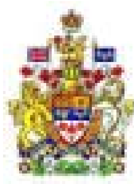
Federal Court of Appeal  Cour d'appel fédérale

Date: 20110610

Docket: A-307-09

Citation: 2011 FCA 198

CORAM: **BLAIS C.J.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

ST. JOHN'S PORT AUTHORITY

Appellant

and

ADVENTURE TOURS INC.

Respondent

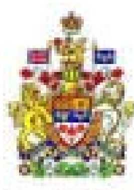
Heard at St. John's, Newfoundland and Labrador, on September 23, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BLAIS C.J.
DAWSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from the order of Justice de Montigny of the Federal Court (2009 FC 746), which dismissed an appeal from the order dated January 5, 2009 of Prothonotary Aalto.

[2] Before Prothonotary Aalto was a motion brought by the appellant, St. John's Port Authority, to strike out virtually all of the statement of claim of the respondent, Adventure Tours Inc. In that

statement of claim, Adventure Tours Inc. claims significant damages against St. John's Port Authority for the tort of abuse of public office.

[3] The issue on appeal in the Federal Court and this Court concerns the requirement under Rule 174 that a party plead material facts in support of the allegations it makes in its pleading. Specifically, in this case, must Adventure Tours plead as a material fact in its statement of claim the identity of the individuals at the Port Authority whose actions are said to constitute an abuse of public office?

[4] In oral argument in this Court, Adventure Tours acknowledged that this Court's recent decision in *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 would likely lead to that question being answered in the affirmative. *Merchant* postdates the orders made by the Federal Court judge and the Prothonotary.

[5] However, Adventure Tours submitted, with great force, that *Merchant* was incorrectly decided and should not be followed.

[6] *Merchant* represents one of the only cases in Canada concerning how the requirement of material facts applies to the tort of abuse of public office, sometimes known as the tort of misfeasance in public office – a notoriously complex tort whose precise elements have only been settled recently: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69.

[7] In order to succeed in its submission that *Merchant* should not be followed, Adventure Tours must establish that it is "manifestly wrong": *Miller v. Canada (Attorney General)*, 2002 FCA 370 at paragraph 10, (2002), 220 D.L.R. (4th) 149. In my view, for the reasons set out below, *Merchant* is not manifestly wrong. It remains authority that binds us.

[8] On the basis of *Merchant*, the statement of claim does not plead sufficient material facts under Rule 174. Therefore, I would allow the appeal with costs and strike out the statement of claim, but with leave to Adventure Tours to amend.

A. The facts

[9] For the purposes of a motion to strike and later appeals, the allegations in the statement of claim, as particularized, are to be taken to as true. The facts in this section of my reasons are taken from the allegations in the statement in claim and have not been proven.

[10] Adventure Tours alleges that the Port Authority caused it $10 million in damages by injuring its tour business in the Port of St. John's, Newfoundland and Labrador.

[11] Adventure Tours has conducted tours of the Port using two boats: *Lukey's Boat* (since 2003) and the *Scademia* (since 1986). The *Scademia* is the last wooden schooner built in Newfoundland and Labrador.

[12] In 1999, the *Scademia* was berthed at a location between Piers 6 and 7 in the Port of St. John's. In that year, the Port Authority decided to develop Pier 7 as a tourism site. It issued a request for proposals for the tourism development. Adventure Tours was the successful proponent.

[13] Almost immediately, relations between Adventure Tours and the Port Authority withered, negotiations between the two stopped, and they parted ways. The Port Authority continued with the tourism development of Pier 7. Adventure Tours openly and publicly criticized the manner in which the Port Authority was carrying out and funding the tourism development.

[14] Several actions and events followed:

(a) The Harbour Master, an employee of the Port Authority, allowed a competitor to berth its tour boat where Adventure Tours' boat, the *Scademia*, normally was (statement of claim, paragraph 16).

(b) The Port Authority leased a kiosk at Pier 7 to Adventure Tours. Adventure Tours anticipated that, as a result, the *Scademia* would be allowed to berth, alone, directly in front of Pier 7, but the Port Authority did not allow this to happen (statement of claim, paragraphs 17-25). Unlike Adventure Tours, in a later year a competitor was able to berth its boat near its kiosk (statement of claim, paragraph 39).

(c) In 2004, the Port Authority assigned the *Scademia* to a berthing place where passenger traffic was obstructed by fences and signs and where there was a smell caused by a sewage outlet (statement of claim, paragraphs 26-28).

(d) In 2005, the Port Authority refused to change the *Scademia*'s berthing place. Later that year, Adventure Tours' lease of its kiosk at Pier 7 was nearing expiration. But the Port Authority's Harbour Master terminated the lease before it expired. After that, the Port Authority advised Adventure Tours that the *Scademia* could be berthed anywhere in the Port except for Pier 7 (statement of claim, paragraph 29) or except for "the two berths immediately east and west of the center boardwalk of the Pier 7 development" (statement of claim, paragraph 30).

(e) Soon afterward, the Port Authority advised Adventure Tours that it would have to pay a passenger levy and enter into a licence agreement. In response, Adventure Tours complained to the Canadian Transportation Agency about the passenger levy. Although the complaint was still outstanding before the Agency, the Port Authority refused to allow Adventure Tours to operate its tour boats until it signed the licence agreement and paid the passenger levy. (See statement of claim, paragraphs 29-32.)

(f) Within two weeks after Adventure Tours complained to the Canadian Transportation Agency about the passenger levy, the Port Authority obtained a detention order against Adventure Tours' two boats. The purported basis for this was Adventure

Tours' failure to pay the passenger levies. The Port Authority obtained the detention order just before the St. John's Day long weekend. (See statement of claim, paragraphs 33-34.)

(g) At one point, while the detention order was in effect, Adventure Tours' principal took the *Scademia* out on a tour of the Port. The Port Authority responded by laying charges against the principal. The charges were later dismissed. (See statement of claim, paragraphs 29-32.)

(h) In the same month as the detention order, Adventure Tours "was forced to execute a lease agreement for one of the small kiosks at Pier 7 because the [Port Authority] had detained [Adventure Tours'] boats" and Adventure Tours had to "return its boats to operation in order to earn income." Other damaging acts are mentioned, including the extended negotiations for a lease and a licence and the construction of a restaurant which blocked access to the *Scademia*. (See statement of claim, paragraphs 36-37.)

(i) In November 2005, Adventure Tours notified the Port Authority that it was going to terminate its lease at Pier 7 for the remainder of the 2005 year but did not wish to give up a renewal right it had for the 2006-2007 seasons. The Port Authority "responded by improperly and duplicitously suggesting" that Adventure Tours did

not want a lease for the 2006-2007 seasons. (See statement of claim, paragraphs 40-41.)

(j) In February 2006, the Port Authority announced a new policy (statement of claim, paragraph 42). This policy had the effect of designating all areas of the Port outside of Pier 7 as restricted, and limiting the number of tour boat operators to three. In doing so, it gave preference to those operators already leasing kiosks at Pier 7. Adventure Tours was not one of them.

(k) Adventure Tours asked the Port Authority for permission to operate *Lukey's Boat* at Pier 7 and to lease a kiosk. However, the Port Authority denied this because Pier 7 had reached capacity. As a result, Adventure Tours was forced to move its boats to Petty Harbour, and this caused it damage. (See statement of claim, paragraphs 45-46.)

(l) A further policy decision by the Port Authority Board in 2007 led to greater restrictions at Pier 7. One of Adventure Tours' competitors became the only tour boat operator at Pier 7. The Port Authority entered into an exclusive contract with that operator without issuing a request for proposals from other operators, including Adventure Tours. (See statement of claim, paragraphs 47 and 50-51.)

(m) In June 2007, Adventure Tours requested that the Port Authority give it access to Pier 7 but the Board of the Port Authority denied the request, invoking two reasons: the fact that capacity at Pier 7 had been reached and Adventure Tours' "overall lease history" with the Port Authority (statement of claim, paragraph 48).

B. The decisions of the Prothonotary and the Federal Court and the standard of review

[15] The Prothonotary found that the statement of claim pleaded sufficient material facts. It supplied the names of two board members and mentioned the conduct of the Harbour Master. It added that further names might emerge during the course of productions and discoveries. On an issue not before us in this appeal, the Prothonotary ordered that references in the statement of claim to subsection 50(1) of the *Canada Marine Act*, S.C. 1998, c. 10, be struck.

[16] On appeal to the Federal Court, the Port Authority raised the issue whether it was incumbent on Adventure Tours to identify in its statement of claim all of the specific individuals alleged to have engaged in misfeasance. It acknowledged that Adventure Tours had named two board members in its pleadings but complained that it had not pleaded any misfeasance on the part of those individuals. Finally, it alleged that the Prothonotary erred by not ordering further and better particulars of the individuals, officers or natural persons alleged to have engaged in deliberate and unlawful conduct.

[17] In his reasons, the Federal Court judge stated that the only issue was whether further and better particulars of the individuals, officers, or natural persons alleged to have engaged in deliberate and unlawful conduct should have been pleaded. He considered that the issue was vital to the determination of the case and exercised his discretion *de novo*, without any deference to the Prothonotary's decision.

[18] In looking at the matter *de novo*, the Federal Court judge appears not to have considered whether Adventure Tours had pleaded sufficient material facts concerning the identity of individuals at the Port Authority. Instead, he regarded the matter as being whether the cause of action of abuse of public office could succeed on the basis of the facts pleaded in the statement of claim. He concluded (at paragraph 23) that "[a]t this preliminary stage, I have not been convinced that the Statement of Claim is bereft of any likelihood of success." However, the main issue before the Federal Court judge was whether the statement of claim was a pleading that complied with the *Federal Courts Rules* by setting out all necessary material facts, including the identity of relevant Port Authority individuals – not whether the tort, as pleaded, was viable.

[19] Both the Prothonotary and the Federal Court judge did not have the benefit of this Court's decision in *Merchant*. *Merchant* was decided later. To some extent, *Merchant* clarified the law concerning the material facts that must be pleaded when asserting the tort of abuse of public office.

[20] In these circumstances, it is appropriate that this Court examine the matter afresh without deference to the decisions below.

C. The tort of abuse of public office

[21] Before analyzing Adventure Tours' statement of claim, I wish to set out the elements of this tort.

[22] As mentioned above, the Supreme Court's decision in *Odhavji Estate*, *supra*, settled the precise essential elements of the tort of abuse of public office.

[23] In setting out the precise essential elements of the tort in *Odhavji Estate*, the Supreme Court tells us that there are two ways in which the tort can be established. The Supreme Court discusses these two ways, and the essential elements associated with them, at paragraphs 22 and 23:

> [22] What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff….It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.
>
> [23] In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff

> proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[24] I would add that extremely lucid and helpful explanations of the requirements of this complex tort, based on *Odhavji Estate*, can be found in *A.L. v. Ontario (Minister of Community and Social Services)* (2008), 83 O.R. (3d) 512 (C.A.) and *O'Dwyer v. Ontario (Racing Commission)* (2008), 293 D.L.R. (4th) 559 (Ont. C.A.).

[25] In order to plead this tort successfully, a plaintiff must cover each essential element of the tort, setting out all material facts (Rule 174), with necessary particularity as to "any alleged state of mind of a person," "wilful default," "malice," or "fraudulent intention" (Rule 181).

[26] Due to the complexity of the tort of abuse of public office and the requirements of pleading, many choose to assert other causes of action against public authorities. But if the tort of abuse of office is to be pleaded, it must be pleaded properly.

D. Analyzing the allegations in the statement of claim pertaining to the tort of abuse of public office

[27] For the purposes of this appeal, the statement of claim under consideration is the statement of claim as it existed following the Prothonotary's order. As mentioned above, the Prothonotary ordered that references in the statement of claim to subsection 50(1) of the *Canada Marine Act*, *supra*, be struck. Adventure Tours did not appeal that. Therefore, I shall analyze the statement of claim with all references to subsection 50(1) of the *Canada Marine Act* deleted.

[28] As I have mentioned in paragraph 8 above, I will be proposing that the appeal be allowed and the statement of claim be struck out, but with leave to amend. I offer comments in this section in the hope that future pleadings motions may be avoided and the action may proceed efficiently. I note that the Prothonotary offered some similar comments in his reasons.

[29] My analysis of the statement of claim shows that, in its present form, it does not plead all of the elements of the tort (see paragraphs 21-26, above) with necessary material facts and particulars, especially on the mental state, knowledge and intentions of the Port Authority. Unless these matters are addressed, this action, which might have merit, will flounder: we will see more pleadings motions, documentary and oral discoveries complicated by objections based on relevance, and an objection-laden trial festooned with delays caused by confusion and uncertainty about what exactly is in issue. To avoid this, Adventure Tours' revised statement of claim should identify each action that is alleged to constitute the tort of abuse of public office and plead, with all necessary material facts and particularity, each essential element of the tort concerning the action. There may be a way

to group certain actions together or to raise the issue of a pattern of conduct, but the requirements of all necessary material facts and particularity concerning all essential elements of this tort must still be met.

[30] Specifically, I would note the following.

[31] In paragraph 55 of the statement of claim, Adventure Tours pleads that a "pattern of decisions" made by the Port Authority and the Port Authority Board constitute the tort. To what decisions does this refer? And what is pleaded concerning the decisions?

[32] The statement of claim identifies only a few "decisions": the Port Authority's decisions to develop Pier 7 (statement of claim, paragraph 12), to limit the number of tour boats operating in St. John's Harbour (statement of claim, paragraph 42), to deny Adventure Tours permission to operate *Lukey's Boat* at Pier 7 (statement of claim, paragraphs 45-46, 50), to reduce capacity at Pier 7 from three boats to one (statement of claim, paragraph 53), and to grant an exclusive contract to Adventure Tours' competitor at Pier 7 (statement of claim, paragraph 53). The only damage resulting from these decisions is said to be business losses in the 2006 tourist season (statement of claim, paragraph 46).

[33] The Port Authority's mental state is pleaded in respect of only some of these decisions:

a. The decision to limit the number of tour boats operating in St. John's Harbour (statement of claim, paragraph 42) is said to have been "intentionally and specifically done…to prevent [Adventure Tours] from being able to operate from [Port Authority] property, and in order to harm [Adventure Tours'] business" (statement of claim, paragraph 43).

b. The decision to deny Adventure Tours permission to operate *Lukey's Boat* at Pier 7 (statement of claim, paragraphs 45-46, 50) is said to have been done with knowledge that this would affect Adventure Tours' ability to earn income (statement of claim, paragraph 45).

c. The decisions to reduce capacity at Pier 7 from three boats to one and to grant an exclusive contract to Adventure Tours' competitor (statement of claim, paragraph 53) are said to have been made "with an express intention of harming [Adventure Tours] by discriminating against [Adventure Tours]" (statement of claim, paragraph 53).

[34] The decision referenced in (a) is said to have been made beyond its capacity and outside of the Act (statement of claim, paragraph 42). The decisions referenced in (c) are said to have been

made for an unlawful purpose (statement of claim, paragraph 53). The decisions referenced in (b) do not appear to be said to be in excess of authority.

[35] As mentioned in paragraph 14 of these reasons, Adventure Tours pleads a number of other actions on the part of the Port Authority. Are some of these meant to be decisions? Or was the word "decision" in paragraph 55 of the statement of claim meant to include these other actions? The answers to these questions are unclear. Certainly, some damage is said to have been caused by some of these actions (see statement of claim, paragraphs 28, 37, 49) and some of them are said to be beyond the Port Authority's jurisdiction (see statement of claim, paragraphs 26, 31, 34), but the main complaint for most of the actions is "undue disadvantage," "discrimination," or "punishment," not damage (see statement of claim, paragraphs 16, 27, 34, 35, 38, 39, 43, 45, and 53).

[36] In paragraph 56 of the statement of claim, Adventure Tours pleads that the "Defendants' [sic] actions" have resulted in "loss of [Adventure Tours'] reputation as a reliable tour boat operator providing superior service in St. John's Harbour" but there is no allegation of specific damage from this. Further, the pleading does not make it clear how all of the actions pleaded in the statement of claim (summarized at paragraph 14 of these reasons, above) could have affected Adventure Tours' reputation.

[37] At various places in the statement of claim, it is said that certain actions (not decisions or possible decisions) done by the Port Authority were done with intention to harm (statement of claim, paragraphs 16, 27, 35, 39, 43 and 51), knowledge that harm might result (statement of claim,

paragraphs 26, 27, 35 and 45), and duplicitousness (statement of claim, paragraph 41). It is unclear as to which branch of the tort of abuse of public office is being pleaded, what "duplicitousness" might mean in the context of this tort, and whether the other elements of the tort are present in respect of each impugned action or decision.

E. Must Adventure Tours plead as a material fact the identity of the individuals whose actions on behalf of the Port Authority are said to constitute an abuse of public office?

[38] The Port Authority properly admits that the tort of abuse of public office can lie against a corporate entity such as itself. It contends, however, that where that tort is alleged against a corporate entity, the pleadings must identify and attribute such conduct to an individual or natural person whose conduct is that of the corporate entity.

[39] There is no doubt that, for the most part, the statement of claim does not do that. The vast majority of the allegations of misconduct in the statement of claim are directed to the Port Authority itself, and not individuals. Only a few allegations concern the Harbour Master and the Board of the Port Authority. Further, in response to a demand for particulars and the order dated May 14, 2008 of Prothonotary Morneau, Adventure Tours identified two Port Authority Board members as having made certain statements or representations to it.

[40] In my view, under the authority of *Merchant*, *supra*, the Port Authority's submissions must be accepted and the statement of claim must be struck.

[41] On this issue, in *Merchant* this Court held as follows:

> [36] The Federal Court also found (at paragraph 23) that the pleading was deficient because the Crown's liability is vicarious (see section 10 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50) and so the identity of the particular individuals who are alleged to have engaged in misfeasance in public office must be named. As noted above, in this case, paragraphs 5 and 12 of the amended statement of claim implicate entire departments and potentially others in the Government of Canada. The pleading fails to identify, with any particularity, the officials allegedly involved in the misfeasance.
>
> [37] In this Court, the respondents submit that plaintiffs pleading this tort must always state the actual name of the individuals who committed the alleged misfeasance. In my view, such a requirement, if applied strictly in every case, would impose too onerous a burden upon plaintiffs in some cases. In addition, it would go beyond the level of particularity necessary to fulfil the purposes of pleadings in civil proceedings.
>
> [38] I do agree that the individuals involved should be identified. The plaintiff is obligated under Rule 174 to plead material facts and the identity of the individual who are alleged to have engaged in misfeasance is a material fact which must be pleaded. But how particular does the identification have to be? In many cases, it may be impossible for a plaintiff to identify by name the particular individual who was responsible. However, in cases such as this, a plaintiff should be able to identify a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible. This might involve identifying job positions, an organizational branch, an office, or a building in which those dealing with the matter worked. Often such information is readily available from the oral and written communications and dealings among the parties that gave rise to the claim. In cases such as this, identification at least at this level of particularity will usually be sufficient. The purposes of pleadings will be fulfilled: the issues in the action will be defined with reasonable precision, the respondents will have enough information to investigate the matter and the respondents will be able to plead adequately in response within the time limits set out in the Rules.

[42] With the exception of the above-mentioned particulars that named individuals on the Board and the references in the pleading to the Board and to the Harbour Master, the pleading does not comply with the standards described in paragraph 38 of *Merchant*.

F. Is *Merchant* to be followed?

[43] This Court is bound by its decision in *Merchant*, *supra*, unless Adventure Tours establishes that it is "manifestly wrong": *Miller*, *supra* at paragraph 10. In my view, *Merchant* is not "manifestly wrong."

[44] Adventure Tours submitted that the tort of abuse of public office, when committed by a corporate entity, does not require proof that a particular person associated with the corporate entity committed acts or had a particular mental state. Accordingly, the statement of claim need not address that issue.

[45] I disagree.

[46] The foremost authority is *Odhavji Estate*, *supra*. In setting out the essential elements of the tort in paragraphs 22 and 23, reproduced above, the Supreme Court repeatedly referred to a "public officer" engaging in the impugned conduct. It could have used the phrase "public authority," but did not.

[47] There are several additional authorities on point.

[48] The omissions and knowledge of the officials of the Banking Supervision Division of the Bank of England grounded the tort of abuse of public office against the Bank of England in *Three Rivers District Council v. Bank of England (No. 3)*, [2001] 2 All E.R. 513. To similar effect is *O'Dwyer*, *supra* at paragraph 51 where the Court of Appeal for Ontario found that the subjective state of mind of Ontario Racing Commission officials gave rise to liability.

[49] In *A.L. v. Ontario*, *supra*, the Court of Appeal for Ontario held that the amended statement of claim failed to plead facts sufficient to satisfy the requirements of the tort of abuse of public office. In words apposite to the statement of claim in this case, the Court observed (at paragraph 37) that the "pleading makes bald allegations that recite the basic elements of the tort in very general terms" but "fails to provide material facts sufficient to demonstrate an intentional wrongdoing *by a specific public officer*" [emphasis added].

[50] In *Longley v. Canada (M.N.R.)*, 2000 BCCA 241, the British Columbia Court of Appeal found that Revenue Canada committed abuse of public office by not being honest when it gave advice to the plaintiff. That conclusion was grounded on findings made by the British Columbia Supreme Court concerning the actions and knowledge of several senior civil servants with Revenue Canada: (1999), 99 D.T.C. 5549.

[51] *Price v. British Columbia*, 2001 BCSC 1494 at paragraph 15 stands for the proposition that "the pleading must be clear as to which office-holder has the necessary intention" and this holding was approved in *B.K.Tree Services Ltd. v. British Columbia (Hydro and Power Authority)*, 2002 BCSC 1432 at paragraph 37.

[52] In *Barbour v. U.B.C.*, 2006 BCSC 1897 at paragraph 45, the British Columbia Supreme Court stated that "[a] party alleging the tort must identify the individuals who engaged in the deliberate and unlawful conduct." The statement of claim was deficient because it failed to make allegations against the governing Board or its individual members.

[53] Finally, in *Jones v. Swansea City Council*, [1990] 3 All E.R. 737, the House of Lords found that the plaintiff would have had a good cause of action against the council for misfeasance in public office if she had alleged and proven that a majority of the councillors present, having voted for the resolution, had done so with the object of damaging her. In the Court of Appeal in *Jones v. Swansea City Council*, [1989] 3 All E.R. 162, Slade L.J considered the essence of this tort to be that "*someone*" holding public office "misconducted *himself*" by purporting to exercise powers "which were conferred on *him* not for *his personal advantage* but for the benefit of the public" with the "intent to injure or in the knowledge that *he* was acting" beyond his power (at page 175, emphasis added).

[54] At the level of legal theory, it makes sense that the particular public officer engaging in the conduct must be pleaded. Corporate entities and public authorities are artificial entities. To the

extent they act, they act through individuals. To the extent they have mental states, the mental states derive from human beings that are associated in some way with them. As Viscount Haldane put it in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 at 713 (H.L.):

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.

[55] Lord Denning put it this way in *H. L. Bolton (Engineering) Co. v. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159 at page 172:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.

[56] The classic authority in Canada on this point is *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662. There, Estey J., writing for the unanimous Supreme Court, held that the mental state of the corporation can be found in “the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation” (at page 693).

[57] In *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497, Iacobucci J., writing for the majority of the Supreme Court, commented on Estey J.'s judgment in *Canadian Dredge & Dock*, *supra*, as follows (at pages 520-521):

> As Estey J.'s reasons demonstrate, the focus of inquiry must be whether the impugned individual has been delegated the "governing executive authority" of the company within the scope of his or her authority. I interpret this to mean that one must determine whether the discretion conferred on an employee amounts to an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy. In other words, the courts must consider who has been left with the decision-making power in a relevant sphere of corporate activity.

[58] It is not every person employed by a corporate entity who will "count" for the purposes of the tort of abuse of public office. This suggests that it is not enough simply to plead that a public authority, agency, or, in the case of *Merchant*, "government" engaged in the impugned conduct.

[59] At the hearing of this appeal, Adventure Tours forcefully submitted that *Merchant* was wrong and should not be followed because it places too great a burden on plaintiffs who are attempting to assert the tort of abuse of public office. In its view, governments and other public authorities who have engaged in wrongdoing will be immunized from liability for this tort because of the overly strict pleadings requirement imposed by *Merchant*.

[60] I disagree for two reasons.

[61] First, *Merchant* does not impose pleadings requirements that will stop plaintiffs from asserting genuine claims. It is true that *Merchant* requires that a statement of claim asserting this tort must identify the individuals who "count" for the purposes of this tort. But *Merchant* makes it clear that names are not necessarily required. As said in *Merchant* (at paragraph 38), it may suffice to plead a "particular group of individuals who were dealing with the matter," "job positions," an "organizational branch, an office, or a building in which those dealing with the matter worked." This information is usually "readily available from the oral and written communications and dealings among the parties that gave rise to the claim." In cases such as the case at bar, there have been many communications and dealings and so there should be little practical difficulty in satisfying this requirement.

[62] My second reason for rejecting Adventure Tours' submission that *Merchant* places too great a burden on plaintiffs is that *Merchant* identified a competing policy consideration:

> 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.).

[63] In my view, it was not "manifestly wrong" for this Court in *Merchant* to be mindful of this policy concern and insist that the requirement to plead material facts be followed, without any

relaxation, for the tort of abuse of public office. The concern in *Merchant* was that it is all too easy for a plaintiff who is aggrieved by governmental conduct to assert, perhaps without any evidence at all, that "the government" acted, "knowing" it did not have the authority to do so, "intending" to harm the plaintiff. Such a bald and idle assertion is insufficient to trigger the defendant's obligation to file a defence, let alone its later obligation to disclose its documents and produce a witness for examination in discoveries. The price of admission to documentary and oral discoveries is the service and filing of an adequately particularized pleading that asserts all of the essential elements of a viable cause of action.

[64] Therefore, in my view, *Merchant* is not "manifestly wrong" within the meaning of *Miller*, *supra*. It binds this Court in this appeal.

G. Conclusion and proposed disposition

[65] As the statement of claim does not comply with *Merchant*, it is insufficient and must be struck.

[66] I would allow Adventure Tours the opportunity to file a fresh statement of claim that complies with the guidance in these reasons, and, in particular, with the requirements of Rules 174 and 181. In my view, the allegations in the statement of claim suggest that it may be possible for Adventure Tours to plead all of the elements of this complex tort properly and it should be given another chance to do so.

[67] Therefore, I would allow the appeal, set aside the order of the Federal Court, and strike the statement of claim, with leave to Adventure Tours to file a fresh statement of claim. I would grant the Port Authority its costs here and below.

"David Stratas"

J.A.

"I agree
Pierre Blais C.J."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-307-09

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE de MONTIGNY DATED JULY 23, 2009, NO. T-247-08

STYLE OF CAUSE:	St. John's Port Authority v. Adventure Tours Inc.
PLACE OF HEARING:	St. John's, Newfoundland and Labrador
DATE OF HEARING:	September 23, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Blais C.J. Dawson J.A.
DATED:	June 10, 2011

APPEARANCES:

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