Federal Court
Federal Court

Cour fédérale
Cour fédérale

Date: 20100830

Docket: T-1580-09

Ottawa, Ontario, August 30, 2010

PRESENT: Madam Prothonotary Roza Aronovitch

BETWEEN:

ABOUSFIAN ABDELRAZIK

Plaintiff

and

ATTORNEY GENERAL OF CANADA
and LAWRENCE CANNON

Defendants

ORDER

UPON a motion by the defendants for:

1. An Order pursuant to Rule 76 of the *Federal Courts Rules* amending the style of cause and paragraph 4 of the Statement of Claim by substituting "Her Majesty the Queen" for "Attorney General of Canada".

2. An Order pursuant to Rule 221(1)(a) of the *Federal Courts Rules* amending the style of cause by removing Lawrence Cannon as defendant on the ground that this Court is without jurisdiction over the defendant Cannon, striking out paragraphs 2, 5 and 148 in their entirety and

ordering consequential amendments to paragraphs 131, 132, 133, 134, 135, 147, 150, 151, 158, 160, 161 and 162.

3. An Order pursuant to Rule 221(1)(a) of the *Federal Courts Rules* striking out:

(a) Paragraph 136 of the Statement of Claim as disclosing no reasonable cause of action in false imprisonment.

(b) Paragraph 137 of the Statement of Claim as disclosing no reasonable cause of action for breach of section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

(c) Paragraphs 139 to 145 of the Statement of Claim as disclosing no reasonable cause of action for breach of the prohibition against torture.

(d) Paragraph 146 of the Statement of Claim as disclosing no reasonable cause of action for breach of section 12 of the *Charter*.

(e) Paragraphs 152 to 155 of the Statement of Claim as disclosing no reasonable cause of action for breach of fiduciary duty.

(f) Paragraph 156 of the Statement of Claim as disclosing no reasonable cause of action in negligence.

(g) In the alternative, further and better particulars respecting these causes of actions.

4. An Order awarding costs of this motion to the defendants.

5. Such further and other relief as to this Honourable Court may seem just.

UPON the submissions of the parties and hearings the parties on April 12, 2010 and April 30, 2010.

UPON the direction of the Court dated April 30, 2010, and the further submissions of the parties dated May 5, 7 and 11, 2010.

ENDORSEMENT

Jurisdiction over Lawrence Cannon

To strike for want of jurisdiction, the Court must be satisfied that it is "plain and obvious" and beyond doubt that this Court lacks jurisdiction to entertain the claim. (*Ermineskin Indian Band No. 942* (2000), 180 F.T.R. 285 at para 10.) The burden of satisfying that stringent standard, in this case, falls to the Crown.

The elements required to support a finding of jurisdiction in the Federal Court are set out in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 766 (*"ITO"*) , namely, 1) there is a statutory grant of jurisdiction by the federal Parliament; 2) there is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; 3) the law on which the case is based must be "a law of Canada" as the phrase is used in section 101 of the Constitution Act, 1867 (U.K.).

In *Roberts v. Canada*, [1989] 1 S.C.R. 322 ("*Roberts*"), Wilson J. notes that there is clearly an overlap between the second and third elements of the test and explains that the second element requires "a general body of law" covering the area in dispute and that the third element, "a law of Canada", is to be understood as "a specific law which will be resolutive of the dispute." (*Roberts*, at 331.) Of importance, in this case, Wilson J. goes on to find that "a law of Canada" need not be a statute, but may be comprised of "regulation or common law". Indeed, federal common law is expressly recognized in *Roberts*, as sufficient to establish the third element of the *ITO* test. (*Roberts*, at 339 and 340.)

The Crown concedes that s. 17(5)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 enables the plaintiff to meet the first requirement of the *ITO* test as the provision gives the Federal Court jurisdiction over acts and omissions of officers, agents, or servants of the Crown. The defendant asserts however that the plaintiff's cause of action against Lawrence Cannon does not meet the second or third requirements set out by *ITO*, and that accordingly, the Federal Court has no jurisdiction to entertain the plaintiff's claims in tort and for breaches of the *Charter* against Lawrence Cannon, in his personal capacity.

The issue of whether there is an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction", and what may constitute "a law of Canada" has been widely examined by the Federal Courts in cases that have proven difficult to reconcile.

The plaintiff emphasizes the decision of the Federal Court of Appeal in *Oag v. Canada*, [1987] 2 F.C. 511. The Court of Appeal found in that case that the Trial Division had jurisdiction to entertain a claim in tort alleging false arrest, false imprisonment, assault and battery by two members of the Parole Board named as defendants in their individual capacity. The Federal Court of Appeal observed that the: "The source of freedom being enjoyed by him [the plaintiff] at the time of his alleged false arrest and imprisonment is found in federal law." Given that the statutory framework was the basis of the plaintiff's right to remain free the Court of Appeal concluded that the alleged torts were "committed because this right to remain free was interfered with." Thus, the tort was dependent on a right which was created by federal law and had no existence outside of that statutory framework. The FCA also concluded that the "statutory framework" need not establish a remedy for the interference for a statutory right to be the subject of a claim in the Federal Court.

Later, in *Kigowa v. Canada*, [1990] 1 F.C. 804 at 816, 67 D.L.R. (4th) 305 (F.C.A.) at 305 ("*Kigowa*"), this Court was found to have jurisdiction to hear an action for damages resulting from the alleged false arrest and imprisonment of a resident of Kenya by an immigration officer. The unlawful acts were also alleged to be in breach of the plaintiff's section 7 and 9 rights under the *Charter*. The Federal Court of Appeal overturned the Federal Court decision to decline jurisdiction because it found that the source of the right of a non-resident in Canada to be free from imprisonment a right trespassed upon by an immigration officer "were demarked" by the former *Immigration Act*. In finding jurisdiction over the claim, Mahoney J.A. at paragraph 16, begins by referring to the "array of this Court's confusing decisions" in the application of the *ITO* test, and

goes on to comment on the Supreme Court of Canada decision in *Prytula v. R., R. v. Rhine*, [1980] 2 S.C.R. 442 ("*Rhine and Prytula*"):

> 16 ... In other words, the relationship between the parties being entirely a creature of federal law, the law to be applied in the resolution of disputes arising out of that relationship is also taken to be federal law even though it is neither expressed nor expressly incorporated by federal statute. That would appear to have been the case in *Rhine* and *Prytula* where it is nowhere suggested that the law by which the debtors' liability to the Crown would actually be determined was anything other than that by which liability for an ordinary commercial obligation would routinely be determined. (emphasis mine)

In his concurring reasons, Heald J.A. articulated the connection between federal law and the plaintiff's claims as follows: "[i]f the torts were committed, it was because the plaintiff's right to remain free pursuant to the provisions of the *Immigration Act 1976* were interfered with". (*Kigowa*, at 307.)

The Crown emphasizes the finding of the Court in *Robinson v. Canada*, [1996] 2 F.C. 624 ("*Robinson*"), confirmed on appeal *Robinson v. Canada*, [1996] F.C.J. No. 1524 (T.D.). In that case, Prothonotary Hargrave distinguished *Oag* and struck out a statement of claim against individual defendants on the grounds that the plaintiff did not establish the existence of a body of federal law which nourished the grant of statutory jurisdiction. In so doing he summarized the applicable test at paragraph 43, as follows:

> ...While the measure of a "detailed statutory framework" will likely differ in each case, the elements include some right or duty owed and some detail in the statutory framework to flesh out that right or duty.

Both parties rely substantially on the most recent decision of the Federal Court of Appeal in *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 1902 ("*Peter White*"), where the Court of Appeal was called upon to decide whether the claims against the individual defendants, including a Minister of the Crown could be said to be sufficiently based on federal law to establish federal jurisdiction, Evan J.A. observes that "the case law dealing with the nexus required between parties, and federal law is not easy to reconcile" and notes the difficulty of deciding "on which side of the blurry line" a particular case falls. (*Peter White*, at para. 54.)

Justice Evans goes on to distills from precedent the five principles which may be applied to determine if a claim is "based on federal law", including the following:

> "...the Federal Court has jurisdiction over claims which are "in pith and substance" based on federal law and in a such case, may apply provincial law incidentally in the course of resolving the litigation.
>
> "...Conversely, a case which "in pith and substance" is based on common provincial law is not within federal jurisdiction even if it incidentally requires the determination of a question of federal law."

> "The fact that a plaintiff's cause of action is in tort or contract doesn't necessarily preclude the matter from federal jurisdiction ..."
>
> "...when parties' rights arise under and are extensively governed by a "detailed statutory framework" the Federal Court will have jurisdiction;" (*Peter White*, at paras. 55-60.)

The causes of action pleaded in *Peter White*, include common law torts, and breaches of contract. In addition, the dispute in that case arose from a lease of lands in a national park and not from statute. The lease did, however, contain an express provision making it subject to federal legislation. The Court, in that case, referred to the *National Parks Act* and the *Parks Canada Agency Act* noting that these constituted legislation that govern the grant of leases, give powers to promulgate management plans, and to refuse business licenses. The Court found that legislation and regulations were sufficient to meet the second test of *ITO*, as the case concerned "the intersection of those powers and the terms of the lease". (*Peter White*, at para. 51.)

The following two questions were held to be essential to determine jurisdiction under the third branch of the *ITO* test:

> The first question is whether the appellant's claims against the individual defendants are "in pith and substance" based on federal law. The second is whether the federal legislation respecting national parks, particularly that governing leases and the operation of businesses, comprises a "detailed statutory framework" which provides the necessary nexus between the legal rights and obligations in dispute, and federal law. (at para. 64.)

While the conduct of the individuals in *Peter White*, gave rise to causes of action in tort and contract, the Court concluded that the Federal Court had jurisdiction since the plaintiff's rights under a lease were "...created in a legal environment that is heavily regulated by federal legislation", and concluded that the "pith and substance of the claims against the individual defendants is that their conduct was not authorized by the federal legislation under which they purported to act." (at paras. 68 and 71.) The Court expressed in *obiter*, that if necessary, there was a sufficiently detailed statutory framework to ground the legal rights and obligations in federal law.

I now turn to the nature of the claims asserted by the plaintiffs in this instance. The plaintiff seeks damages against Lawrence Cannon in his personal capacity for misfeasance in public office, intentional infliction of mental suffering, and breached of sections 6 and 7 of the *Charter*. Misfeasance in public office requires the plaintiff to show the defendant Cannon "deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff". (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 ("*Odhavji Estate*") at para. 23.) For the tort of intentional mental suffering, the plaintiff must establish flagrant or outrageous conduct on the part of the defendant that was calculated to produce harm or was known would produce harm in the circumstances.

The Crown's argument is that it is plain and obvious that there is no jurisdiction over Lawrence Cannon, in his personal capacity, as the causes of actions asserted against him, essentially in tort,

fall in provincial jurisdiction as they do not arise from a right or an obligation created by federal law. In particular, the rights asserted by the plaintiff do not arise in the *Canadian Passport Order*, P.C. 1981-1472, SI/81-86 ("*Passport Order*"). The issuance of a passport is purely discretionary and a matter of the exercise of the royal or Crown prerogative over passports, as is evidenced by s. 4(3) of the *Passport Order*, which preserves the royal prerogative in this area. While the Minister based his decision to refuse the plaintiff a passport on subsection 10.1 of the *Passport Order*, this section does not give rise to a cause of action as it does not establish a right to the applicant, or a statutory, or indeed any, duty to the Minister. (*Robinson.*)

As to the claims for breaches of the *Charter*, it has been established that the *Charter* is not a "law of Canada" for the purposes of the *ITO* test. (*Robinson.*) The plaintiff's right of action to damages, in tort, therefore falls to be decided by reference the common law of torts which puts the matter squarely within provincial jurisdiction. (*Stoney Bank v. Canada (Minister of Indian and Northern Affairs)*, 2005 FCA 220 at para. 46.)

The defendant Crown points out that, in *Peter White*, the Court found that the lease that gave rise to the dispute between the parties in that case, was regulated by federal legislation. In this instance, says the defendant, there is not a detailed statutory framework similar to that found in *Peter White*, which regulates the grant of passports, thus, the matter "in pith and substance" is within provincial jurisdiction. What federal element there is relating to the lawfulness of the denial of an emergency passport, is incidental, a matter of public law, not capable of sustaining a cause of action giving rise to damages at private law, in tort.

The plaintiff, for his part, maintains that the Court's lack of jurisdiction is not plain and obvious. He says that the basis of his claim against Lawrence Cannon relates to his unlawful refusal to grant the plaintiff an emergency passport that would have allowed him to return to Canada, and therefore the denial of his rights as a citizen. He relies on the *Passport Order* and the federal law relating to the exercise of the prerogative power over passports which the plaintiff maintains is federal common law, as a basis to found jurisdiction for the purposes of the two latter branch of the *ITO* test. (*Roberts*) The argument is that the issuance of passports is "in pith and substance" a federal matter, informed by the *Passport Order*, and grounded in the royal prerogative over passports exercised exclusively by the Crown in right of Canada, a matter of federal common law. The plaintiff maintains that the substances of the torts and *Charter* challenges arise in that context, have to be decided by reference to federal law, and that any elements of provincial law are thereby ancillary. The plaintiff adds that there is little guidance as to what constitutes "a detailed statutory framework" and that it may in any case be redundant if the claims are found to be federal "in pith and substance". (*Peter White*, at para. 72.)

While the Crown makes a strong argument, I agree with the plaintiff that the matter is not free from doubt. The *Passport Order* is made by the Governor in Council, and has been found by the Federal Court of Appeal to be a "law" for the purposes of a *Charter* analysis. (*Kamel v. Canada (Attorney General)*, 2009 FCA 21 at para. 19.) The Minister designated by the *Passport Order*, with power to refuse to issue a passport, is the Minister of Foreign Affairs whose office is created by *The Department of Foreign Affairs and International Trade Act*, RSC 1985, c E-22. I would add that

the *Passport Order* makes reference to the *Citizenship Act*, and that the plaintiff is a Canadian citizen as defined in the *Citizenship Act*. Arguably, the events and claims that concern us arise in a legal environment that is demarcated by federal law.

I have cited Wilson J. in *Roberts*, for the proposition that there is overlap between the second and third elements of the *ITO* test. As already stated, the Court also notably found in that case, that federal common law may constitute "a law of Canada" for the purpose of the *ITO* test.

Federal common law has been defined as follows: "... a body of basic public law operating uniformly across the country within the federal sphere of competence...". (B. Slattter and J.M. Evans, "Federal Jurisdiction- Pendant Parties – Aboriginal Title and Federal Common Law – Charter Challenges Reform Proposals: *Roberts v. Canada*" (1989) 68 Can. Bar. Rev. 817 at 832. Cited with approval in *Algonquins of Barriere Lake v. Algonquins of Barriere Lake (Council)* 2010 FC 160 at para. 102.)

Federal common law of the exercise of the prerogative power has not been explicitly recognized by Canadian courts. That said, the Crown does not dispute that the royal prerogative is a creature of the common law, and that the issuance of passports is a royal prerogative exercised exclusively by the Crown in right of Canada. Arguably, the exercise of the prerogative including the making of the *Passport Order*, and the jurisprudence in relation thereto may be found to constitute federal common law and therefore "federal law" for the purposes of the *ITO* test. (*Roberts*, at 340.) Thus, the *Passport Order*, related federal legislation, and federal common law relating to the exercise of prerogative in the issuance of passports, if established, will satisfy the requirements of the *ITO* test and ground jurisdiction in the Court.

There is, moreover, a nexus between the plaintiff's rights and federal law. The *Passport Order*, in essence, regulates the issuance of passports. It stipulates conditions to be met by the applicant and specifies in what circumstances the passport will be refused. The failure to issue a passport is justiciable, and the content of the prerogative has been the subject of judicial comment. (*Khadar v. Canada*, [2007] 2 F.C.R. 218.) Indeed, the jurisprudence is to the effect that applicants for passports may have a legitimate expectation, akin to a right, that a passport will issue to them if they do not fall into any of the exceptions set out therein. In *Khadar*, at paragraph 112, the Court concludes:

> ... No reasonable person reading the *Order* would conclude that if one otherwise complied with the terms of this *Order*, the Minister could, and on entirely new grounds, deny one a passport or indeed that the Passport Office could act likewise.

Indeed, the claims arise directly from the unlawful conduct of the Minister, in his position defined under the *Foreign Affairs Act*, and his exercise, or failure to properly exercise his power and discretion in a legal environment regulated or circumscribed by the provisions of the *Passport Order*, Crown prerogative and federal common law. Thus it may be said of the plaintiff's claims that it is "in pith and substance" based on federal law, in that the conduct of the Minister was not authorized by the *Passport Order*, or the royal prerogative through which he purported to act, and

that the lawfulness of that conduct will fall to be decided by reference to the federal common law on the scope and content of the exercise of the prerogative, leaving provincial law to be applied only incidentally to resolve the dispute. (*Peter White*, at paras. 58 and 71.)

I conclude on that basis that the Court's want of jurisdiction to entertain the claims against the defendant Cannon, in his personal capacity, is not plain and obvious. However, this does not end the matter. Subject to appeal, the finding of this Court is simply a finding that the Court's want of jurisdiction is not beyond doubt. This still leaves the matter to be ultimately determined at trial.

It is therefore worth noting the Crown's point that the matter of the Court's jurisdiction may be obviated, and jurisdiction eliminated as a contentious issue for the purpose of trial if the plaintiff's allegations are asserted against the Crown pursuant to Section 3 of the *Crown Liability Act* (*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50), as vicariously liable for the actions of the defendant Cannon. Allegations in relation to Lawrence Cannon's misconduct or actions in excess of his authority would remain the liability for his conduct, however, if any, would be to the Crown. (*Odjhavi Estate*)

Striking for lack of a cause of action, and failure to plead material facts

I now turn to the second portion of the Crown's motion to strike claims for torture, false imprisonment, breaches of section 7 and 12 of the *Charter*, breaches of fiduciary duty and negligence, on the basis that the pleadings disclose no cause of action, or that the plaintiff has failed to plead sufficient material facts to make out a reasonable cause of action.

The applicable test and principles for striking a pleading are well established and supported by ample jurisprudence. The threshold is set high. In order to prevail, the Crown must demonstrate that it is plain and obvious and beyond doubt that the claim sought to be struck cannot succeed. (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 ("*Hunt v. Carey*").)

To apply the test, the Court is bound to assume the truth of the facts alleged in the statement of claim which is to be read as whole, and generously construed, such that a mere "scintilla" of a cause of action will suffice to maintain it. A party to an action is also not to be deprived of his or her right of action merely because the arguments made are novel, or indeed tenuous; all the more so in areas where the law is unsettled. Consequently, this Court has rejected motions to strike where the issues in play have raised serious questions of law, or arguable questions of mixed fact and law which are best left for determination by the trial judge. (*Hunt v. Carey*; *VISX Inc. v. Nidek Co.* (1998), 82 C.P.R. (3d) 289, [1998] F.C.J. No. 871; *Apotex Inc. v. Syntex Pharmaceuticals International Ltd.*, 2005 FC 1310, 44 C.P.R. (4th) 23.)

What is involved in this area is a Court's inherent power to rid its own process of abuse. The Courts are therefore cautioned against interfering with litigants' rights of action and limiting the advancement of novel causes of action at this stage. As Wilson J., explains in *Hunt v. Carey* at 990-991:

> [...] where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

That said, the proposed new, or unprecedented, cause of action can not be too far-fetched. It must present a case that is arguable, or "have some chance of being recognized at the end of the road". (*Prentice v. Canada*, 2005 FCA 395, [2006] 3 F.C.R. 135 at para. 24.)

The Crown variously argues that there are insufficient material facts pleaded to support a particular cause of action, or takes issue with the failure to plead sufficient material facts to enable it to understand the case it has to meet and consequently, to plead in response. The simple recourse to the second dilemma is to make a formal request for particulars. Given that the defendant Crown has not adduced evidence of the need for particulars, these will only be ordered to be provided where the lack of material facts is evident on the face of the pleading.

The plaintiff has the obligation to plead and set out the facts that give rise to the rights, obligations, and breaches that are claimed. (*Pellikaan v. R.*, 2002 FCT 221, [2002] 4 F.C. 169 at para. 12 ("*Pellikaan*").) However, the plaintiff correctly asserts that the specific elements of a cause of action need not be pleaded so long as the facts supporting each element are alleged. (*Altagas Marketing Board v. Canada*, 2004 FC 80 at para. 8; *Re Vandervell's Trust (No. 2)*, [1974] 3 All E.R. 205 (C.A.) ("*Re Vandervell's Trust*").) Indeed a plaintiff is not bound to assert a cause of action, and is not bound by that assertion at trial.

> [...] It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. [...] *Re Vandervell's Trust*, at para. 213.

I emphasize the point, because the Crown in this motion has not moved to strike most of the 162 paragraphs of facts alleged by plaintiff on which he relies. The defendant has moved instead against a limited number of conclusiory paragraphs that, based on the facts, assert various causes of actions or forms of relief. Such motions are wasteful of the time and resources of the parties, and the Court. In this case, there remains an entire, lengthy, statement of facts that are not sought to be struck out, and will support at least one cause of action. The defendants' arguments to strike in the circumstances are addressed to the characterization of those facts and reduce to arguments of law that can and should be made at trial, on a full evidentiary record. Motions to strike are meant to focus the issues for trial and limit unnecessary discovery. No such purpose is served in this case. These comments are reflected in the award of costs for the motion.

Breach of fiduciary duty

Admittedly, the plaintiff seeks to establish a new *ad hoc* class of beneficiary to whom the government would owe a fiduciary's obligation. The plaintiff's plea is that the citizen detained abroad who is at risk of serious human rights violations is in a uniquely dependant and vulnerable

position where only the home state has the power to gain consular access to the detainee and intercede on his or her behalf. According to the plaintiff, the government thereby incurs a fiduciary obligation to provide assistance to its citizens in those circumstances. In this case, the government is said to have breached its fiduciary duty by failing to take reasonable steps to cause the plaintiff to be released from detention, to issue him an emergency passport, and to take the steps necessary to repatriate him.

Generally, a fiduciary relationship exists when one party exercises power on behalf of another and in so doing pledges or undertakes to act in the best interests of that person. Accordingly, fiduciary relationships are marked by vulnerability in that the fiduciary can abuse the power or discretion given him or her to the detriment of the beneficiary. (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 399. ("*Hodgkinson*").)

While fiduciary duties have been typically found to be owed by agents, trustees, partners, and directors, the imposition of a fiduciary duty calls for a case by case analysis as to the nature of the relationship between the parties, with the understanding that, as with negligence, the categories of fiduciary relationship remain open. (*Hodgkinson*, at 409.) The following indicia, though not the "ingredients" of a fiduciary relationship are recalled by Justice LaForest in *Hodgkinson*, at 409, as helpful in identifying a new fiduciary relationship which will typically have the following characteristics: 1) The fiduciary has scope for the exercise of some discretion or power; 2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; 3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The defendant argues that on the facts as pleaded, the relationship of the plaintiff can not be characterized as a fiduciary relationship, and that there are not sufficient allegations of fact to support a cause of action for breach of fiduciary duty. More to the point, whatever duty Canadian citizens detained abroad and at risk of maltreatment may attract, they can not be owed a fiduciary duty by the state. The imposition of such a duty, for the sole benefit of the plaintiff says the defendant would be inconsistent with the exercise of discretion vested in the Crown to conduct Canada's foreign affairs in the public interest.

On the insufficiency of material facts, the Crown says as follows. Fiduciary relationships are always dependant on the fiduciary's expressed or implied undertaking to act in the beneficiary's interest, that is, in accordance with the duty of loyalty reposed in him or her. (*Galambos v. Perez*, 2009 SCC 48, at paras. 69, 71 and 75.) The defendant argues that the plaintiff has not pleaded any such undertaking by the Crown nor has he pleaded any statute or agreement upon which such an undertaking might be implied.

The relationship also requires that a party cede power over a matter to another who is expected to exercise the power with loyalty and care. (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 38.) In this case, says the Crown, there are no allegations of powers that have been ceded by the citizen to the Crown that are to be exercised with loyalty and care.

As to the question of vulnerability, the Supreme Court of Canada has observed that while vulnerability resulting from factors external to the relationship is a relevant consideration, the more important consideration is the extent to which vulnerability arises from the relationship. (*Galambos*, at para. 68.) The plaintiff does not plead that he has been made vulnerable by virtue of the relationship with the defendant.

In this case, as elsewhere, the Crown confounds the elements that have to be pleaded with those that have to be proven. As noted above, the specific elements of a cause of action need not pleaded as long as the facts supporting each element is alleged. The undertaking of fiduciary obligation, for instance, may be implied from the facts. It will be for the Court to decide whether as suggested by the plaintiff, any of the actions or assurances given to Mr. Abdelrazik at various times may constitute "an undertaking".

In *Hodgkinson*, the Court emphasizes the importance of the evidence at trial and describes the Court's role in determining the legal effect of that evidence in terms of finding a new category of fiduciary relationship. The Court goes on to cite with approval at 413-414, the phrase used by Lord Scarman in *National Westminster Bank p/c v. Morgan*, [1985] 1 All E.R. 821 (H.L.) at 831: "[t]here is no substitute in this branch of the law for a meticulous examination of the facts". In short, it is a matter for trial.

I turn to the Crown's argument of the inherent incompatibility of a duty owed by the state to a particular citizen, or class of citizens, to the exclusion of the general public interest. The powers arising from a roval prerogative are exercised in the general public interest and not solely for the benefit of a particular individual. For this reason, says the defendant, in *Habib v. Commonwealth of Australia (No 2)*, [2009] FCA 228 (*Habib*), the Federal Court of Australia has held that the recognition of a fiduciary duty of the kind alleged in this case regarding the conduct of foreign affairs would impermissibly encroach on the function and province of the executive branch:

> 53 [...] To accede to the duty alleged would require this Court to conclude that, in the conduct of Australia's alliance with the US (and its affairs with Pakistan and Egypt), the Commonwealth was bound to disregard its own interests and, instead act only in Mr. Habib's interests. This proposition is impossible to accept.
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> [...]
>
> [55] I reject therefore the duty alleged on two bases. Its existence does not present a matter for consideration by this Court since it takes the Court into the exclusive domain of the political branches; even if that were not so, there are prospects of establishing that equity would impose a fiduciary duty on the exercise of such a function.

Indeed, the Crown is not normally viewed as a fiduciary in the exercise of its legislative, executive, or administrative functions. (*Guerin v. The Queen*, [1984] 2 S.C.R. 335.) In *Harris v. Canada*, 2001 FCT 1408, 214 F.T.R. 1, Dawson J., as she then was, asserts the following general principle, at paragraph 178:

> [...] A fiduciary relationship is unlikely to exist where that would place the Crown in a conflict between its responsibility to act in the public interest and the fiduciary's duty of loyalty to its beneficiary.

The plaintiff says that he wishes to rely on the special circumstances of this case and Canada's avowed abhorrence of torture to make the case that when it comes to the right to be free from torture and serious human rights violation, there should be no discretion to the government, no recognition of other competing interests. The plaintiff also finds support in the statement of the Court in *Habib*, at paragraph 50; "There is no question that the executive power extends to the conduct of foreign relations" and later, "it is beyond doubt that the executive power of the Commonwealth does not run to authorising such crimes under the guise of conducting foreign relations". The plaintiff further points to the recent Supreme Court of Canada judgment in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44. Though decided in the context of the *Charter*, the Court in that case rejected the argument that there can be no encroachment on the Crown prerogative to conduct foreign relations finding that there can be constraints in the exercise of that discretion where human rights are at issue.

The matter is not beyond doubt. Whether a fiduciary duty may be imposed in these circumstances raises an arguable issue that merits judicial consideration and should not be extinguished at this early stage.

Breaches of the prohibition against torture

The plaintiff advocates the recognition of a new private law cause of action for torture. He wishes to establish the civil liability of the state, in Canada, for its implication in the torture of the plaintiff by the Sudanese, arguing that Canadian common law should develop in a manner that is consistent with Canada's international obligations. Canada has a duty to abstain from the infliction of torture and to prevent it whenever possible. These duties are said to have been breached when, having created the risk that Mr. Abdelrazik would be tortured, Canada failed to take measures to prevent it.

It is conceded that Canadian courts to date have not recognized the nominate tort of torture and that there is no private cause of action for damages arising from torture at Canadian common law. The parties are also *ad idem* that the prohibition of torture is customary international law and a peremptory norm that forms part of the domestic law of Canada. The parties disagree, however, as to whether this prohibition may give rise to a private law cause of action for torture. The Crown argues that Canadian courts have not yet recognized a cause of action for breach of customary international human rights law, much less an independent tort of torture. There is moreover, no need for the courts to recognize a new tort in this case as Canada complies with its international obligations on the prohibition of torture through existing domestic law. According to the Crown, many of the allegations made by the plaintiff under this heading can be addressed through existing causes of action.

The defendant adds that Canadian courts will not countenance fixing a positive duty, at law, on the state to take all reasonable steps to ensure their citizens imprisoned abroad would not be tortured by a foreign government, and points to the Australian Court having declined to do so in similar

circumstances. (*Habib*, at para. 62.) To embark on a substantive consideration of whether the foreign policy steps taken by the state may be said to be "reasonable" says the defendant, would involve this Court in directly and impermissibly examining the merits of Canada's foreign policy.

These pleadings raise an important issue as to the scope and content of Canada's international law obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 24 June 1987, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 ("*CAT*") and the prohibition against torture in customary international law. The linkage between international law and domestic law is evolving. The plaintiff, moreover, is supported by academic opinion and jurisprudence which evidently leaves open the possibility that courts may, in the proper circumstances, recognize a cause of action for violation of customary international human rights. (Larocque, François, *The Tort of Torture* (2009) 17 Tort L. Rev 158 at p. 164; *Mack v. Canada (Attorney General)* (2002), 60 OR (3d) 737 (Ont.C.A.), para. 31; *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 36.) It is therefore not plain and obvious that the plaintiff can not succeed, and it is premature to foreclose the debate at this juncture.

The tort of false imprisonment

In essence, false imprisonment is the intentional confinement or restriction of a person without lawful justification. To succeed in a claim of false imprisonment, a plaintiff must plead and prove imprisonment by the defendant or his or her agent. Lawful justification for the imprisonment is for the defendant to plead and prove. (*Frey v. Fedorchuk & Stone*, [1950] S.C.R. 517 at 523; *Abbott v. Canada* (1993), 64 F.T.R. 81 at paras. 160-161 (T.D.); *Carten v. Canada*, 2009 FC 1233 at para. 46.)

The plaintiff has pleaded that Canada is directly or indirectly liable for false imprisonment on the occasion of three periods of detention. The first, is his imprisonment by the Sudanese authorities between September 23 and July 2004. Second, the period during which the plaintiff was subject to custodial restrictions, a form of house arrest, between July 2004 and October 2005. Third, is the second period of imprisonment from October 2005 to July 2006.

The Crown ostensibly concedes the first period of imprisonment, as at the hearing of the motion it confined its request for relief to the two last periods of detention, asking that the Court strike paragraph 136(h) of the Statement of Claim as it relates to the custodial restrictions, and paragraph 137, as it relates to the second period of imprisonment from October 2005 to July 2006, on the basis that there are no material facts pleaded in the claim to sustain a cause of action in respect of those two periods of detention.

Having previously argued that the plaintiff must plead and prove that Canada's conduct "directly" caused the periods of confinement at issue, at the hearing of the motion, the Crown conceded that the burden on the plaintiff would be merely to prove that Canada was "instrumentally active" in effecting the detentions or imprisonment. (*Tschekalin v. Brunette*, [2004] O.T.C. No. 589 at para. 70, 132 A.C.W.S. (3d) 608; *Hanisch v. Canada*, 2004 BCCA 539 at paras. 32-35, 38.)

The defendant says that there are no facts to show that Canada was in any way instrumentally active in effecting the custodial restrictions placed on the plaintiff by the Sudanese, no allegations that Canada requested Sudan to impose the restrictions, in sum, nothing linking Canada to Sudan's decision to impose the restrictions. The Crown also maintains based on the facts pleaded that Canada, could not be said to have been instrumental or indeed played any role in effecting the second imprisonment. All that is pleaded is that prior to his second arrest, NSI officials requested that Mr. Abdelrazik attend their headquarters to pick up documents, that he then visited the Canadian embassy in Khartoum where was assured by the head of the Canadian mission that there would be no risk to him in meeting with the Sudanese.

The plaintiff counters that he considers the period of custodial detention to be a continuation of the arrest and imprisonment of September 2003, and will take that position at trial. That being the case, it is at least arguable that Canada's alleged complicity leading to the first period of imprisonment may be found to extend to the period of house arrest. I agree with the defendant that the plaintiff asserts as a bald statement without more that Canada "prompted" the Sudanese government to imprison the plaintiff a second time. While that allegation has to be accepted as proven for the purposes of striking, the defendant is entitled to know the particulars of the allegation, and it will be so ordered.

A second point of objection by the Crown relates to the period of custodial restrictions. Although the plaintiff was required to attend at night and stay at the halfway house, he was free during the day to come and go as he pleased in Khartoum. This was not a situation in which the plaintiff was "totally confined" or "completely restricted". (*Nurse v. Canada* (1997), 132 F.T.R. 131 (T.D.); Lewis Klar in his text, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 56.) Total restraint of one's liberty being necessary to establish imprisonment, the defendant says there can be no reasonable cause of action for false imprisonment on the facts of the period of house arrest.

I take the Crown's point that *Muir v. Alberta* (1996), 179 A.R. 321, 132 D.L.R. (4th) 695, on which the plaintiff relies is not on point. The allegations in that case, are framed in breach of statutory duty, negligence, and breach of fiduciary duty, and do not involve the tort of false imprisonment. There is, however, the plaintiff's argument that the first period of imprisonment and subsequent period of custodial restrictions constitute one continuous period of detention and therefore confinement. The success of that argument is for determination at trial.

Violation of section 7 of the Charter

The Crown takes issue with two paragraphs that allege violations of section 7 of the *Charter*, being paragraphs 138 and 150 of the statement of claim that refer to the second period of imprisonment from October 2005 to July 2006. The plaintiff having alleged that Canada "prompted" the Sudanese to imprison him a second time goes on to say at paragraph 138 of his claim that by deliberately encouraging or prompting the Sudanese to prison the plaintiff without reasonable grounds, Canada violated the plaintiff's rights under section 7 of the *Charter*.

The sole argument of the Crown in that regard at the hearing of the motion was that there were not material facts pleaded that could establish a sufficient causal connection between Canada's actions and the depravation of the plaintiff's rights to life, liberty, and security effected by the Sudanese who imprisoned him. I take the Crown, therefore, to have abandoned their objections to the claim as it relates to the first period of detention and on the other grounds addressed in their written submissions.

As a general proposition, to establish a breach of section 7 of the *Charter*, the pleadings must, at a minimum, set out both a deprivation of life, liberty or security of the person and a violation of the principles of fundamental justice. (*Albarquez v. Ontario*, 2009 ONCA 374 at para. 42.)

There is of course no allegations that Canada was the primary source of the deprivation of the plaintiff's liberty. Where as in this case an actor other than Canada is directly responsible for the violation of a citizen's rights, the courts will query the sufficiency of the causal connection between this government's participation and the ultimate deprivation of the claimant's rights guaranteed under section 7. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 ("*Suresh*") at para. 54, the Supreme Court of Canada confirms the principle and sets out the circumstances where such a causal connection may be found, namely, where Canada's participation is a necessary precondition for the deprivation which, moreover, is an entirely foreseeable consequence of Canada's participation.

The defendant points out that the facts alleged with respect to the second period of imprisonment, and Canada's implication, rest solely on the assurances that were given by the head of mission of the Canadian embassy in Khartoum to Mr. Abdelrazik that he would not be detained or would not be arrested if he went on to meet with NSI. Beyond that, says the Crown, there is only the conclusiory statement that Canada "prompted" the Sudanese government to imprison the plaintiff. The assurances that were given by the head of mission cannot be set to be "necessary pre-conditions" to his second detention and imprisonment nor can it be said that the detention was a "foreseeable consequence" of those assurances. Thus argues the defendant, there are insufficient material facts to establish a causal connection and the allegation of breach of section 7 in respect of the second period of imprisonment. The allegation of breach of section 7 as it relates to that period must therefore be struck.

The allegation that Canada "deliberately" encouraged and "prompted" the Sudanese government to imprison Mr. Abdelrazik the second time must be taken as proven. Given that it may be sufficient on the face of the pleading to establish the necessary connection it will not be struck. The statement will however have to be particularized, which will suffice to allow the Crown to plead over.

The plaintiff's further claim of a breach of section 7 of the *Charter* that is sought to be struck is at paragraph 150 of the Statement of Claim that relates to denial of an emergency passport to the plaintiff. Mr. Abdelrazik maintains that his right to security of the person was violated by Canada, and Lawrence Cannon, by directing the plaintiff to participate in a passport application

process that was conducted in bad faith and "in flagrant disregard of the defendants' own stated rules of procedural fairness".

At hearing the defendant restricted itself to making a request for particulars as to what the plaintiff means by the "defendants' own stated rules of procedural fairness". While I agree with the plaintiff that procedural fairness is a fundamental principle of the protections guaranteed under section 7 of the *Charter*, and that the principles of fundamental justice are known and need not be pleaded, (*Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 212-13), the plea that the government and Lawrence Cannon acted in violation of their own stated rules must be particularized.

Violation of Section 12 of the Charter

The defendants seek to strike a paragraph alleges that Canada was directly and indirectly responsible for the plaintiff's detention in Sudan with the knowledge that he would be subjected to cruel and unusual treatment or punishment, and that by these actions Canada breached section 12 of the *Charter*, allegedly motivated by the plaintiff's lack of cooperation with CSIS while in Canada.

Under section 12 of the *Charter*, "everyone is guaranteed the right not to be subjected to cruel and unusual treatment or punishment". The right is guaranteed from infringement by the Parliament and government of Canada, and the legislature and government of each province. The right cannot be guaranteed from infringement by foreign officials in foreign countries. (*Charter*, section 32.)

The defendant maintains that on the facts pleaded, section 12 of the *Charter* is not engaged. The causal link, if any, between Canada's actions of requesting suggesting and prompting the detention of the plaintiff and the cruel and unusual punishment suffered by him is too remote to engage section 12 and the case therefore falls to be reviewed under section 7 of the *Charter*. (*United Sates v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 at paras. 50-57 (*"Burns"*); *Suresh*, at paras. 53-53.)

In *Burns*, an individual extradited to the states without any assurances having been sought by Canada that the U.S. would not seek the death penalty. The Court considered whether in the circumstances, section 12 would be engaged as it would be the state of Washington and not Canada that would impose and carry out any death sentence. Having considered whether the linkage is "strong enough and direct enough" to invoke section 12 in an extradition proceeding, the Court found that section 12 was not engaged in that case because the nexus between the extradition order and the mere possibility of capital punishment was too remote. The Court went on to state that the proper place for the debate on state responsibility in that case was under section 7 of the *Charter*. This by no means precludes the plaintiff's claim under section 12 of the *Charter*. The finding of a sufficient nexus, or not as the case may be is again, a matter for trial.

Negligence

Mr. Abdelrazik is alleging negligence on the part of CSIS officials and consular officers which caused him to be detained in Sudan, or created the risk of detention, which caused him to suffer severe physical and mental injuries.

The defendant asserts that the plaintiff has failed to plead the material facts necessary to establish negligence. Specifically, the defendant submits that there are not sufficient material facts which could support a duty of care, a standard of care, or causation in fact and in law. Relying on *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 at para. 3, as identifying the necessary elements of negligence, the defendant asserts that failure to plead facts that could support any one of the elements is ground to strike the claim in negligence. The submissions of the defendant focus in particular on the plaintiff's failure to plead proximity as between the parties. The Crown accepts that paragraph 156(a) includes an allegation that Mr. Abdelrazik was a foreseeable plaintiff. Since both foresight of the plaintiff and proximity of the parties are required elements of a duty of care, the failure to plead one, according to the defendant, renders the duty unknowable.

The plaintiff submits that the relationship between the parties is analogous to that of a "particularized suspect" as recognized in *Hill v. Hamilton-Wentworth*, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 27 and consequently, a *prima facie* duty of care is owed. In the event that the Court will embark on an analysis to determine if a new duty of care should be recognized, the plaintiff has pleaded material facts to support a legal conclusion that there was a "close and direct" relationship between the parties to establish proximity. The Supreme Court of Canada's recent decision in *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132 at paras. 17-19, 55, is a potentially useful precedent to establish Crown liability in relation to a tort committed by a third party.

In the circumstances, the Crown cannot meet its burden of showing that it is plain and obvious that the facts can not sustain a cause of action in negligence. It will be for the Court on the facts alleged to draw the necessary conclusions as to the duty owed, the standard of care, and to find a breach, if any, which may have caused harm to the plaintiff. The Crown is also not entitled to particulars of the allegations. It did not demand particulars, and the inadequacy of the pleading is not evident on its face.

THIS COURT ORDERS that

1. The motion is granted as follows and is otherwise denied.

2. The style of cause will be amended to substitute "Her Majesty the Queen" for "The Attorney General of Canada".

3. Within seven (7) days of the date of this Order the plaintiff shall provide particulars of the following:

   a) At paragraph 137 of the statement of claim: "The Defendant prompted the Sudanese government to imprison the plaintiff a second time".

   b) At paragraph 138 of the statement of claim: "By deliberately encouraging and prompting the Sudanese to imprison the plaintiff without reasonable grounds..."

   c) At paragraph 150 of the statement of claim: "...a passport application process that was conducted in bad faith and in flagrant disregard to the defendants' own stated rules of procedural fairness."

4. Costs of the motion, fixed in the amount of $7,000, including disbursements, are payable by the defendant Crown, to the plaintiff, forthwith in any event of the cause and, in any case, by no later than thirty (30) days from the date of this Order.

"R. Aronovitch"
Prothonotary