

CITATION: Bie v. Attorney General, 2010 ONSC 1798
DOCKET: CV-08-00362242-0000
DATE: 20100329

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bie Health Products O/B 2037839 Ontario Ltd (Plaintiff) v. The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada, Jim Daskalopoulos, Canwest Global Communications Corp., The Canadian Press, Torstar Corporation, CTV Inc., CNW Group Ltd., The Attorney General of Ontario on behalf of Her Majesty the Queen in the Right of the Province of Ontario, Google Canada Corporation, Yahoo! Canada Co, Brunswick News Inc., Mediresource Inc., The National Association of Pharmacy Regulatory Authorities, The Alberta College of Pharmacists, Rogers Publishing Limited, Healthwatch.Net Inc., Dr. Terry Polivoy, MD, Webby Inc., Metroland Printing and Publishing & Distributing Ltd. (Defendants)

BEFORE: Justice L.A. Pattillo

COUNSEL: *Shain Widdifield*, for the Moving Parties, the Defendants The Attorney General of Canada and Jim Daskalopoulos

Paul H. Starkman, for the Plaintiffs

HEARD: July 22, 2009

ENDORSEMENT

Introduction

[1] The defendants, The Attorney General of Canada (“AGC”) and Jim Daskalopoulos, (“Daskalopoulos”) seek the following orders:

- (i) Deleting Daskalopoulos from the style of cause as a party to the action and striking out those portions of the fresh as amended statement of claim relating to Daskalopoulos;

- (ii) Striking the claims in the fresh as amended statement of claim against the AGC for abuse of due process, abuse of misfeasance in public office and breaches of sections 7, 11, 12, and 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”); and
- (iii) Striking out numerous other paragraphs in the fresh as amended statement of claim on the ground that they disclose no cause of action (Rule 21.01(1)(b)) and/or may delay the fair trial of the action and/or are frivolous, vexatious or an abuse of process (Rule 25.11).

[2] A week before the return of the AGC and Daskalopoulos’ motion, the Plaintiff brought a motion, returnable at the same time as the AGC and Daskalopoulos’ motion for an order permitting it to issue an amended fresh as amended statement of claim. Apart from correcting some typos in the fresh as amended statement of claim, the proposed amendments deal only with the claims asserted against the ACG and Daskalopoulos. In particular, the amendments propose to delete the Plaintiff’s claims for abuse of process and breach of s. 11 of the *Charter* and provide additional information and/or clarification in respect of some of its other claims which are challenged by the moving parties.

[3] The moving parties did not oppose the Plaintiff’s motion to amend and the argument on their motion proceeded on the basis that the amended fresh as amended statement of claim was the operable pleading. As a result, I intend to deal with the moving parties’ motion on the basis that the amended fresh as amended statement of claim (the “Claim”) is the applicable pleading.

Background

[4] The Plaintiff markets and sells health care products in Canada. The Plaintiff’s action arises out of steps taken by Health Canada from 2002 through 2005 to prevent a product known

as “GHR-15” which was being promoted and sold in Canada by the Plaintiff from entering Canada from the United States or being advertised in Canada. The action was started by statement of claim dated September 2, 2005 and subsequently amended in a fresh as amended statement of claim issued pursuant to the October 20, 2008 order of Master Brott.

[5] In the fresh as amended statement of claim, the Plaintiff alleges that Health Canada’s regulatory actions were improper and contrary to its authority under the *Food and Drug Act*, R.S.C. 1985 c. F-27 (the “Act”) and the Natural Health Products Regulations, SOR/2003-196 (the “Regulations”) of the Act. The Plaintiff further challenges the constitutionality of the Act and the Regulations, alleges breaches of the *Charter* and that Health Canada’s actions constituted breaches of the *Charter*.

[6] The Plaintiff further claims for defamation arising out of a notice which Health Canada posted on its web-site on June 10, 2005, warning Canadians not to use GHR-15 promoted by the Plaintiff due to risks associated with unsubstantiated health claims, hypothyroidism, possible interactions and allergic reactions. Health Canada’s notice advised the public that this product had not been authorized for sale in Canada. Health Canada’s notice was published by the defendant news organizations.

[7] In addition to the claim against the AGC in relation to Health Canada’s actions, the Plaintiff has also claimed against Daskalopoulos who is an employee with Health Canada. The Plaintiff’s claims against Daskalopoulos are for misfeasance of public office, defamation and breach of the *Charter*.

[8] The Plaintiff claims damages in the cumulative total of \$13.5 million composed of general damages of \$7.5 million; aggravated, exemplary and punitive damages of \$5 million and special or pecuniary damages of \$1 million. The Plaintiff further seeks an order for retraction of the published statements and declaratory and injunctive relief, including that the Federal defendants be permanently enjoined from proceeding with enforcement of the Regulations.

The Act and Regulations

[9] The Act deals with, among other things, the advertising, labeling and sale of food, drugs, cosmetics and therapeutic devices in Canada. In particular, section 3(1) prohibits advertising of “any food, drug, cosmetic or device” to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule “A” thereto. Section 3(2) provides that no person shall sell any food, drug, cosmetic or device that is represented by a label or that the person advertises to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule “A”. Schedule “A” lists a number of common diseases including cancer, diabetes, hypertension, and thyroid disease.

[10] The Regulations deal with, among other things, the sale, manufacture, packaging, labeling, importation, distribution and storage of natural health products. Natural health product is defined to include, among other things, a homeopathic medicine or a traditional medicine that is manufactured, sold or represented for use in the diagnosis, treatment or prevention of disease, disorder or abnormal physical state in humans; restoring or correcting organic functions in humans or modifying organic functions in humans.

Standard of Review

[11] Rule 21.01(1) (b) provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action. No evidence is admissible on a Rule 21.01(1) (b) motion: Rule 21.01(2) (b). In considering such a motion, all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proven and therefore assumed to be true. The test is whether it is “plain and obvious” or “beyond reasonable doubt” that the statement of claim discloses no reasonable claim. It is only if the action is certain to fail that it should be struck: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[12] Rule 25.11 provides that the court may strike out all or part of a pleading, with or without leave to amend, on the ground that the pleading may prejudice or delay the fair trial of the action; is scandalous, frivolous or vexatious; or is an abuse of the process of the court.

[13] In *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.), Epstien J. (as she then was) considered the meaning of “scandalous”, “frivolous” or “vexatious” at para. 20:

20. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or

information and belief, and contain many irrelevant matters, will be rejected in their entirety. See: ACIC (Canada) Inc. v. Merck & Co. [\(1995\), 62 C.P.R. \(3d\) 362](#) (F.C.T.D.); Solid Waste Reclamation Inc. v. Philip Enterprises Inc. [\(1991\), 49 C.P.C. \(2d\) 245](#) (Ont. Ct. (Gen. Div.)); Innovation and Development Partners/IDP Inc. v. Canada, [\[1993\] F.C.J. No. 6-02](#) (F.C.T.D.) and Waverly (Village) v. Nova Scotia (Acting Minister of Municipal Affairs) [\(1993\), 16 C.P.C. \(3d\) 64](#) (N.S.S.C.), aff'd [\(1994\), 30 C.P.C. \(3d\) 205](#) (C.A.), leave to appeal to Supreme Court of Canada refused March 23, 1995.

The *Charter* Claims

[14] The moving parties move to strike the Plaintiff's *Charter* claims on the grounds that they disclose no reasonable cause of action (Rule 21.01(1)) and the Plaintiff is without legal capacity to commence the action (Rule 21.01(3)).

[15] The Plaintiff's *Charter* claims are based on alleged breaches of sections 7, 12 and 15 of the *Charter* and are set forth in paragraphs 2(j), 2(k), 5, 38, 39, 47, 48, and 65 of the Claim.

[16] Sections 7, 12 and 15 of the *Charter* provide as follows:

s. 7. Everyone 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.

s. 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

s. 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[17] In paragraph 2(j) of the Claim, which is part of the request for relief, the Plaintiff pleads that the definition of “drug” found in s. 2 of the Act is overly broad and should be declared void for vagueness and/or “a violation of various sections of the *Canadian Charter of Rights and Freedoms* including but not limited to section 7, 12 and 15 and the common law doctrine of vagueness”.

[18] At paragraphs 2(k), 5, 38, and 39 of the Claim, the Plaintiff pleads that Health Canada and Daskalopoulos’ conduct in directing that its product be held as part of a regulatory investigation violates the Plaintiff’s rights under ss. 7, 12 and 15 of the *Charter* in that it constitutes an unreasonable and illegal search and an indirect criminal prosecution.

[19] At newly added paragraphs 47 and 48 of the Claim, the Plaintiff further pleads that the targeted attempt by the AGC and Daskalopoulos to prohibit trade and commerce activities by seizing and returning its property violate, among other things, section 15 of the *Charter*.

[20] In paragraph 65, the Plaintiff pleads that the definition of “drug” in s. 2 of the Act is imprecise, vague and uncertain and should be declared void for vagueness and a violation of section 7 of the *Charter*.

The *Charter* - Section 11

[21] Section 11 of the *Charter* deals with rights of accused persons in criminal and penal matters and includes rights to a trial within a reasonable time, the presumption of innocence and the right not to be compelled as a witness in one’s own criminal proceeding. Section 11 applies

only to criminal or quasi criminal proceedings giving rise to true penal consequences (criminal fines and incarceration): *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

[22] The Plaintiff concedes that section 11 of the *Charter* is not applicable given that there is no allegation in either its earlier pleadings or the Claim of criminal or quasi criminal charges being laid. Although the Plaintiff states that it has deleted reference to section 11 in the Claim, an allegation of a breach of section 11 remains in paragraph 5 of the Claim. In light of the Plaintiff's concession, it should therefore be deleted.

The *Charter* – Sections 7 and 15

[23] The moving parties submit that the Plaintiff's allegations of a breach of sections 7 and 15 of the *Charter* are improper because the Plaintiff is a corporation. The Supreme Court of Canada has consistently held that the rights under s. 7 or 15 of the *Charter* apply only to individuals and corporations do not have a direct standing (Section 7: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 96; Section 15: *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 73; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326).

[24] The Plaintiff submits that section 7 of the *Charter* applies to corporations where the government activity relates to an investigation which is penal in nature: *Kligman v. Canada Ministry of National Revenue*, [2004] F.C.J. No. 639 (F.C.A.) overturning [2003] F.C.J. No. 70 (F.C.C. – Trial Division). The Plaintiff further submits that it has standing to challenge the constitutionality of the Act even though the proceeding is civil in nature: *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. Finally, the Plaintiff submits that it has

the right to challenge the constitutionality of legislation on behalf of others: *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.); [2000] O.J. No. 2787.

[25] Generally speaking, a party seeking to invoke the *Charter* may be granted standing under four broad heads: by asserting a violation of the party's own rights or by asserting a violation of anyone's rights, either: (i) pursuant to the court's residuary discretion; (ii) upon obtaining public interest standing; or (iii) defensively, in state-initiated criminal or civil proceedings: *Canadian Egg Marketing, supra* at para: 35.

[26] While it is not clear from the Claim, when read as a whole it is my view that the Plaintiff is asserting *Charter* violations both on its own behalf in respect of the seizure of its merchandise and the campaign of harassment waged against it (sections 12 and 15) and on behalf of its would-be-customers by denying them the opportunity to make personal choices about health and medical care contrary to the principles of fundamental justice and depriving them of the right to life, liberty or security of the person (section 7).

(a) The Plaintiff's Own Rights

[27] The courts have consistently held that corporations do not themselves possess rights under either section 7 or 15 of the *Charter*. Section 7: *Irwin Toy, supra* at para. 96; *Canadian Egg Marketing, supra* at para: 36; Section 15: *Edmonton Journal, supra*, at para. 101; *Hislop, supra*, at para 73. As a section 24(1) remedy is available only where the claimants own rights have been violated (*Borowski v. Canada*, [1981] 2 S.C.R. 575 at para. 57) it follows that a corporation cannot seek a section 24(1) remedy under either sections 7 or 15 of the *Charter*.

(b) Defence of a State Initiated Criminal, Quasi-Criminal or Civil Proceeding

[28] The Plaintiff submits that it has the right as a corporation to advance its *Charter* claims in respect of sections 7 and 15 pursuant to the exception created by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 which was further expanded by the Court in *Canadian Egg Marketing, supra*.

[29] In *Big M, supra*, the Court held that where legislation violates the *Charter*, no one, including corporations, can be convicted under that legislation, regardless of whose rights are infringed by the law. This so-called exception has been subsequently used by defendants, including corporations, in criminal and quasi-criminal proceedings to challenge legislation alleged to have infringed not only a defendant's rights but the rights of others: see: *R. v. Morgentaler*, [1986] 1 S.C.R. 30 at para. 34; *Parker, supra* at para. 78-80.

[30] In *Canadian Egg Marketing, supra*, at para. 34, the Court expanded the *Big M* exception to grant standing to parties not only in criminal or quasi-criminal proceedings, but also

“where they are defendants in civil proceedings instigated by the state or a state organ pursuant to a regulatory scheme”.

[31] The Plaintiff submits that the Act and the Regulations under which the moving parties acted are criminal or quasi-criminal in nature given that it provides for criminal sanctions, as well as investigations that are penal or criminal in nature. Without deciding that issue, it is clear from the Claim that the Plaintiff has voluntarily brought proceedings against the moving parties for, among other things, declaratory relief. The proceedings were not instigated by the state. As a result, the *Big M* exception as expanded by *Canadian Egg Marketing*, does not in my view apply to the Plaintiff’s claims. Rather, the Plaintiff’s section 7 and 15 *Charter* claims are more akin to those asserted in *Irwin Toy, supra*, where the Supreme Court expressly held, at para. 96, that *Big M* did not grant standing to a plaintiff who voluntarily brought proceedings for declaratory relief.

(c) Public Interest Standing

[32] The Plaintiff has not sought public interest standing in order to advance its *Charter* claims and accordingly public interest standing is not applicable to the Plaintiff’s *Charter* claims.

(d) The Court’s Residuary Discretion

[33] The court has residuary discretion to hear *Charter* arguments where the case has been fully argued on the merits and the issue involves a matter of public importance: *Canadian Egg Marketing, supra*, at para. 33 – 34.

[34] In my view, given that the Plaintiff has no standing to assert its section 7 and 15 *Charter* claims, this would not be an appropriate case to exercise the court's "residuary discretion".

[35] To the extent therefore that the Plaintiff's claims relate to violations of its own rights or those of others under sections 7 or 15 of the *Charter*, it is my view for the above noted reasons that the Plaintiff has no standing to assert such claims and therefore it is plain and obvious that it cannot succeed in respect of such claims (Rule 21.01(1) (b)). Further, in the absence of standing, the Plaintiff does not have a legal capacity to advance such claims (Rule 21.01(3) (b)). On either basis the Plaintiff's section 7 and 15 *Charter* claims should be struck.

The *Charter* – Section 12

[36] Turning to the Plaintiff's claim for a breach of section 12 of the *Charter*, it does not appear to have been conclusively decided by the courts as to whether a corporation can invoke section 12. In the absence of binding authority on the issue and given the use of the word "everyone" in section 7, it cannot be said that it is "clear and obvious" that a section 12 claim cannot be advanced by a corporation.

[37] In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, the Court refrained from deciding whether "treatment" included non-penal sanctions. At a minimum, however, it stated at para 182 that "treatment" required an "active state process involving an exercise of state control over the individual ... whether it be positive action, inaction or prohibition." Arguably the actions of Health Canada, as pleaded, could amount to "treatment" within the meaning of section 12.

[38] In *R. v. Smith*, [1987] 1 S.C.R. 1045 at para. 53, the Court held, in the sentencing context, that punishment is cruel and unusual if it is “grossly disproportionate” to the conduct it seeks to deter. The question is whether the punishment or treatment is “so excessive as to outrage standards of decency”.

[39] The threshold to establish a breach of section 12 is high: *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C. R. 519 at para. 182. Notwithstanding that I am of the view that the Plaintiff’s claim under section 12 is unlikely to succeed, that is not the test at this stage of the action. For the reasons stated, therefore, I am unable to conclude that it is plain and obvious and beyond doubt that the plaintiff’s section 12 claim cannot succeed.

The Claims against Daskalopoulos

[40] The moving parties submit that the Plaintiff’s claims against Daskalopoulos for misfeasance in public office, defamation and *Charter* violations should be struck out for failing to disclose reasonable causes of action. They further submit that Daskalopoulos should be struck as a defendant in the action entirely on the basis he is not a necessary party.

Misfeasance in Public Office

[41] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras 18 - 32, Iacobucci J., on behalf of the Court, stated that the tort of misfeasance in public office is an intentional tort, the constituent elements of which, in addition to causation and damages are: (a) deliberate unlawful conduct in the exercise of public functions and (b) awareness that the conduct is unlawful and likely to injure the Plaintiff. The unlawful conduct can arise from a straightforward

breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

[42] The Claim identifies Daskalopoulos as a Drug Compliance Verification & Investigations manager for Health Canada (para. 5). In paragraphs 23 to 37, the Plaintiff pleads that from 2002 to June 2005, it received a number of letters from the Drug Investigation Unit of the Health Products and Food Branch Inspectorate of Health Canada stating, among other things, that the GHR-15 was infringing the Act and Drug Regulations and that, in the absence of compliance, it must not be offered for sale or advertised to the Canadian market. The Plaintiff responded that it was compliant. On August 29, 2003, Daskalopoulos instructed Canadian Border Services to hold at the US/Canada border 30 packages of GHR product (para. 30). Health Canada seized a further order of 300 shipments (para. 35). On February 7, 2005, the Plaintiff advised Health Canada that the shipments are for personal use and are covered by Health Canada's Personal Import Policy.

[43] The pleading in respect of the claim for misfeasance in public office is set forth in paras. 5, 6, 41 – 44 of the Claim. Paragraphs 5 and 6 baldly state that since 2002 Daskalopoulos used criminal regulatory powers to improperly harm the Plaintiff's business and reputation by closing the border to the Plaintiff's client's shipments and improperly stopping the Plaintiff's advertising in Canada and/or interfering with media publication accepting the Plaintiff's advertising without probable cause. Paragraph 6 alleges that Daskalopoulos was acting outside his oath of office, the Public Service guidelines of conduct, the applicable law, domestic and international, GATT, WTO, NAFTA, the departmental empowering legislation, the Constitution,

the Canadian Bill of Rights, the *Charter* and Health Canada's internal policy with respect to personal imports.

[44] Paragraphs 41 to 44 provide as follows:

41. BIE states that the Attorney General and Daskalopoulos are liable on the basis of the tort of abuse of public office. The said Defendants deliberately, maliciously, with premeditation and intent to injure the Plaintiff verbally and/or by email prevented the Minister of Agriculture and the CFIA [Canadian Food Inspection Agency] from undertaking their legislative duties pertaining to foods as per the Act by directing the CBSA [Canadian Border Services Agency] to intercept and seize shipments for inspection, knowing that these shipments were not within the jurisdiction of Health Canada to seize, as admitted in by Health Canada's 1998 Personal Use Import Policy.

42. BIE further states that the Attorney General and Daskalopoulos unlawfully contracted other Canadian, US and International regulatory authorities to attempt to prompt further regulatory harassment of BIE including unlawfully opened regular mail.

43. BIE states that the Attorney General and Daskalopoulos were clearly advised repeatedly by BIE's Agent that said Defendants had no jurisdiction or statutory authority to hold/seize the shipments at the border and/or refuse these shipments entry into Canada.

44. In addition, when the seizures did not stop the flow of goods into Canada, the Attorney General and Daskalopoulos further abused their public office by making various unfounded claims about alleged serious health risks associated with GHR-15, which said Defendants knew or ought to have known were inaccurate, without scientific basis and that such claims would cause serious damage to the reputation and business interests of the Plaintiff.

[45] In the first instance, no cause of action exists against the AGC for abuse of public office. The tort of misfeasance in public office involves the conduct of a public officer. Although a public officer, the AGC is not sued in his personal capacity in the action but rather for and on behalf of Health Canada, The Canadian Border Services Agency "and other federal entities and

their employees” (paragraph 4 of the Claim). Accordingly, reference to the AGC in the Claim in respect of the claim for abuse of public office should be struck.

[46] The Plaintiff’s allegation of the “unlawful conduct” undertaken by Daskalopoulos is that he directed the Canadian Border Services to intercept and seize shipments of GHR-15 to the Plaintiff’s clients, contrary to Health Canada’s 1998 Personal Use Import Policy (para. 41) and that he contacted other Canadian, US and International regulatory authorities to attempt to prompt further harassment of the Plaintiff (para. 42).

[47] On the motion, I was provided with a copy of the Act, the Regulations and the Personal Use Enforcement Directive of the Health Products and Food Branch of Health Canada, dated June 1, 1998 (the “Personal Use Directive”). As those documents were specifically referred to in the Claim, they are part of the pleading and can be considered on a Rule 21.01 (1) (b) motion: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.).

[48] On a review of the Act, the Regulations and the Personal Use Directive, I was unable to find nor was I directed by the Plaintiff to any provision in those documents that provides that the alleged conduct of Daskalopoulos was “unlawful” in that it constituted a breach of any of the provisions contained in the Act, the Regulations or the Personal Use Directive. To the contrary, the Personal Use Directive indicates that Health Canada officials have the authority to seize and hold drug shipments at the border. Section 7 of the Personal Use Directive provides, where a Health Canada official determines that a shipment of a drug encountered at Canada Customs is being imported by an importer for commercial purposes (as defined), the shipment can be refused entry at Customs, can be voluntarily detained, re-exported or voluntarily disposed of.

[49] Nor has the Plaintiff pleaded that Daskalopoulos was acting in excess of any powers he had under the Act, the Regulations or the Personal Use Directive or for an improper purpose. The fact that the Plaintiff has challenged the validity of certain provisions in the Act and the Regulations in its action cannot render the conduct of Daskalopoulos or others at Health Canada pursuant thereto unlawful.

[50] Further, the Plaintiff's allegation in paragraph 42 of the Claim that Daskalopoulos' alleged conduct in contacting other Canadian, US and International regulatory authorities is unlawful provides no basis for such assertion. A bald allegation that certain conduct is unlawful, such as in paragraph 42 or in paragraphs 5 and 6 or of the Claim, in the absence of a specific basis for it, is not sufficient. Because the tort is an intentional one, the essence of which is the unlawful conduct of a public official, it is important, in my view, that the elements of the tort be specifically pleaded.

[51] As a result, therefore, it is my view that the Plaintiff has failed to properly plead the "unlawful conduct" which is an essential element of the tort of misfeasance in public office.

[52] I am further of the view that the Plaintiff has failed to plead that Daskalopoulos had the requisite subjective knowledge that he was acting unlawfully. Paragraph 43 of the Claim that the AGC (Health Canada) and Daskalopoulos were repeatedly advised by the Plaintiff's agent that there was no jurisdiction to hold or seize the shipments is not, in my view sufficient, particularly in the absence of a proper pleading of unlawful conduct.

[53] A plaintiff is required to plead facts capable of supporting each constituent element of the cause of action raised: *Normat Management Ltd. v. Westhill redevelopment Company*

(1998), 37 O.R. (3d) 97 (C.A.). As discussed, the Plaintiff has failed to do that in respect of its claim for misfeasance in public office. Accordingly, in my view, the Plaintiff's claim against Daskalopoulos in that regard discloses no reasonable cause of action and should be struck.

Defamation

[54] The Plaintiff's claim for defamation relates to a press release issued by Health Canada on June 10, 2005 which warned consumers not to use GHR-15 due to risks associated with unsubstantiated health claims, hyperthyroidism and possible interactions and allergic reactions. It stated that the product was not authorized for sale in Canada and that contrary to the Plaintiff's claims, people taking GHR-15 were not likely to experience any therapeutic benefits.

[55] The defamation claim is set forth in paragraphs 83 to 89 of the Claim. Paragraph 83 sets out the specific offending words in the press release. Paragraph 84 sets out the Plaintiff's allegations of why the statements complained of are false. Paragraphs 85 to 88 provide:

85. On June 10, 2005, BIE became aware that Daskalopoulos had posted the Attorney General of Canada and Her Majesty the Queen in Right of Canada's Warning Press Release on Health Canada's website www.hc-sc.gc.ca containing the same content as the June 7, 2005 draft Press Release and circulated globally via the regulators' global advisory networks and Press distribution system.

86. The Defendants, The Attorney General of Canada and Daskalopoulos knew, or ought to have known that the June 10, 2005 publication is defamatory, false and published maliciously. Said Defendants knew or ought to have known that the publication inferred that the Plaintiff is potentially engaged in a criminal activity. In fact, one of the Defendants herein, Dr. Terry Polevoy jumped to the conclusion that criminal charges had been laid and published a statement to that effect.

87. The Attorney General of Canada and Her Majesty the Queen in Right of Canada and Daskalopoulos, should have known that their publication was

malicious and was false, defamatory and intended to bring public humiliation to the Plaintiff and substantial damage to its business and reputation.

88. The Attorney General of Canada and Daskalopoulos deliberately used the June 10, 2005 Press Release and their criminal authority under the Act in an indirect criminal prosecution which caused damage to the Plaintiff's reputation and business because the Plaintiff refused to acknowledge Health Canada's authority under the Natural Health Products Regulations.

[56] In my view, the Plaintiff's pleading of defamation contains the requisite elements of a defamation claim against Daskalopoulos. It sets out, with particularity, the alleged defamation, the specifics of Daskalopoulos' publication including what, when, how and to whom and the damages that the Plaintiff has suffered: *H.V.K. v. Children's Aid Society of Haldimand-Norfolk*, [2003] O.J. no. 1572 (S.C.J.) at para. 20.

Charter Claims

[57] The Plaintiff's *Charter* claims against Daskalopoulos mirror the *Charter* claims against the AGC as discussed. To the extent that I have concluded that the Plaintiff's claims pursuant to sections 7 and 15 of the *Charter* cannot succeed, the same conclusion applies in respect of such claims against Daskalopoulos.

[58] The moving parties submit that the remaining *Charter* claims against Daskalopoulos, being sections 2(b), 8 and 12 as pleaded in paragraphs 2(k), 5, 38 and 39 of the Claim should be dismissed on the ground that as an individual, it is not possible for Daskalopoulos to be found to have breached the *Charter*.

[59] As noted, the Claim (paragraph 5) states that Daskalopoulos is an employee of the Crown. The issue of whether public officials can be held personally liable for breaches of the

Charter is one that has not been resolved by judicial decision. Noted academics have differed on whether such liability should exist. See: *Wiche v. Ontario*, [2001] O.J. No. 1850 (S.C.J.) (Ground J.) at para. 113 to 119; affirmed, [2003] O.J. No. 221 (C.A.). In the circumstances, therefore, it cannot be said it is “plain and obvious” that the Plaintiff’s *Charter* claims will not succeed against Daskalopoulos.

Necessary Party

[60] The moving parties submit that because s. 3(b) (i) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 provides that the Crown is liable for damages in respect of a tort committed by a servant of the Crown, it is not necessary to name Daskalopoulos personally in respect of his alleged negligence which, if proven, the AGC will be liable for. The moving parties therefore submit that Daskalopoulos’ presence in the Claim is not necessary for a fair adjudication of the Plaintiff’s claims and he should be removed as a defendant in the action.

[61] In my view, if the Plaintiff properly pleads a cause of action against Daskalopoulos, it is entitled to maintain that claim, notwithstanding a concession of vicarious liability by the Crown. An admission of vicarious liability does negate a cause of action against a Crown employee. See: *Edwards v. British Columbia*, [2006] B.C.J. No. 992 (S.C.); *Vesuna v. British Columbia (Ministry of Forest)*, [2007] B.C.J. No. 2014 (S.C.).

Scandalous, Frivolous or Vexatious

[62] The moving parties submit that paragraphs 2(j), 54 to 56, 63, 64, 71, 72, the last sentence of 74, 76, 80 and 119 of the Claim are scandalous, frivolous or vexatious within the meaning of Rule 25.11 and accordingly they should be struck.

[63] In my view, given that I have held that the claim in respect of section 12 of the *Charter* remains, I do not consider that paragraph 2(j) to be either scandalous or vexatious.

[64] Further, and while I agree that paragraphs 54 to 56, 63 and 64 are prolix and somewhat argumentative; I do not consider them to be scandalous or vexatious either.

[65] The Plaintiff pleads in paragraph 71 that Health Canada uses sections 3(1) and (2) of the Act to “restrict and/or prevent Canadians from being aware of and seeking safer and more affordable traditional holistic health care to the more expensive and hazardous allopathic North American style medical treatment.” It further pleads that Health Canada considers North American medical treatment as “proper” for the diseases listed in Schedule “A” of the Act over traditional holistic health care. Paragraph 72 pleads that there are numerous dietary food supplements including the Plaintiff’s that are effective in the safe treatment mitigation or prevention of the diseases listed in Schedule “A” of the Act. Paragraph 76 pleads that “proper” medical treatment is not without risks and that one of the leading causes of death in North America, “if not the leading cause” is “Proper” medical treatment. Paragraph 80 pleads that the absence of choice caused by subsections 3(1) and (2) of the Act “forces Canadians to assume the risk of “Proper” medical treatment.

[66] In my view, the pleading in paragraphs 71, 72, 76 and 80 is scandalous and vexatious and should be struck. The paragraphs contain expressions of opinion concerning the benefits of

holistic medicine versus traditional medicine. That issue, in my view, is irrelevant to the main issues pleaded and certain to delay the trial of the action. More importantly, I view the allegations inflammatory.

[67] In the last sentence of paragraph 74 states: “The Plaintiff pleads that many Canadians needlessly suffer and even die as a result of the actions of the Attorney General and Daskalopoulos.” That sentence is scandalous in the classic sense in that it is inflammatory and needlessly attacks the integrity of both the AGC and Daskalopoulos.

[68] Finally paragraph 119 pleads the Plaintiff’s entitlement to punitive, aggravated and exemplary damages based on “the actions of the Defendant described above” which are said to constitute a “callous and flagrant disregard of the rights of the Plaintiff”. Given the allegations that precede paragraph 119, it is impossible to understand either which defendant the Plaintiff is referring to or what the actions are which constitute a callous and flagrant disregard of the Plaintiff’s rights. In my view, the pleading is so bare that it is scandalous and vexatious and cannot be permitted to stand. That being said, I would give the Plaintiff leave to amend paragraph 119 to properly plead against whom the claim for punitive damages is made and the particular actions relied upon in support thereof.

Conclusion

[69] Accordingly, the Plaintiff’s motion for leave to issue the amended fresh as amended statement of claim attached as Schedule “A” to the notice of motion is allowed, subject to the following.

[70] The moving parties motion is allowed, in part, as follows:

- (a) The Plaintiff's claim for breach of section 11 of the *Charter* in paragraph 5 of the Claim is struck out in light of the Plaintiff's concession;
- (b) The Plaintiff's claims for breach of section 7 of the *Charter* as set forth in paragraphs 2 (j), 2(k), 2(m), 5, 38, 39, 65, 73, 78, 81 and 82 of the Claim are struck out pursuant to Rules 21.01 (1) (b) (no cause of action) and 21.01(3) (b) (lack of legal capacity);
- (c) The Plaintiff's claims for breach of section 15 of the *Charter* as set forth in paragraphs 2 (j), 2(k), 5, 38, 47 and 48 of the Claim are struck out pursuant to Rules 21.01 (1) (b) (no cause of action) and 21.01(3) (b) (lack of legal capacity);
- (d) The Plaintiff's claim for misfeasance in public office as set forth in paragraphs 41 to 44 of the Claim is struck out pursuant to Rule 21.01(1) (b) as disclosing no cause of action;
- (e) Paragraphs 71, 72, the last sentence of paragraph 74, 76, and 80 are struck out pursuant to Rule 25.11 as being scandalous, frivolous or vexatious;
- (f) Paragraph 119 is struck out with leave to the Plaintiff to amend within 20 days.

[71] The balance of the moving parties' motion is dismissed.

[72] The Plaintiff's amendment motion was brought after the moving parties' motion and principally in response to it. It was not opposed by the moving parties or any of the other defendants. There is no question that some of the amendments sought in its motion assisted the Plaintiff in its defence of the moving parties' motion. This is particularly so in respect of the claim against Daskalopoulos for defamation. Prior to the delivery of the Claim, the Plaintiff's amended statement of claim did not allege a cause of action in defamation against Daskalopoulos. Given the Plaintiff's late delivery of its motion, the defensive nature of the motion and the fact that its statement of claim had already been amended once, I am of the view that the Plaintiff is not entitled to costs in respect of its motion.

[73] The moving parties had more success than failure on their motion. In addition, and as noted, part of their failure was because of the amendments to the claim sought by the Plaintiff after the commencement of the moving parties' motion. In the circumstances, therefore, it is my view that the AGC and Daskalopoulos should have their costs of their motion on a partial indemnity basis, fixed at \$3,000 inclusive of disbursements and GST.

L. A. Pattillo J.

Released: March 29, 2010