SUPREME COURT OF NOVA SCOTIA
Citation: *Kasheke v. Canada (Attorney General)*, 2017 NSSC 61

Date: 2017/03/08
Docket: Hfx. No. 434273
Registry: Halifax

Between:

Rev. Dr. Abella Ezra Kasheke

Plaintiff

v.

Attorney General of Canada

and

Mr. John Baird, Minister of Foreign Affairs

Defendant

Decision

Judge:	The Honourable Justice Arthur J. LeBlanc
Final Written Submissions:	March 3, 2017
Counsel:	Rev. Dr. Ezra Abella Kasheke, Self-Represented Melissa A. Grant, for the Defendants

By the Court:

Introduction

[1] This is a motion for summary judgment on pleadings, pursuant to *Civil Procedure Rule* 13.03. The defendants also rely on *Rule* 88, which governs abuse of process.

Background

[2] The plaintiff filed the Statement of Claim on December 9, 2014. The Answer to Demand for Particulars was filed on May 5, 2015. The Answer includes various attachments which amount to evidence, and which I have not considered on the pleadings motion.

[3] The plaintiff's pleadings include allegations of breaches of ss. 6, 7, and 12 of the *Canadian Charter of Rights and Freedoms*; references to the *Criminal Code*; and allegations of negligence, breach of fiduciary duty, conspiracy, and other more novel claims, such as abandonment to torture and failure to evacuate. The pleadings also appear to allege misfeasance in public office.

[4] The defendants seek an order setting aside the Statement of Claim without leave to amend, pursuant to *Rule* 13.03 or *Rule* 88. Alternatively, they request that the Statement of Claim be struck, and the plaintiff be required to seek leave of the court to file an Amended Statement of Claim. In the further alternative, they seek an order pursuant to *Rules* 35.01(c) and 35.07 removing "John Baird, Minister of Foreign Affairs" as a defendant. In the final alternative, they request an order extending the time for serving and filing a Statement of Defence, pursuant to *Rule* 2.03.

The pleadings

[5] The Statement of Claim alleges that the plaintiff was the victim of a form of identity theft while in Tanzania, and that after commencing legal proceedings against those he believed to be responsible, he was subject to various forms of physical attack, including assaults, attempted shootings, poisoning, car chases, damage to his vehicles, attempted strangulation, and phone tapping, among other things. The plaintiff says the Tanzanian police did nothing to assist him and in fact, suggests that police officers were among his antagonists. He alleges that Canadian

government officials failed to shelter or rescue him, leading to various harm and damages.

[6] The plaintiff states in the Statement of Claim that he is “a Canadian citizen of Congolese origin” who immigrated to Canada in 1989 from Tanzania, where he had been a refugee (para. 3). In March 2010, he travelled to Dar-es-Salaam, Tanzania, in order to take delivery of several buses, with which he intended to set up a business in order to generate income for certain religious and charitable initiatives. On his arrival in Dar-es-Salaam, however, he met a number of obstacles in taking possession of the buses and setting up a new business, which ended up embroiling him in litigation against a company that he claimed was using his name on its buses without his authorization. He therefore overstayed his original departure date in late May 2010. By the fall of 2010 he had obtained two buses and set up a company to operate them. Around this time he also became aware that another company was using his name, raising the possibility of liability on his part in the event of accidents. The police in Dar-es-Salaam advised him to retain a lawyer, which he did. The ensuing litigation required him to put up local property, owned by his wife, as “surety” to ensure he remained in the country.

[7] The Statement of Claim goes on to allege that “a systematic plan to cripple the plaintiff financially was under way beginning from April 2011.” He says the company he accused of stealing his identity organized a harassment campaign, including damaging his company’s buses so that he had to “depend on friends for accommodation and food” (para. 24). The campaign the plaintiff alleges was waged against him included “direct poisoning, indirect poisoning, and frontal attempts to kill the plaintiff physically” (para. 25). The basis for the poisoning claim appears to be various bouts of physical illness he suffered, which he attributed to the effects of food and drink he received from acquaintances. He also claimed that on several occasions he found substances in or on his car that he believed to be “poison”, and that his medication was poisoned. He says he was chased by cars and shot at, and that his tormentors tried to strangle him. He attributed his malfunctioning car to deliberate damage. He believed that at least one of his antagonists was a police officer, and claims the police threatened him when he complained (paras. 25-45).

[8] Around 18 November 2011, the plaintiff says, his Canadian passport was stolen. On 30 November, he went to the Canadian embassy in Dar-es-Salaam, where he met an Administrative and Consular Assistant, Asha Mjaidi, to whom he told his story. She informed him that the embassy did not “pay airfare for stranded

people" and that the embassy did not host "stranded Canadians" (para. 51). She gave him the documents necessary to replace his passport. However, the plaintiff's passport was returned several days later. He returned to the Embassy in March 2012, "two days after he escaped being shot." On this occasion, he states Ms. Mjaidi told him to write a letter addressed to the Tanzanian Foreign Minister, which the embassy would submit with a cover a letter. He did so (para. 51).

[9] The plaintiff states that the campaign against him continued, but each time he went to the embassy he was told that the embassy could not help him, and was advised to leave the city for the interior of the country; to go there, he asserts, would have meant "sudden kidnapping and death…" In August 2012, he returned to the embassy with a request for laboratory testing of the "poison" found in his car. He says Ms. Mjaidi was not pleased to see him and only after he insisted, would she agree to pass on a letter from the Tanzanian criminal investigation authorities requesting the laboratory testing to senior personnel (paras. 52-53). "At the point," he states, the plaintiff "wondered if any of his letters made it past [Ms. Mjaidi] or if they did, whether it was the responsible Canadian officials who decided he could not receive any help from the Embassy" (para. 54).

[10] The plaintiff subsequently asked his wife to contact the Department of Foreign Affairs in Ottawa, which apparently led to his lawyer in Dar-es-Salaam being contacted to tell him that the embassy was looking for him; the plaintiff at this time had "turned off his phones" because he believed they were being sued to monitor his movements and "decided not to venture outside the gate" of the house where he was staying (para. 55). On 25 October 2012, he met Dominique Lombard, who was Canadian Vice-Consul, who told him that the Embassy could not accommodate him and that as he was there on private business, it was his responsibility to arrange for his own return to Canada. She did ask him, however, to write a letter that could be advanced to the Tanzanian Police, which he did (para. 57).

[11] The plaintiff also e-mailed the defendant John Baird, then Minister of Foreign Affairs, but received no reply. Several months later, he wrote again and received a reply from Diane Ablonczy, Minister of State for Foreign Affairs Responsible for Consular Affairs, who encouraged him to "wind down his affairs in Tanzania and return to Canada" (para. 59). At some point, apparently after this he says, he was summoned to the embassy by Ms. Lombard, who urged him to leave the country quickly. He told her that he did not have the money to leave "and that he wanted to attend the mediation for his case in the hope that he would be

adjudged to receive compensation to enable him to pay his way out" (para. 60). The response from Ms. Ablonczy came after this.

[12] The plaintiff ultimately left Tanzania on 2 March 2013, after his lawyer gave him money for a plane ticket (para. 63).

[13] The plaintiff goes on to allege that embassy officials left him in "mental confusion and trauma on account of giving him false and impractical solutions to his plea for help to find safety" (para. 69) and prevented him "from seeking consular help from other Embassies that are friendly to Canadians, like the Danish Embassy" (para. 70). This last allegation apparently relates to a suggestion the plaintiff made to his lawyer that he should seek protection at the Danish Embassy, to which his lawyer said that "such a step would bring much shame to Canada" (para. 63).

[14] The plaintiff alleges that it was "because of the colour of his skin that the Canadian Embassy officials in Tanzania disregarded and refused to meet him in person, until his Tanzanian lawyer pushed for this to happen." He alleges that Ms. Mjaidi "constantly used her position to enforce his denial of access…" (para. 75).

[15] The plaintiff alleges that embassy officials refused to evacuate him because of his skin colour, and that they gave him "false and cunning" advice designed to obstruct him from being evacuated to Canada (paras. 99-100). He says the embassy refused to provide him with shelter, leaving him afraid he would never get back to Canada.

[16] The plaintiff pleads that the denial of "temporary safe haven" violated his rights under ss. 7 and 15 of the *Charter of Rights and Freedoms*. He further states that the failure of the former Minister of Foreign Affairs, the defendant John Baird, and consular officials to assist him in getting out of Tanzania violated his right to "essential assistance" from his state and its consular officials, which he says is contrary to ss. 7 and 12 of the *Charter*, as well as "rules of international law." Generally speaking, he alleges that the failure of consular officials to protect him or evacuate him violated his s. 7 rights (paras. 102-106). He further maintains that the right to enter and leave Canada guaranteed by s. 6 of the *Charter* entitled him to "emergency rescue as a Canadian citizen in distress" (para. 113).

[17] The plaintiff also asserts what appears to be a claim of misfeasance in public office against Mr. Baird, who allegedly facilitated "unlawful acts of torture" that the plaintiff says he experienced, despite being "well aware" of the plaintiff's right

to “an emergency one-way rescue air ticket to evacuate him from danger” after his original return ticket had expired (para. 119).

[18] The plaintiff also alleges that embassy staff intentionally inflicted mental suffering on him by refusing to “provide shelter to a Canadian whose life was in danger.” He adds that the failure to provide “safe-haven” was an act of “segregation and racism” (paras. 135-136). He also alleges breach of fiduciary duty and violation of the *Universal Declaration of Human Rights* (paras. 137-141).

[19] The plaintiff also alleges negligence by the Attorney General in putting in charge of his situation a consular official who was a Tanzanian national, who he alleges was used by the Tanzanian police to advance the plot against him. He says that even if there is no general duty of care to Canadians overseas, there should be a duty of care in these circumstances due to “clear attempts to kill him” (para. 142).

[20] The pleadings go on to allege that after returning to Canada, the plaintiff and his family were subject to an ongoing campaign of attacks and intimidation by secret agents on behalf of the Tanzanian state who had, among other things, stalked and harassed him and his family, broken into and vandalized his home, and hacked his e-mail account. He says the Halifax police have not assisted him (paras. 120-134). In his written submissions, the plaintiff announces that he has concluded that in fact the people “hunting” him and his family in Canada must be Canadian, not Tanzanian secret agents.

[21] The plaintiff also alleges consequential financial and business losses, “personal” damages (apparently general damages), and punitive and aggravated damages (paras. 143-153).

The applicable law

[22] *Civil Procedure Rule* 13.03 governs summary judgment on pleadings. It provides:

> 13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;

> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[23] The motion must be determined entirely on the basis of the pleadings; no evidence may be adduced: *Rule* 13.03(3). The judge may adjourn the motion pending a motion to amend the pleadings: *Rule* 13.03(4). Pursuant to *Rule* 13.03(5), the judge is permitted to determine a question of law if satisfied that:

> (a) the allegations of material fact in the pleadings sought to be set aside provide, if assumed to be true, the entire facts necessary for the determination;
>
> (b) the outcome of the motion depends entirely on the answer to the question.

[24] The forms of summary judgment on pleadings are set out at *Rule* 13.03(2):

> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
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> (a) judgment for the party making a claim, when the statement of defence is set aside wholly;
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> (c) allowance of a claim, when all parts of the statement of defence pertaining to the claim are set aside;
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.

[25] The defendants also submit that the statement of claim could be struck as an abuse of process, pursuant to *Civil Procedure Rule* 88. Pursuant to *Rule* 88.02(1)(e), a "judge who is satisfied that a process of the court is abused" may strike or amend a pleading. The judge may also issue an injunction preventing a party from taking a further step in the proceeding without a judge's permission, or "any other injunction that tends to prevent further abuse": *Rules* 88.02(1)(g) and (h). The defendants acknowledge that an unsustainable pleading is not an abuse of process for that reason alone: see *Rule* 88.03(1). However, they maintain that certain aspects of the pleadings are scandalous, frivolous, or vexatious, and could therefore fall under *Rule* 88 as *well* as Rule 13.

[26] The law applicable on a pleadings motion such as one under *Rule* 13.03 has been addressed on many occasions. It was recently summarized by the Court of Appeal in *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21, [2016] N.S.J. No. 106, where Fichaud J.A. said, for the court:

21 Rule 13.03(3) says no affidavit is receivable for or against the motion, which must be determined solely on the pleadings.

22 Summary judgment on the pleadings clears the docket of claims or defences that are bound to fail. It neither blunts the analysis of a difficult legal question through oversimplification, nor stifles the evolution of legal principle. Not every question may be isolated for legal scrutiny. A point that turns on its factual context has elements of mixed fact and law. Unless the factual component is clear and complete in the pleaded allegations that are assumed under Rule 13.03, that point is not for summary judgment on the pleadings. The Rules offer other avenues that include a motion for summary judgment on the evidence under Rule 13.04 and an application hearing under Rule 6, in appropriate cases, or trial. I refer to the following authorities.

23 In the seminal ruling of *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Justice Wilson for the Court said:

> 18 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: ... [citations omitted].

24 Recently, in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 18, the Chief Justice for the Court said it was "useful to review the purpose of the test and its application", then continued:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
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> ...
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> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. ... [citing *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) and *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.)] Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

25 This Court has said that a motion for summary judgment on the pleadings succeeds only if the responding party's claim or defence is "certain to fail" because it is "absolutely unsustainable", i.e. it is "plain and obvious" that it

> "discloses no cause of action or defence". *Cragg v. Eisener*, 2012 NSCA 101, para. 9, and authorities there cited; *Cape Breton v. Nova Scotia*, [2009 NSCA 44], para. 21.

[27] The requirement to assume the truth of facts pleaded is not unqualified. The Supreme Court of Canada noted in *Imperial Tobacco* that "[a] motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven": para. 22. Further, it has been held that bald allegations in the nature of bad faith, malice, and abuse of power do not constitute material facts for pleading purposes unless they are particularized: see, for instance, *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184, [2010] F.C.J. No. 898, at paras. 34-38; *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198, [2011] F.C.J. No. 875, at paras. 25-26 and 63. This principle is also recognized in *Civil Procedure Rule* 38.03(3), which provides that "[a] pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice."

[28] The plaintiff is not necessarily required to plead the precise legal characterization of a claim; as Stratas J. said, for the majority, in *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2015] F.C.J. No. 399, "plaintiffs who choose to use a particular legal label are not struck out just because they chose the wrong label": para. 113.

The causes of action

[29] The defendants' position as to the pleadings as a whole is that the facts pleaded, "no matter how much they are expanded upon or how much the Plaintiff believes he was harmed, do not result in a viable claim at law within the jurisdiction of a Canadian provincial superior court." The defendants argue that there is no statutory or common law duty for the Canadian state to protect or rescue Canadian citizens overseas. They further submit that in addition to the lack of a positive duty, there are no material facts pleaded that could support a conclusion that Canadian officials "conspired with foreign officials to violate the fundamental rights of a citizen": see *Khadr v. Canada*, 2014 FC 1001, [2014] F.C.J. No. 1096, at para. 13.

[30] The essence of the plaintiff's claim appears to be that when he found himself in distress in Tanzania – and particularly, he claims, the subject of a campaign of fraud, harassment, and attempted murder – as the result of acts allegedly

perpetrated by Tanzanian individuals, businesses and government figures, the Federal Crown was obliged to provide him refuge and to evacuate him. At the least, he appears to be saying, the Crown was obligated to provide him with air fare back to Canada. The failure to do so, he alleges, led to physical, mental and financial harm, both in Tanzania and in Canada, after his return.

[31] As the Attorney General points out, this was not a situation where the plaintiff was without his passport and needed consular services to regain it. It is also apparent from the pleadings that during a good deal of the time period in question, the plaintiff in fact did not want to leave Tanzania, as he was involved in a legal proceeding against some of his alleged antagonists that he wanted to resolve. For instance, on one occasion when he says officials encouraged him to leave Tanzania, he said he wanted to stay in the hopes of success in mediation (see statement of claim at para. 60).

[32] The defendants have itemized the asserted causes of action. Some, such as "refusal to extend consular services", do not appear to comprise claims at law, but may be subsumed within other causes of action. I will consider the causes of action in turn.

[33] ***Charter violations, "human rights violations", and Criminal Code offences.*** The Attorney General submits that the *Charter* generally does not apply to Canadian officials abroad, except where they violate Canadian international human rights obligations. In *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] S.C.J. No. 28, the Federal Court of Appeal held that the plaintiff, a Canadian detainee in Guantanamo Bay who was interviewed by Canadian intelligence officers while detained, would have been entitled to full disclosure respecting the charges against him had the interviews occurred in Canada. The Supreme Court of Canada said:

> 17 The government argues that this constituted an error, because the Charter does not apply to the conduct of Canadian agents operating outside Canada. It relies on *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, where a majority of this Court held that Canadian agents participating in an investigation into money laundering in the Carribean were not bound by Charter constraints in the manner in which the investigation was conducted. This conclusion was based on international law principles against extraterritorial enforcement of domestic laws and the principle of comity which implies acceptance of foreign laws and procedures when Canadian officials are operating abroad.

> 18 In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the Charter, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at paras. 51, 52 and 101, per LeBel J.). The Court further held that in interpreting the scope and application of the Charter, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, per LeBel J.).
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> 19 If the Guantanamo Bay process under which Mr. Khadr was being held was in conformity with Canada's international obligations, the Charter has no application and Mr. Khadr's application for disclosure cannot succeed: *Hape*. However, if Canada was participating in a process that was violative of Canada's binding obligations under international law, the Charter applies to the extent of that participation.

[34] In a second decision in the *Khadr* case, at 2010 SCC 3, [2010] 1 S.C.R. 44, the court added, at para. 14:

> As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the Charter. International customary law and the principle of comity of nations generally prevent the Charter from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, per LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 461, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, per LeBel J.; *Khadr 2008*, at para. 18.

[35] The Attorney General submits that there are no material facts pleaded that could support the finding that any Canadian official acted in concert with a foreign government to harm the plaintiff. Further, the defendants say, the pleadings do not make out breaches of the plaintiff's constitutional rights.

[36] With respect to s. 6(1) of the *Charter*, it states only that "[e]very citizen of Canada has the right to enter, remain in and leave Canada." Nothing in the pleadings asserts that the plaintiff was denied passport services, or otherwise prevented by acts or omissions of the consular staff from being able to enter, remain in, or leave Canada. The plaintiff suggests that this provision entitled him to be repatriated at state expense, but there is no authority to suggest that this is a duty, nor is it implicit in the language of the provision.

[37] Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 12 provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." Nothing in the pleadings suggests that the defendants arrested, punished, or detained the plaintiff, or that they acted in concert with a foreign government to do so.

[38] I agree with the submissions of the Attorney General. Canadians abroad are subject to the laws of the countries they find themselves in, unless the exception identified in *Khadr* applies. Nothing in the pleadings could support a finding of "Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms", as the Supreme Court of Canada put it in *Khadr (2010)*. The plaintiff describes attempts by Embassy officials to make representations on his behalf with certain officials, such as the Tanzanian foreign minister. He makes various speculative allegations about the state of mind of the officials involved. The pleading does not assert material facts that would support Canadian participation in, or encouragement of, the various schemes against him that he describes.

[39] The pleadings appear to advance alleged *Criminal Code* violations as a basis for the civil claim against the Federal Crown. The Attorney General cites the comments of Rooke A.C.J. in *A.N.B. v. Alberta (Minister of Human Services)*, 2013 ABQB 97, [2013] A.J. No. 258, to the effect that:

> Criminal and civil law are different schemes, intended to meet different objectives. A.N.B. has no right to prosecute or enforce criminal prohibitions - that authority belongs solely to the state and its delegates - though he has a limited right to initiate a criminal proceeding via *Criminal Code*, s. 504. If A.N.B. wishes to seek a monetary award of damages then he may sue based on breach of civil obligations, for example contract and tort.

[40] I agree that the *Criminal Code* is not a source of any private law duty in these circumstances, even if material facts were pleaded to support the allegations.

[41] The pleadings also cite certain international treaties and conventions, such as the *Universal Declaration of Human Rights*, but the law similarly does not support these as a source of a private law duty: *Scott v. Canada (Attorney General)*, 2013 BCSC 1651, [2013] B.C.J. No. 1973, at paras. 176 and 178; *Greene v. New Brunswick*, 2014 NBQB 168, [2014] N.B.J. No. 335, at paras. 172-176.

[42] ***Negligence.*** The elements of the tort of negligence have been framed in various ways, but generally what must be established are (1) the existence of a duty of care, (2) a breach of that duty, and (3) damage caused by the breach: see, for instance, *Ketler v. Nova Scotia (Attorney General)*, 2015 NSSC 170, [2015] N.S.J. No. 241, at para. 276, affirmed at 2016 NSCA 64.

[43] The defendants maintain that no duty of care existed in the circumstances. The determination of whether a duty of care exists is a question of law. Determining whether the Canadian government and its officials owe a duty of care to citizens abroad requires application of the "*Anns*/*Cooper*" analysis set out in a line of Supreme Court of Canada decisions. The majority put it in the following terms in

> 20 The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80, at para. 9; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at paras. 47-50; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18, at para. 47.)

[44] The plaintiff's claim does not fall within a category where a duty of care has been recognized in the past. Accordingly, a duty of care analysis is required to determine whether a new duty of care should be imposed: *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] S.C.J. No. 77, at paras. 12-13.

[45] It is for the plaintiff to demonstrate that the relationship between him and the defendants discloses "sufficient foreseeability and proximity to establish a *prima facie* duty of care."

[46] The defendants say neither the relationship between the plaintiff and the consular officials, nor that between the plaintiff and the Minister, establishes the conditions for a *prima facie* duty of care. Courts are not quick to impose common law duties of care on officials acting in an administrative decision-making capacity on behalf of the public: see, for instance, *Edwards*; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] S.C.J. No. 38. In this case, the officials the plaintiff had contact with were carrying out their consular duties. As the defendants

point out, liability is possible in such circumstances if the plaintiff can establish bad faith or that the officials operated beyond their authority: see, for instance, *Roncarelli v. Duplessis*, [1959] SCR 121, at 140-143. The pleadings do not provide particulars of the alleged malice. Rather, they convey the plaintiff's own views and speculations as to the motives and actions of the officials in question, as well as the Minister.

[47] The defendants note that where the defendants are governed by statute, the statute will be relevant to the determination of whether proximity exists; as the British Columbia Court of Appeal said in *Bergen v. Guliker*, 2015 BCCA 283, [2015] B.C.J. No. 1281, "the governing statute can: (i) create a relationship of proximity; (ii) negate a relationship of proximity; or (iii) be neutral": para. 79. Neither the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, nor the *Consular Fees (Specialized Services) Regulations*, SOR/2003-30, support the existence of a consular duty to evacuate a citizen, or to provide "safe haven." More broadly, they do not provide any support for the view that the Canadian government owes a *prima facie* duty care to citizens abroad.

[48] As for the now-repealed *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22 – which was in force until June 26, 2013 – the Attorney General points out that, while it assigned various specific duties to the Minister (see s. 10), it did not remove the Crown prerogative over the conduct of foreign relations and consular affairs: *Khadr* (2010) at para. 35. Section 10 was preserved in substance in s. 10 of the successor legislation, the *Department of Foreign Affairs, Trade and Development Act*, S.C. 2013, c 33.

[49] Accordingly, I do not see any basis upon which to find that a *prima facie* duty of care in negligence would exist.

[50] Even if a *prima facie* duty of care were found to exist, the defendants say, there are residual policy considerations which should negate or limit it at the second stage of the analysis. It is the defendants' burden to establish a policy basis for negating the duty.

[51] The defendants submit that a duty of care of the kind asserted by the plaintiff would be simply untenable in the operational context of diplomatic relations with sovereign states. As noted earlier, Canadians in foreign states are subject to the laws of those countries, and cannot assert Charter rights, unless the Canadian government has been complicit "in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights

norms": *Khadr* (2010) at para. 14. To assert a broader duty to shelter or rescue Canadian citizens would further raise the potential of conflict with the principles of international customary law and the law of comity between states. Put simply, Canada cannot assert the primacy of its laws over the domestic laws of another country so as to (for instance) rescue a Canadian citizen who is subject to a domestic legal proceeding in that country.

[52] The Attorney General further argues that to find the duty claimed would raise the possibility of indeterminate liability. Counsel notes that "[a]t any given time, there may be many thousands of Canadian citizens, including those with dual citizenship, residing and travelling outside of Canada; many hundreds of Canadians are imprisoned in foreign jurisdictions every year. There is always the potential for natural disasters, civil emergencies and wars…"

[53] I am satisfied that even if there were grounds for a *prima facie* duty of care, there are compelling policy grounds that would negate it. At any given time, numerous Canadians are outside Canada on private business or travel with no connection to the Canadian government. Their movements and activities are generally their own choice. To recognize a duty in negligence law to protect or evacuate Canadians who find themselves in private difficulties – including situations in which they claim to fear for their lives or safety – would have the potential of leading to almost limitless demands for such measures. It would also place Canadian diplomatic staff in a position of asserting a duty to defy the domestic legal systems of the countries in which they serve, if a Canadian citizen demands protection from (for instance) a local legal proceeding or other entanglement.

[54] According, I conclude that no duty of care exists in these circumstances. I emphasize that this finding in negligence law is a distinct matter from situations where the relevant Canadian officials have actually acted (for instance) with malice; it is also distinct from public law duties under statutory authority, which may lead to proceedings in administrative law.

[55] ***Breach of fiduciary duty.*** The defendants go on to argue that the plaintiff's claim for breach of fiduciary duty is likewise certain to fail. The requirements to establish a breach of fiduciary duty are well established. The alleged fiduciary must have "scope for the exercise of some discretion or power"; secondly, the fiduciary "can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests"; and finally, the beneficiary must be

"peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power": see, e.g., *Walsh v. Atlantic Lottery Corp. Inc.*, 2015 NSCA 16, [2015] N.S.J. No. 56, at para. 11. As the defendants point out, absent an agreement, any such obligation would need a basis in the statute. I note the comments by the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] S.C.J. No. 24: [PARAS 30-36]

> 30 First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary: *Galambos*, at paras. 66, 71 and 77-78; and *Hodgkinson*, per La Forest J., at pp. 409-10. As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."
>
> 31 The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.
>
> 32 The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. As stated in Galambos, at para. 77:
>
> > The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. [Emphasis added in *Elder Advocates*.]
>
> 33 Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui qui trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.
>
> 34 Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.

> 35 In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an ad hoc duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.
>
> 36 In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in Frame: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[56] The Attorney General submits that the material facts pleaded do not assert either an undertaking or a statutory basis for a fiduciary duty. I agree. I see nothing in the relevant legislation to suggest that such a duty exists in these circumstances, and no undertaking given to the plaintiff is alleged that would support that conclusion. As for the alternative of an *ad hoc* duty, there is similarly nothing in the pleadings to support such a finding. According to the pleadings, the consular officials the plaintiff dealt with made it utterly clear from the first meeting that there would be no shelter or rescue available through the embassy.

[57] ***Intentional infliction of mental distress.*** The elements of this tort are set out as follows in *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280, [2014] N.S.J. No. 412, at para. 99, citing *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, [2002] O.J. No. 2712 (Ont. C.A.), at para. 48:

> A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness...

[58] The material facts pleaded can support a finding that trauma or illness were caused by foreign agents or individuals, acting in foreign territory. Any allegations in the pleadings respecting the conduct or intentions of the defendants is merely speculation as to state of mind, and therefore insufficient to make out the necessary material facts.

[59] ***Misfeasance or abuse of public office.*** The elements of this tort are set out in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] S.C.J. No. 74: “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" (para. 23). It must be emphasized that a "bald and idle assertion" that the government acted in the knowledge that it lacked authority and that harm to the plaintiff was intended is an insufficient pleading: *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198, [2011] F.C.J. No. 875, at para 63.

> The defendants maintain that there are no material facts pleaded in support of the claim that the officials in question acted in deliberate disregard of their public duties and in the knowledge that harm was likely. As has been noted, there is no basis in law on which to find a duty on the government to evacuate or shelter a Canadian citizen overseas. The plaintiff indicates that he e-mailed the Minister of Foreign Affairs several times, and eventually received a reply from the Minister of State for Foreign Affairs, who encouraged him to return to Canada. He also pleads that he received no reply after writing to the Prime Minister. None of this, in my view, is sufficient to support a claim of deliberate disregard of a public duty – a duty which, I repeat, has no apparent basis in law.

[60] As with intentional infliction of mental distress, this claim amounts to speculation and conjecture, not material facts. The allegations about the officials' state of mind are no more than "bald and idle assertions."

[61] ***Business or financial loss.*** The plaintiff makes various allegations of business or financial losses allegedly arising from his experience in Tanzania. He alleges, for instance, that as a result of the time he spent in Tanzania, his businesses in Canada suffered or failed. As the defendants submit, however, none of these allegations are said to arise from any contract or duty assumed by the defendants. I can see no basis for a viable cause of action on this account.

[62] ***Claims against the Minister personally.*** The plaintiff has named John Baird, who was Minister of Foreign Affairs for at least part of the period he was in Tanzania, as a personal defendant. There is no allegation of direct acts or omissions by Mr. Baird; the plaintiff only asserts that he attempted to contact the Minister, and received no reply, or unsatisfactory replies. In the plaintiff's view, it follows that the Minister is responsible for exposing him to the dangers and harms he alleges he was exposed to in Tanzania. There is no assertion that Mr. Baird made any representations or undertakings that could underlie any of the alleged claims. Moreover, a servant of the Crown – such as a Cabinet Minister – is not vicariously liable for the actions of other Crown servants; only the Crown itself is vicariously liable for torts committed by its servants: *Paszkowski v. Canada (Attorney General)*, 2006 FC 198, [2006] F.C.J. No. 248, at paras. 42-43.

[63] The defendants also submit that the claims against Mr. Baird in his former capacity as Minister – such as the allegations in the reply to demand for particulars that he "facilitated these murderous events" – should be struck out as being scandalous, frivolous, or vexatious, or an abuse of process. I prefer to dispose of these allegations as a matter of summary judgment.

[64] ***Conspiracy.*** The plaintiff has not specifically pleaded conspiracy, but the defendants suggest that his written submissions point toward a claim to this effect. The defendants submit that even if he received leave to amend the Statement of Claim to plead conspiracy, this is yet another defective claim that cannot be cured by amendment. The defendants say it is plain and obvious that there are no material facts pleaded that can support a civil claim for conspiracy. The elements of the tort of conspiracy were recently set out in *Future Health Inc. v General Accident Assurance et. al.*, 2016 ONSC 2149:

> [34] In *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (CanLII), [2014] O.J. No. 851, at para. 82 aff'd 2014 ONCA 878 (CanLII), [2014] O.J. No. 5815, the court articulated the criteria that a plaintiff must prove in order to establish the tort of conspiracy. In applying this test to the case before the court, the plaintiff must prove the following:
>
> a) There was an agreement by two or more of the defendants; and
>
> b) The defendants acted in furtherance of the agreement; and either
>
> c) (i) the predominant purpose of the conduct in furtherance of the conspiracy (whether lawful or unlawful) was to cause injury to Future Health; or
>
> (ii) if the conduct in furtherance of the conspiracy was illegal, that it was directed towards Future Health and the defendants knew or should have known in the circumstances that Future Health was likely to be injured; and
>
> d) Future Health was injured as a result of the conspiracy.

[65] As with intentional infliction of mental distress and misfeasance in public office, the defendants say this claim amounts to speculation and conjecture, not based on material facts. As to the elements, it is not clear who the parties to the conspiracy would be, as neither the Tanzanian government nor the alleged "spy operatives" are defendants. Moreover, no actual agreement is alleged between the defendants and alleged conspirators in Tanzania, and no particulars as to purpose are provided: see *John v. Peel Police*, 2016 ONSC 2012, at paras. 67-70.

[66] The defendants also suggest that certain claims about events that allegedly occurred after the plaintiff returned to Canada are scandalous, vexatious, or

manifestly incapable of proof. Mr. Kasheke alleges in the Statement of Claim that he and his family have been "hunted" by agents of the Tanzanian government since he returned from that country. In his written submissions, the plaintiff indicates that he has now concluded that these individuals are in fact agents of the Canadian government. This conclusion appears to rest on his dissatisfaction with the response of the Halifax Police to his complaints; he states that there are "reasonable grounds to think that those responsible for his suffering and that of his family must be Canadian spy operatives." The defendants submit – and I so find – that this amounts to a conclusory statement without a foundation of material facts in the pleadings.

[67] ***The "distressed Canadian fund."*** In his answer to the defendants' demand for particulars, the plaintiff refers repeatedly to a "distressed Canadian fund" that allegedly should have been made available to him by the defendants. There are no material facts as to the nature of this fund, or the circumstances in which it might be available. I am unable to find any basis for a cause of action under any of the headings above in respect of this fund.

[68] ***Claim within jurisdiction of another court.*** The defendants maintain that any civil claims arising from the acts alleged by the various malefactors in Tanzania are entirely within the jurisdiction of the courts of that country. Having found that the pleadings disclose no reasonable causes of action, I do not believe it is necessary to speculate about jurisdiction over potential claims respecting events in Tanzania.

[69] ***Conclusion.*** The defendants submit that the pleadings amount to a recitations of facts that are "manifestly incapable of being proven" (*Imperial Tobacco* at para. 22), consisting predominately of "conjecture and speculation, shrouded in a grand conspiracy theory." As will be apparent from the comments above, I am satisfied that it is plain and obvious that the plaintiff's claims are bound to fail.

[70] It is apparent that the plaintiff's claim is rooted in a sincere belief that the Canadian government should be obliged to evacuate Canadians who find themselves in difficulty or danger abroad. The plaintiff pleads, for instance, that it is his "strong conviction" that his alleged damages would have been avoided or minimized had then embassy "diligently intervened to offer consular assistance" (Statement of Claim, para. 48); as the defendants submit, such a belief is not sufficient to sustain a legal claim. There is no discernable basis for these claims in

private law. As the law stands, determinations as to whether Canadian citizens will be sheltered in an embassy or evacuated are matters of policy. As the court said in *Imperial Tobacco*:

> 87 Instead of defining protected policy decisions negatively, as "not operational", the majority in [*United States v. Gaubert*, 499 U.S. 315 (1991)] defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

[71] The defendants observe that the plaintiff's claim, at least arguably, has an administrative law aspect, rooted in the doctrine of legitimate expectations. This would be proper subject matter for an application for judicial review, but the doctrine "cannot lead to substantive rights outside the procedural domain": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, at para. 26; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] S.C.J. No. 36.

[72] I note that the plaintiff submitted a large quantity of documents on this motion (and throughout the proceeding previously) that are, or purport to be, evidence going to his claims. In accordance with the requirements of summary judgment on the pleadings, I have not considered any of this material on this motion.

[73] I see no indication that there is a potential to remedy the deficiencies in the pleadings by amendment. I am satisfied that the Statement of Claim must be struck in its entirety, without leave to amend.

[74] The Attorney General submits that, in view of the plaintiff's manner of conducting the proceedings – which featured repeated adjourned hearings, so that it ultimately took nearly a year to deal with the motion – and defendants' success on the motion, the plaintiff should not be relieved of "the financial consequences

of undertaking this litigation." That said, the defendants request only a "modest" award of costs and leave the matter to the court's discretion, in accordance with *Rule* 77.02(1), which permits the court to "make any order about costs as the judge is satisfied will do justice between the parties." Despite the extended time it took, this proceeding was essentially a straightforward motion. In all the circumstances, I am satisfied that an award of $750 is appropriate.

LeBlanc, J.