $35,000. The amount claimed by Mr. Staley, counsel for Novak, the Prime Minister, Glover and the Hon. Lisa Raitt, currently public officials, is in excess of the amounts actually being charged because the amount being charged to the

client is a discounted rate. Although Giorno and Pellerin are completely allied in interest with the respondents represented by Mr. Staley, separate counsel were retained. The court was advised this was because they are no longer public officials. Yet, all the actions in question occurred while they were public officials.

[100] The CPC seeks costs on a substantial indemnity basis because it submits it should not have been included in the appeal. It argues that because it was an unincorporated entity, it was obvious that the appeal against the CPC had no chance of success. We do not agree that including the CPC in the appeal is the kind of conduct that should give rise to costs on a substantial indemnity basis.

[101] Having considered the submissions of counsel, we are of the opinion that one counsel fee for the Prime Minister's Group, Giorno, and Pellerin is appropriate. Accordingly, we would award costs inclusive of disbursements and all applicable taxes as follows:

> The Prime Minister's Group, Giorno, and Pellerin: $25,000 to be divided among themselves as they think fit;
>
> The CPC: $8,000

Released: June 28, 2013
"KMW"

"Karen M. Weiler J.A."
"Robert J. Sharpe J.A."
"Paul Rouleau J.A."