Federal Court  Cour fédérale

Date: 20160916

Docket: T-1747-15

Citation: 2016 FC 1052

Ottawa, Ontario, September 16, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ZHENHUA WANG AND CHUNXIANG YAN

Plaintiffs

and

HER MAJESTY THE QUEEN, OXANA M. KOWALYK (ID MEMBER), SUSY KIM (ID MEMBER), IRIS KOHLER (ID MEMBER), OFFICER O'HARA (CBSA OFFICER), HAL SIPPEL, ERIC BLENKARN, ANDREJ RUSTJA, CBSA OFFICERS, ALL JOHN AND JANE DOE CBSA/CIC OFFICIALS UNKNOWN TO THE PLAINTIFFS, INVOLVED IN THE ARREST, DETENTION AND CONTINUED DETENTION OF THE PLAINTIFFS, LINDA LIZOTTE-MACPHERSON, PRESIDENT OF THE CBSA, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, MINISTER OF CITIZENSHIP AND IMMIGRATION, ATTORNEY GENERAL OF CANADA

Defendants

ORDER AND REASONS

[1] On these motions the Defendants seek relief under Rule 221 of the *Federal Courts Rules*, SOR/98-106, striking out the Statement of Claim filed by the Plaintiffs in this action on the basis that it discloses no viable cause of action, is scandalous, frivolous or vexatious, is an abuse of the process of the Court and is barred by cause of action estoppel.

[2] At the outset of argument the Plaintiffs conceded that the claims asserted against the President of the Canada Border Services Agency [CBSA], the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration [CIC] should be struck. In the result the action is dismissed as against those parties. What remains for determination is whether the claims against the remaining Defendants should be struck and, if so, on what terms.

[3] In order to apply the legal principles relied upon by the parties it is necessary to consider the specific allegations in the Plaintiffs' 65 page Statement of Claim.

[4] The Plaintiffs' complaint arises out of their arrest and detention at the hands of the CBSA on March 7, 2014. Among other allegations the Plaintiffs say that they were wrongfully arrested and unlawfully detained on the strength of false information that CBSA and CIC officials either knowingly or negligently relied upon in the prosecution of the Plaintiffs' ongoing immigration detentions. Included in the claims against the named and unnamed officials are allegations that they misrepresented evidence, conspired to deprive the Plaintiffs of a fair hearing, and sought to punish the Plaintiffs for bringing refugee claims.

[5] Some representative passages concerning the alleged conduct of the CBSA and CIC officers are set out below:

> • The Arrest and Detention of Plaintiffs in Canada
>
> 87. Prior to, and up to being arrested by the CBSA on March 7th, 2014, the Plaintiffs were subject to the following actionable conduct by the CBSA/CIC officials:
>
> (a) negligent investigation in refusing to properly investigate the facts and evidence put forward by the Plaintiffs; and relying solely on the false information provided by those who defrauded the Plaintiffs, as well as officials of the People's Republic of China, and who were defendants in Ontario civil actions for that fraud and other criminal acts, for which negligent investigation the CBSA/CIC officers, and Her Majesty the Queen are liable, in that:
>
> (i) the officers owed a common-law and statutory duty of care to competently investigate prior to arrest and detention;
>
> (ii) the officer(s) breached that duty of care; and
>
> (iii) as a result of that breach they caused the Plaintiffs compensable damages;
>
> (b) that the initial duty to competently investigate is owed to the present day, which has been flagrantly breached and ignored by the named and unnamed CBSA/CIC officers, notwithstanding more comprehensive and updated information and evidence provided by Plaintiffs' counsel;
>
> (c) engaged in abuse and excess of authority, and misfeasance of public office for the facts set out above, by:
>
> (i) refusing disclosure undertaken and resisting disclosure due to the Plaintiffs;
>
> (ii) misrepresenting the nature and quality of the evidence against the Plaintiffs;

(iii) acting in bad faith, and absence of good faith, continued to shift the grounds, for continued detention against the Plaintiffs;

(iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;

(v) refusing to properly investigate;

(d) conspired to deprive the Plaintiffs of their statutory and constitutional rights, to be free of arbitrary and unlawful arrest and detention as set out below in this statement of claim;

(e) breached the Plaintiffs' constitutional right(s) to counsel; and

(f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

. . .

102. Prior to, and during, the 1st detention review, the Defendant CBSA/CIC officials at the hearing, engaged in the following actionable conduct:

(a) they continued to engage in negligent investigation as set out above;

(b) they engaged in abuse of process, and abuse and excess of authority, and misfeasance of public office by:

(i) refusing disclosure undertaken and owed to the Plaintiffs;

(ii) misrepresenting the nature and quality of the evidence against the Plaintiffs';

(iii) in bad faith, and absence of good faith, shifted the grounds, for continued detention against the Plaintiffs;

(iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;

(c) conspired to deprive the Plaintiffs of a fair hearing, and further conspired to continue the Plaintiffs' unlawful and arbitrary arrest and detention by:

(i) engaging in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs; and/or

(ii) engaging, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, is to cause injury to the Plaintiffs, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, is likely to, and does result;

(d) continued to breach the Plaintiffs' right to counsel and effective right to assistance of assistance of counsel;

(e) endangered the lives of the Plaintiffs if ever returned to China; and

(f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

[6] In this action the Plaintiffs also seek damages from three members of the Immigration Division (collectively the ID Members) for unlawfully maintaining the Plaintiffs' detention in the context of three detention reviews. Each of the impugned decisions was overturned by this Court on judicial review. The Plaintiffs' claims are based, in part, on an assertion that ID Members Kowalyk, Kim and Kohler are liable in damages for failing to follow the Federal Court orders that quashed the earlier detention review decisions and for a variety of other adjudicative errors. Parts of the Statement of Claim assert causes of actions in negligence and others assert fraud and malice.

[7] The material allegations made against the ID Members are the following:

> MEMBER KOWALYK
>
> 106. In making her decision, on December 11th, 2014, ID Member O.M. Kowalyk, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs by:
>
> (a) making substantive determinations with respect to the strength and ***bona fides*** of the Plaintiffs' refugee claims which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;
>
> (b) making rulings diametrically opposed to binding Federal Court orders and judgments;
>
> (c) knowingly misapplying the jurisprudence to the facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)-(e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding jurisprudence, and the knowledge, experience, and expertise of the Member which spans just over 30 years as an Adjudicator and ID member conducting detention reviews.

…

109. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Kowalyk, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

…

MEMBER KIM

114. In making her decision, on April 2nd, 2015, ID Member Susy Kim, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgment of Justice Phelan and knowingly ignored and contradicted Justice Phelan's judgment on judicial review;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) making rulings diametrically opposed to binding Federal Court orders and judgments;

(d) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(e) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(f) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(g) doing all of the above set out in (a)-(e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of the previous, successful judicial review, by the Federal Court, of the previous detention review of Oxana M. Kowalyk.

...

116. The Member's decision essentially adopted and rehashed the decision of the previous ID Member (Kowalyk). This is referenced in Justice Gagne's decision, at paragraph 48, as quoted in the previous paragraph of this Statement of Claim. The decision further ignores and flies in the face of the judicial review conducted by Justice Phelan of ID Member Kowalski's decision, whereby ID Member Kim knowingly adopts Kowalyk's errors to fly in the face of the Federal Court decision quashing Kowalyk's decision.

117. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Susy Kim, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

…

MEMBER KOHLER

143. In making her decision, which decision was made in bad faith, and absence of good faith, the ID Member, Iris Kohler, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgments;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)-(e), with discrimination, contrary to s. 15 of the ***Charter*** **,** because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of previous, successful judicial reviews, by the Federal Court, of previous detention reviews, by Justice Phelan and Justice Gagné, as set out above.

...

146. Furthermore, ID Member Kolher's decision, rehashes and repeats the reasons of the previous two ID Members' decisions, with a number of paragraphs being extracted and merged from ID Member Kowalyk's, and ID Member Kim's decision, which findings and conclusions knowingly,

> and with the sole intent to continue the detention of the Plaintiffs, fly in the face of the previous two Federal Court decisions of Justice Phelan and Justice Gagné.
>
> 147. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Iris Kohler, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

[8] In addition to the above allegations, the Statement of Claim includes prolix, unfocussed and generalized accusations of a conspiracy to harm the Plaintiffs carried out by the named Defendants and other unnamed government officials. It is not possible to tell whether the ID Members are included in all of the conspiracy allegations but, in a few instances, they are expressly identified. For the most part, these conspiracy allegations simply repeat the earlier pleading of individualized bad faith set out above. Below are the key conspiracy allegations specific to the ID Members:

> (d) that the ID members, Oxana Kowalyk, Susy Kim, Iris Kohler, have also done so in a separate and overlapping conspiracy, by:
>
> (i) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;
>
> (ii) making rulings diametrically opposed to binding Federal Court orders and judgments particularly the Federal Court orders and judgment made with respect to the Plaintiffs; on judicial review(s) of their detention;
>
> (iii) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(iv) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(v) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(vi) doing all of the above set out in (a)-(e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

…

155. The Plaintiffs further state that actions of the named and unnamed CBSA/CIC officers, in conjunction with the ID Members, at the behest and false information from agents of the People's Republic of China, and the fraudsters Szeto and Chen, with the resulting unlawful and unconstitutional detention, constitute torture and unusual treatment contrary to the ***Convention Against Torture and Other Cruel or Unusual Treatment***, and also constitutes a crime against humanity contrary to, ***inter alia***, s. 6 of the ***Crimes Against Humanity Act***, as well as an offence under the ***Criminal Code of Canada***. The Plaintiffs state, and fact is, that the named and unnamed officials, in furtherance of attempting to remove the Plaintiffs to China, are acting as ***de facto*** agents for the People's Republic of China, and in fact are accessories, co-conspirators with the attempt to deliver the Plaintiffs to torture, and unlawful imprisonment and/or death. This conspiracy, and over-lapping conspiracies, and unlawful and unconstitutional conduct, through the knowledge and willful conduct of the above-noted officials, in bad faith and the absence of good faith, also grounds the basis for civil and constitutional torts and liability.

…

158. The Plaintiffs further state that this entire process, is a statutory and constitutional abuse of process, by way of disguised extradition, on false information obtained from fraudsters and officials of a dictatorial regime, with a refusal by Canadian officials to properly and competently investigate, to remove at the request of a regime that engages in ***inter alia***, torture, without the procedural and substantive safeguards of the ***Extradition Act***, which the

> named and unnamed officials, and ID Members, know run contrary to the Royal Commission Inquiry conducted with respect to Maher Arar, and its report and recommendations, as well as the Ontario Court of Appeal decision (leave to the SCC denied), finding it constitutionally impermissible to extradite based on information obtained by torture, as set out in ***USA v. Kadr***, which decision is a document referred to in the pleadings herein.

[9] In one concluding passage, the Statement of Claim asserts that the ID Members, among others, were acting "as ***de facto*** agents of the People's Republic of China, in what amounts to a disguised and baseless extradition" (see para 156 (vi)).

I. Analysis

[10] Rule 221 of the *Federal Courts Rules* applies to these motions and provides for relief on the following basis:

STRIKING OUT PLEADINGS	RADIATION D'ACTES DE PROCÉDURE
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole

	ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[11] The Defendants all contend that the Statement of Claim discloses no cause of action known to law and is scandalous, frivolous and vexatious. They also argue that a markedly similar Statement of Claim was struck out by the Ontario Superior Court as disclosing no viable cause of action, thus rendering this proceeding an abuse of process by relitigation or subject to cause of action estoppel. The Immigration Division members also rely on the immunity that is afforded to them by section 156(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. The claims against the ID Members

[12] There is no question that the claims advanced against the ID Members in the performance of their adjudicative duties are protected by a strongly worded immunity provision. Section 156 of IRPA states:

> 156. Immunity and no summons – The following rules apply to the Chairperson and the members in respect of the exercise or purported exercise of their functions under this Act:
>
> (a) no criminal or civil proceedings lie against them for anything done or omitted to be done in good faith; and
>
> (b) they are not competent or compellable to appear as a witness in any civil proceedings.

[13] Mr. Galati opposes the motion to strike the claims against the ID Members on the basis that the Court must take the pleaded facts as provable. He asserts that it is only where it is plain and obvious that a pleading is bad that it can be struck: see, for instance, *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at page 980, 74 DLR (4^{th}) 321. Motions to strike under Rule 221 of the *Federal Courts Rules* are, of course, also subject to Rule 174 requiring that every pleading contain "a concise statement of the material facts on which the party relies".

[14] While I accept that, on a motion to strike, the Court must take the pleaded facts to be provable and should only strike in the clearest of cases, at the same time not every legal theory that can be imagined by the creative legal mind must be entertained. For instance, I do not agree that this Court must accept, as potentially viable, fanciful interpretations of the scope of immunity afforded to the ID Members by section 156 of IRPA. An example of such an argument

is the Plaintiffs' contention that they are entitled to pursue a cause of action for the negligent enforcement of a judicial decree (*i.e.*, the Federal Court judgments). The Plaintiffs advance this claim on the strength of the decision in *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551. That case, of course, involved an allegation of negligent implementation of a judicial decree and not negligent adjudication. In the face of the broad immunity created by section 156, it is plain and obvious that this allegation and any similar allegation could not, in the absence of pleaded material facts bearing on bad faith, possibly succeed.

[15] The same can be said of the allegations concerning ostensible errors made by the ID Members. The Statement of Claim does not survive a motion to strike by the pleading of a series of supposed errors followed by a bare assertion of bad faith and conspiracy. Indeed, all of the conspiracy allegations are purely speculative and improper. To assert without any factual foundation that the ID Members were engaged in a conspiracy to harm the Plaintiffs with the CBSA and CIC officials and were acting as de facto agents of the Chinese authorities is particularly scandalous and improper. What the record actually discloses is that the ID Members produced thoughtful and thorough decisions. This Court found some discrete reviewable errors in their decisions but identified nothing blameworthy and returned the cases for redetermination. The remedy for adjudicative error lies in judicial review and not in a collateral action seeking damages.

[16] What the Court must still consider is whether some remainder of the Statement of Claim would, if proven, be sufficient to escape the confines of section 156. To determine this, it is necessary to consider the basic principles with respect to pleadings. The fundamental purpose

and rule of pleadings were discussed by Justice Eric Bowie in *Zelinski v the Queen*, [2002] 1 CTC 2422, [2002] DTC 1204 (TCC) and recently endorsed by Justice Wyman Webb in *Beima v Canada*, 2016 FCA 205, [2016] FCJ No 907 (QL):

> 4 The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought …
>
> 5 The applicable principle is stated in Holmsted and Watson [Ontario Civil Procedure, Vol. 3, pages 25-20 to 25-21]:
>
> > This is the rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

[17] The question is therefore whether the Statement of Claim contains any material factual allegations that could support a finding of bad faith on the part of any of the ID Members in the discharge of their adjudicative functions. In this context, bad faith requires proof of deliberate dishonest conduct by each of the ID Members in carrying out their detention review responsibilities.

[18] An assessment of the Statement of Claim must begin with an appreciation of the legal principles that distinguish between speculative or conclusory allegations and those that are sufficiently particularized to be subjected to further judicial scrutiny (*i.e.*, material facts that are

capable of supporting a potentially viable cause of action). This distinction is discussed by Justice David Stratas in *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184, 321 DLR (4th) 301 [*Merchant Law*] in the following passage:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, *i.e.*, deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[19] More recently, Justice Michael Manson discussed the need for particulars when pleadings allege fraud or malice. His comments in *Tomchin v Canada*, 2015 FC 402, 332 CRR (2d) 64 [*Tomchin*] are particularly apt on this motion:

> [21] In order to strike a pleading on the ground that it does not disclose a reasonable cause of action, those allegations that are properly pleaded as concise material facts and are capable of being proved must be taken as true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Federal Court Rules*, Rule 174). However, that rule does not apply to allegations based on assumptions and speculation (*Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at para 27).
>
> [22] As well, any pleading of misrepresentation, fraud, malice or fraudulent intent must provide particulars of each and every allegation; bald allegations of bad faith, ulterior motives or *ultra vires* activities is both "scandalous, frivolous and vexatious", and an abuse of process of this Court (*Federal Court Rules*, Rule 191; *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at paras 34-35).
>
> ...
>
> [38] Throughout the Statement of Claim, the Plaintiff alleges bad faith and ulterior motives on the part of the Defendants. However, I agree with the Defendants that the allegations are purely speculative and none of the statements are supported by the facts as pleaded. What the facts show is nothing other than legitimate, *intra vires* reasons for the Plaintiff's interview, investigation and detention by CBSA.
>
> ...
>
> [47] The pleading as a whole is replete with opinion and conclusory statements, devoid of the concise, material facts needed to support a viable cause of action. I agree with the Defendants that the Statement of Claim appears to have been filed for collateral purposes, in the hopes that a fishing expedition may yield some claim of substance that may somehow support the Plaintiff's desire for a remedy against the Defendants. His position is simply wrong (*Kastner v Painblanc*, [1994] FCJ No 1671 at para 4 (FCA)).

[20] The allegations made by the Plaintiffs against the ID Members in this proceeding are bad for the same reasons identified in the *Merchant Law* and *Tomchin* decisions noted above. The allegations of bad faith and malice are merely conclusions unsupported by any material facts. The allegation of a conspiracy in concert with the People's Republic of China is particularly troublesome. In the absence of any supporting facts it is a scandalous allegation and, in that form, should never have been pleaded.

[21] I can only conclude from the total absence of particulars that the claims made against the ID Members were solely intended to embarrass those Defendants for making detention rulings adverse to the Plaintiffs' interests. In the result, all of the claims against the ID Members are struck out without leave to amend and the action is dismissed as against each of them.

[22] The ID Members are entitled to their costs in the action. Having regard to the scandalous nature of the allegations made against them, an increased award of costs is justified. These Defendants are awarded $5,500 payable within 30 days by the Plaintiffs, jointly and severally.

III. The claims against the CBSA and CIC

[23] One of the principal arguments advanced on behalf of the CBSA and CIC Defendants is that this action is an abusive relitigation of a very similar cause of action dismissed by the Ontario Superior Court of Justice. To fairly address this argument it is necessary to examine the scope and disposition of that earlier action.

[24] The Statement of Claim issued on behalf of the Plaintiffs in the Ontario Superior Court of Justice named, among other parties, CIC and the CBSA as Defendants. That Statement of Claim sets out, almost verbatim, much of the factual history contained in the Federal Court Statement of Claim (see for example paras 16-18 and 76-99).

[25] Nevertheless, the specific allegations directed at the conduct of CIC and the CBSA in the Ontario pleading were limited to the following:

> 62. CIC and CBSA knew, or ought to have known, at the time that the application forms were submitted by Chen and Szeto, that Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1).
>
> 63. Furthermore, subsequent to Ms. Yan and Mr. Wang's discovery that Chen and Szeto were not licensed to submit immigration applications, and subsequent to their discovery of significant other misrepresentations and frauds perpetuated against them by Chen and Szeto, CIC and CBSA were notified by letters dated, respectively, January 27, 2014 and February 5, 2014 from counsel for Ms. Yan and Mr. Wang, specifically advising CIC and CBSA that:
>
> (a) Ms. Yan and Mr. Wang had discovered that Chen and Szeto were not licensed or approved immigration consultants and were not licensed or qualified to complete and submit applications to Canada Immigration on their behalf;
>
> (b) Ms. Yan and Mr. Wang had reason to believe that Chen and Szeto had provided incorrect information on the applications;
>
> (c) Chen and Szeto had threatened repeatedly to make false reports regarding Ms. Yan and Mr. Wang to CBSA and Canada Immigration in the course of continued attempts at extorting funds from Ms. Yan and Mr. Wang. Because of the legal actions and criminal complaints made by Ms. Yan and Mr. Wang against Chen and Szeto, Ms. Yan and

Mr. Wang had reason to believe that Chen and Szeto had made and were continuing to make false allegations to CBSA and CIC against Ms. Yan and Mr. Wang; and

(d) Ms. Yan and Mr. Wang were requesting copies of all application documents submitted on their behalf by Chen and Szeto.

64. Ms. Yan and Mr. Wang have to date received no response whatsoever from CBSA or CIC to the January 27th and February 5th letters.

65. Therefore, in addition to the fact that CIC and CBSA should have known that Chen and Szeto were in breach of s. 91(1) of the IRPA at the time of submission of the purported application, CIC and CBSA should certainly have known, and commenced a specific investigation and consulted with Ms. Yan and Mr. Wang's counsel, after receipt of their counsel's February notice letter.

66. Further, having received the latest application in or about 2013, and possibly previous applications from Chen and Szeto prior to that time, and then the February notification from counsel for Yan and Mr. Wang, CBSA should then have known that they were relying upon documents, the preparation of which were a criminal offence by Chen and Szeto contrary to s. 91(1) of the IRPA.

67. Knowing that the preparation of the application documents was a criminal offence by third parties, the CBSA should not have instructed its counsel to rely upon information on those documents to continue the detention and deny the freedom of Ms. Yan and Mr. Wang.

68. Chen and Szeto were not licensed or approved immigration consultants, and they were submitting the application documents contrary to the IRPA s. 91(1).

…

74. The CBSA's arrest disclosure referred to "tips" that they received in respect of Ms. Yan and Mr. Wang.

75. Ms. Yan and Mr. Wang believe that their concerns, set out in their counsel's February 2014 letter to CIC and CBSA, were correct and that Chen and Szeto made false report to the Canadian immigration agencies including CIC and CBSA, as well as false reports to the embassy, national government, and provincial

> government of China, as well as false reports to the Dominican Republic, all falsely claiming improperly actions and activities by the Plaintiffs.
>
> …
>
> 109. The plaintiffs state pleading that they have suffered damages as a result of the Citizenship and Immigration Canada and Canada Border Services Agency failure:
>
> (a) to identify and take preventative steps because, at the time that the application forms were submitted by Chen and Szeto, Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1);
>
> (b) to take preventative action, including contacting counsel for the plaintiffs, upon receipt of counsel's letter in February 2014 warning that Chen and Szeto were not licensed and may have file false information regarding the plaintiffs;
>
> (c) to refrain from using documents prepared by Chen and Szeto and relying upon "tips" from Chen and Szeto as a part of the basis for investigation and detention of the plaintiffs; and
>
> (d) to refrain from CBSA instructing its Minister's Counsel to rely on documents prepared by Chen and Szeto in submissions at Detention Hearings to continue the detention of the plaintiffs.

[26] Not surprisingly, the Attorney General of Canada moved to strike the Ontario Statement of Claim as it related to CIC and the CBSA on the basis that it disclosed no cause of action and was otherwise frivolous, vexatious and an abuse of the Court process. On the day the motion was to be heard, the Plaintiffs' then counsel (not Mr. Galati) requested and obtained an adjournment based, in part, on an argument that "new facts" had emerged "which inform the Plaintiffs' case against the moving Defendants". Plaintiffs' counsel also advised the Court that he intended to

amend the Statement of Claim. Thrown-away costs were awarded to the Attorney General in the amount of $2,500.00, payable within 30 days.

[27] The Attorney General brought the motion to strike back before the Court on June 17, 2015. Plaintiffs' counsel failed to file any responding material and seems not to have opposed the motion. Indeed, in an apparent effort to avoid the motion to strike, the Plaintiffs filed a Notice of Discontinuance on June 11, 2015. Justice Edward Belobaba described the filing of the Notice of Discontinuance as "improper" and of no effect. He went on to strike the claims against the Attorney General without leave to amend on the following basis:

> The AG Canada's motion to strike St. of Claim as against AG Canada (CIC & CBSA) w/o leave to amend is granted. Unopposed. No reasonable cause of action is created by not investigating s 91 IRPA breaches. Ps have not alleged insufficient legal basis for detention. I agree with and adopt AG's submissions in paras. 35-37, 38-40 and 41-43, 45 and 50 of AG's Factum.

[28] By reference Justice Belobaba adopted the following points from the Attorney General's written arguments:

> 35. There is nothing in *IRPA* that imposes a duty on CIC or CBSA to investigate or take action against anyone who contravenes s. 91 by giving representation or advice in an immigration proceeding or application for consideration.
>
> 36. Similarly, s. 91(9) of *IRPA*, which provides that "[e]very person who contravenes subsection (1) commits an offence..." does not impose any duty on CIC or CBSA to investigate or penalize every person who breaches s. 91.
>
> 37. The Plaintiffs have cited no authority to show any duty on CIC or CBSA to investigate or penalize all persons who may have breached s. 91 of *IRPA*. They have also not pointed to any rationale for imposing such a duty on CIC or

CBSA or indicated how it would be possible or feasible to perform such a duty.

2) No cause of action created by not investigating Ms. Chen and Mr. Szeto

38. The Plaintiffs seem to suggest that CIC or CBSA should have investigated Ms. Chen and Mr. Szeto after the Plaintiffs' counsel wrote letters of January 27, 2014, and February 5, 2014 advising that these persons breached s. 0091. This allegation fails to show any cause of action as the Plaintiffs cannot, by their counsel's letters, create a duty on CIC and CBSA to investigate persons who allegedly breach s. 91(1), where no such duty exists in law.

> Claim, paras 63, 65, 68, 109(b), [Motion Record of the AG]

39. The Plaintiffs have not explained how their counsel's letters could mandate CIC or CBSA to investigate or prosecute Ms. Chen or Mr. Szeto for breaching or allegedly breaching s. 91, absent any legislative duty, court order or other legal requirement to do so.

40. Further, the Plaintiffs do not allege that their detention by CBSA is unlawful, i.e. that there are insufficient legal bases for the detention. As such, they fail to show any reasonable cause of action regarding their detention.

3) Plaintiffs have not alleged insufficient legal basis for detention

Plaintiffs' detention currently based on flight risk

41. The Plaintiffs assert a claim for "Special damages in the amount of $10,000.00 of each day of detention of the plaintiffs by the defendant Canada Border Services Agency", but nowhere in the Claim do the Plaintiffs allege that their detention is unlawful.

> Claim, para 1 (o), [Motion Record of the AG]

42. It seems that the Plaintiffs are seeking damages for time spent in lawful detention. However, this does not give rise to any reasonable cause of action.

43. Further, the Plaintiffs implicitly admit that their detention is lawful, as they assert that "the essence of its [CBSA's]

> current claims against the Plaintiffs" include "the flight risk and misrepresentation issues". While the Plaintiffs say that these "claims" are "in any event, incorrect", they do not indicate any reason why they are not flight risks. In addition, they do not allege that the flight risk issue was caused by Ms. Chen or Mr. Szeto. In fact, their allegations indicate the contrary.
>
> Claim, para 45, [Motion Record of the AG]
>
> ...
>
> 45. The Plaintiffs' allegations indicate that they are foreign nationals who are detained in Canada as flight risks, i.e., being unlikely to appear for examination, an admissibility hearing or removal from Canada. Since they state that "flight risk" is part of the essence of CBSA's claims against them, and flight risk in these circumstances is sufficient for their lawful detention by the Immigration Division, the mere fact that they are detained or that they disagree with the flight risk finding does not create a reasonable cause of action.
>
> ...
>
> 50. As such, the Plaintiffs fail to show any cause of action against the AG (on behalf of CIC or CBSA) regarding their detention, or regarding the use or reliance of alleged incorrect information submitted by Mr. Chen and Mr. Szeto, as the Plaintiffs' allegations indicate that CIC or CBSA relied on information other than that received from Ms. Chen and Mr. Szeto, to lawfully detain them as flight risks, pursuant to *IRPA*.

[29] It is quite clear to me that Justice Belobaba effectively dismissed the Plaintiffs' claims against the CIC and the CBSA alleging a negligent investigation, albeit in relation to specified deficiencies pertaining to the supposed fraudsters, Szeto and Chen. To the extent that the Statement of Claim purported to assert a claim to damages from the Plaintiffs' detention, that, too, was dismissed.

[30] I have some reservations about globally applying abuse of process principles to this motion to strike based on the Ontario Superior Court's dismissal endorsement. That proceeding was supported by a few vague allegations of negligent investigation by unnamed officials in the CBSA and CIC, but the Statement of Claim did not include allegations against the ID Members named in this action nor did it assert that government officials acted or conspired to present false evidence to the Immigration Division for the purpose of harming the Plaintiffs. In addition to the absence of a clear overlap of pleaded issues, it is also not entirely clear what the Ontario Superior Court decided beyond the finding that no cause of action based on an alleged negligent investigation could be made out. It is also of some significance that the Ontario action was dismissed on a motion to strike that was unopposed. Finally, some of the allegations in the Federal Court Statement of Claim post-date the dismissal of the Ontario action. Those after-the-fact allegations cannot be struck based on the argument that a party is required to put its best case forward and cannot selectively plead or split its case. Alleged events that have not yet occurred cannot be reasonably anticipated and pleaded. Given these issues I am not prepared to strike the entire Statement of Claim based on abuse of process by relitigation principles. That is not to say, however, that all of what has been pleaded in this action is permissible in the face of the dismissal of the Ontario action. In my view, the Plaintiffs are not entitled to replead their allegations concerning supposedly negligent investigations by the CBSA, CIC or any of their officials. The Ontario Superior Court found those allegations could not support a viable cause of action and the Plaintiffs are not legally entitled to relitigate that issue in this Court. To do so is an abuse of process: see *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37, [2003] 3 SCR 77. Those allegations are accordingly struck from the Statement of Claim without leave to amend.

[31] There is not much of any substance that remains in the Statement of Claim, and what does remain is devoid of material facts. Prolixity, repetition and the bare pleading of a series of events are not substitutes for the requirement that a defendant know what is being factually and legally alleged so that a proper answer and defence can be stated. What is always required is a recitation of material facts that can support an arguable cause of action. Nevertheless, there are some generalized allegations that CBSA and CIC officials knowingly fabricated a case against the Plaintiffs in order to keep them in custody. In theory, a viable cause of action for misfeasance in public office could arise, provided that there are sufficient material facts pleaded to support it. Here there are none and the remaining portions of the Statement of Claim are struck out for that reason and because what little remains is unintelligible. The Plaintiffs will, however, have leave to file a fresh Statement of Claim provided that it contains sufficient material particulars to support a cause of action for misfeasance in the prosecution of a case for the detention of the Plaintiffs.

[32] These Defendants have been successful on their separate motions and are entitled to their costs which I fix at $3,500.00. These costs are similarly payable jointly and severally by the Plaintiffs within 30 days.

ORDER

THIS COURT ORDERS that these motions are allowed and the Statement of Claim is struck out in its entirety. The action against the Defendants, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Linda Lizotte-Macpherson, President of the CBSA, the Minister of Public Safety and Emergency Preparedness, the Minister of Citizenship and Immigration is dismissed without leave to amend or refile. The Plaintiffs will have leave to refile only in respect of a cause of action framed in accordance with these reasons.

THIS COURT FURTHER ORDERS that the Defendants Oxama M. Kowalyk, Susy Kim and Iris Kohler, shall have their costs in the amount of $5,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

THE COURT FURTHER ORDERS that the remaining Defendants shall have their costs in the amount of $3,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1747-15
STYLE OF CAUSE:	ZHENHUA WANG AND CHUNXIANG YAN v HER MAJESTY THE QUEEN, OXANA M. KOWALYK (ID MEMBER), SUSY KIM (ID MEMBER), IRIS KOHLER (ID MEMBER), OFFICER O'HARA (CBSA OFFICER), HAL SIPPEL, ERIC BLENKARN, ANDREJ RUSTJA, CBSA OFFICERS, ALL JOHN AND JANE DOE CBSA/CIC OFFICIALS UNKNOWN TO THE PLAINTIFFS, INVOLVED IN THE ARREST, DETENTION AND CONTINUED DETENTION OF THE PLAINTIFFS, LINDA LIZOTTE-MACPHERSON, PRESIDENT OF THE CBSA, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, MINISTER OF CITIZENSHIP AND IMMIGRATION, ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 16, 2016
ORDER AND REASONS:	BARNES J.
DATED:	SEPTEMBER 16, 2016

APPEARANCES:

Mr. Rocco Galati	FOR THE PLAINTIFFS
Mr. Jonathan Dawe Mr. Michael Dineen	FOR THE DEFENDANTS OXANA M. KOWALYK (ID MEMBER) SUSY KIM (ID MEMBER) IRIS KOHLER (ID MEMBER)
Mr. Jamie Todd Ms. Ildiko Erdei	FOR THE DEFENDANTS OFFICER O'HARA (CBSA OFFICER) HAL SIPPEL ERIC BLENKARN ANDREJ RUSTJA, CBSA OFFICERS

ALL JOHN AND JANE DOE CBSA/CIC OFFICIALS UNKNOWN TO THE PLAINTIFFS, INVOLVED IN THE ARREST, DETENTION AND CONTINUED DETENTION OF THE PLAINTIFFS
LINDA LIZOTTE-MACPHERSON, PRESIDENT OF THE CBSA
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
MINISTER OF CITIZENSHIP AND IMMIGRATION
ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

Rocco Galati Law Firm Toronto, ON	FOR THE PLAINTIFFS
Dawe & Dineen Toronto, ON	FOR THE DEFENDANTS OXANA M. KOWALYK (ID MEMBER) SUSY KIM (ID MEMBER) IRIS KOHLER (ID MEMBER)
William F. Pentney Deputy Attorney General of Canada	FOR THE DEFENDANTS OFFICER O'HARA (CBSA OFFICER) HAL SIPPEL ERIC BLENKARN ANDREJ RUSTJA, CBSA OFFICERS ALL JOHN AND JANE DOE CBSA/CIC OFFICIALS UNKNOWN TO THE PLAINTIFFS, INVOLVED IN THE ARREST, DETENTION AND CONTINUED DETENTION OF THE PLAINTIFFS LINDA LIZOTTE-MACPHERSON, PRESIDENT OF THE CBSA MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS MINISTER OF CITIZENSHIP AND IMMIGRATION ATTORNEY GENERAL OF CANADA