CITATION: Guergis v. Novak et al, 2012 ONSC 4579
COURT FILE NO.: 11-53210
DATE: 20120824

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HELENA GUERGIS Plaintiff	Stephen Victor, QC and David Cutler, for Helena Guergis
– and –	
V. RAYMOND NOVAK, ARTHUR HAMILTON, CASSELS BROCK & BLACKWELL LLP, THE RIGHT HONOURABLE STEPHEN HARPER, GUY GIORNO, SHELLY GLOVER, THE HONOURABLE LISA RAITT, AXELLE PELLERIN, CONSERVATIVE PARTY OF CANADA and DERRICK SNOWDY Defendants	Robert W. Staley and Derek J. Bell, for V. Raymond Novak, The Right Honourable Stephen Harper, Shelly Glover and The Honourable Lisa Raitt Peter N. Mantas and Marisa E. Victor, for Guy Giorno Wendy J. Wagner, for Axelle Pellerin Paul D'Angelo, for the Conservative Party of Canada Paul Le Vay for Arthur Hamilton and Cassels Brock & Blackwell LLP.
	ARGUED: July 18-20, 2012 (Ottawa)

HACKLAND R.S.J.

REASONS FOR DECISION

Overview

[1] The moving parties seek an order striking out the Statement of Claim in this action, without leave to amend, or in the alternative, an order for particulars of the conspiracy alleged in this pleading.

[2] The plaintiff is a former Member of Parliament and former Minister of State for the Status of Women. She alleges a conspiracy, as well as certain other tort claims – defamation,

misfeasance in public office, intentional infliction of mental suffering, and negligence – against the defendants. The alleged conspiracy is described at para. 24 of the Statement of Claim, as follows:

> The conspiracy was to engage in unlawful acts in order to remove and/or justify the removal of the Plaintiff from her positions as a member of the caucus of CPC (Conservative Party of Canada), the candidate for the CPC in the Electoral District of Simcoe-Grey, and the Minister of State for the Status of Women, in a manner deemed by the Defendants to be to their political, personal, and/or financial benefit.

[3] The defendants, moving parties on this motion, are:

a. The Right Honourable Stephen Harper, Prime Minister of Canada;

b. Guy Giorno, the Prime Minister's Chief of Staff, at the material time;

c. Raymond Novak, the Prime Minister's Principal Secretary, at the material time;

d. The Honourable Lisa Raitt, Minister of Labour;

e. Axelle Pellerin, an official on Minister Raitt's staff;

f. The Conservative Party of Canada ("CPC");

g. Arthur Hamilton, a lawyer with the law firm, Cassels Brock & Blackwell LLP ("Cassels Brock"), who was the lawyer for the Prime Minister and the CPC, at the material time, and

h. Shelly Glover, a Conservative Member of Parliament.

The defendant, Derrick Snowdy, takes no part in this motion.

[4] The Statement of Claim alleges that the Prime Minister's office received a report of alleged criminal misconduct concerning the plaintiff, originating from the defendant, Snowdy. On the advice of Mr. Giorno and Mr. Novak, the Prime Minister communicated this information in a telephone call to the plaintiff in an attempt to have her resign from cabinet. According to the

plaintiff, the object of the conspiracy was, "to effect or justify the plaintiff's removal as a member of the caucus of CPC, her removal as the candidate for the CPC in the Electoral District of Simcoe-Grey, and her removal from her position as Minister of State for the Status of Women...."

[5] Further, it is alleged that on April 9, 2010, the same day of the Prime Minister's telephone call to the plaintiff, the Prime Minister, with Mr. Giorno and Mr. Novak, sent letters to the Commissioner of the RCMP and the Conflict of Interest and Ethics Commissioner, repeating the allegations that the plaintiff had been involved in improper, unlawful and/or criminal conduct. It is alleged that these letters were defamatory of the plaintiff and were written in furtherance of the conspiracy engaged in by the defendants.

[6] This motion to strike is brought under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The applicable test is well-known. The court must assume that the alleged facts can be proven, and ask whether it is "plain and obvious" that the Statement of Claim discloses no reasonable cause of action? See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 33.

The Issues

[7] The principal submission made by the moving parties on this motion is that the conspiracy and other tort claims advanced in the action are neither justiciable nor subject to judicial process, as such claims relate to the exercise of Crown prerogative or parliamentary privilege. In addition, the moving parties argue that these issues have been previously decided, adverse to the plaintiff, by the Canadian Human Rights Commission ("CHRC"), such that this action is frivolous, vexatious, and amounts to an abuse of process.

[8] The moving parties also submit that the communications between the Prime Minister and Messrs. Novak and Giorno are subject to absolute privilege and that the letters to the RCMP Commissioner and the Ethics Commissioner are not defamatory. The moving parties contend that, in any event, the communications are subject to absolute, or in the alternative, qualified privilege.

[9] As such, the moving parties submit that it is plain and obvious that the alleged claims cannot succeed and should be struck from the Statement of Claim.

Law and Analysis

Crown Prerogative

[10] As previously noted, the plaintiff asserts, at para. 24 of her Statement of Claim, that the object of the conspiracy was to engage in unlawful acts "in order to remove and/or justify the removal" of the plaintiff as a Minister of the Crown. The plaintiff pleads that the Prime Minister, his Chief of Staff, and his Principal Secretary, were all part of this conspiracy.

[11] The moving parties submit that the power to appoint or dismiss cabinet ministers at pleasure is a Crown prerogative, exercised by the Prime Minister, that is not justiciable at law. Therefore, the alleged tortious conduct, directed as it is to the removal of a cabinet minister from office, is not justiciable.

[12] The plaintiff's position is that while her expulsion from cabinet would be within the Prime Minister's prerogative in the normal course, the Crown prerogative does not insulate the Prime Minister's Office from responsibility for tortious conduct in relation to the plaintiff's removal from cabinet. In the plaintiff's submission, the fact that such tortuous conduct ultimately led to the resignation of the plaintiff from cabinet – an end which could have been achieved by the Prime Minister lawfully – does not absolve or protect the Prime Minister from liability for such tortuous conduct, on the basis of Crown prerogative.

[13] The law is well settled that the appointment of Ministers and their dismissal is a core aspect of the Crown prerogative exercised by the Prime Minister. *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 [*Black*], a decision of the Ontario Court of Appeal, deals with the Prime Minister's prerogative regarding the bestowal of honours. In *Black*, at para. 58, the court approved Lord Roskill's enumeration of specific exercises of the prerogative power "whose subject matters were by their very nature not justiciable":

> So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the *Civil Service*

> *Unions* case, Lord Roskill listed a number of exercises of the prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. He wrote, in a passage I have already referred to, at p. 418:
>
> > But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament **and the appointment of ministers** as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. [Underlining in original; bold emphasis added.]

[14] As noted, the plaintiff contends that because, as pleaded, the Minister's removal from office was the product or effect of the Prime Minister's tortious conduct, the prerogative otherwise applicable does not apply to protect his conduct from judicial scrutiny. In other words, the contention is that the Prime Minister and his senior advisors can be called into court to explain and justify the Prime Minister's removal of the plaintiff from the federal cabinet because her removal was part of a conspiracy or motivated by improper, tortious intentions.

[15] I am of the opinion that the plaintiff's contentions are wrong and, if sustained, would render meaningless this important privilege. The Prime Minister would be required to answer, in court, for the political decisions he makes, as to the membership of his cabinet. Crown privilege is an important principle of our legal system and it cannot be displaced or attacked collaterally by way of allegations of tortious conduct. There is no authority that would support the proposition that Crown prerogative is waived or is inapplicable if the otherwise protected decisions are alleged to be tortious. On the contrary, the result must be that when Crown privilege applies, the court lacks the jurisdiction to review the acts protected by the privilege. In this case, I find that it is plain and obvious that the actions of the Prime Minister, in relation to the removal of the

plaintiff from cabinet, fall within Crown prerogative and this Court lacks the jurisdiction to review the tort allegations related to the Prime Minister's actions. These actions are pleaded to be taken on the advice of the Prime Minister's two senior advisors, Mr. Giorno, Chief of Staff, and Mr. Novak, Principal Secretary, whose conduct in the circumstances alleged must also be protected by Crown prerogative.

Parliamentary Privilege

[16] A similar analysis applies to the plaintiff's allegation that the conspiracy was to engage in unlawful acts in order to remove and/or justify the removal of the plaintiff from her position as a member of the caucus of the CPC. The moving parties submit that decisions as to caucus membership are not justiciable at law because they are protected by parliamentary privilege.

[17] Under the constitutional doctrine of parliamentary privilege, the Prime Minister, as a Member of Parliament, is immune from external review by a court or tribunal when he carries out functions that are necessary to the discharge of his legislative responsibility. The threshold question is whether the acts in question fall within the scope of the privilege. If they do, the court has no jurisdiction to determine whether the exercise of the privilege was appropriate.

[18] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 [*Vaid*], the Supreme Court of Canada confirmed the constitutional status of parliamentary privilege in Canada. The Supreme Court also provided important guidance in determining whether an activity falls within the protected sphere of that privilege. The Court stated that the first step in determining whether parliamentary privilege exists is to determine whether the validity and scope of the claimed privilege has been "authoritatively established in relation to our own Parliament" (*Vaid*, at para. 39). If the privilege has not been authoritatively established, the claim must be tested against the "doctrine of necessity," which requires that the matter at issue is necessary for the legislature to operate.

[19] Canadian courts have applied the doctrine of parliamentary privilege to find that expulsion, disqualification, and other disciplinary actions taken against Members of Parliament

or other office holders fall within parliamentary privilege and are, therefore, beyond the jurisdiction of the courts.

[20] In *Harvey v. New Brunswick (Attorney General)*, [1996] S.C.R. 876, a former member of the provincial legislature brought a *Charter* challenge with respect to his expulsion from the legislature for election fraud and his statutory disqualification from being re-elected. The minority judgment of the court, delivered by McLachlin J., addressed the issue of parliamentary privilege, holding that the member's expulsion from the legislature, and disqualification from running for re-election, were matters falling within parliamentary privilege and, therefore, were not subject to review by the court. They observed that the power to disqualify members for corruption was necessary to the dignity, integrity and efficient functioning of the legislature.

[21] I accept the submission of the moving parties that it is settled law that the doctrine of parliamentary privilege precludes judicial review of expulsion, disqualification from caucus and other disciplinary matters pertaining to Members of Parliament. A Prime Minister's removal or suspension of a Member of Parliament from caucus is at the core of parliamentary privilege.

[22] The plaintiff's position is that while, in the ordinary course, the Prime Minister has the power to remove a member from caucus, an act that would be immune from review by the courts by reason of parliamentary privilege – in this case, the tortious conduct – remains actionable even though the result of such conduct was the plaintiff's removal from caucus. I do not accept this argument. It suggests that the Prime Minister and his senior officials can be called to account, in this legal proceeding, for the exercise of the Prime Minister's powers to control his parliamentary caucus. This would undermine parliamentary privilege and subject this purely political decision-making to review by the courts. It is plain and obvious that the tort claims arising from the plaintiff's removal from caucus are beyond the court's jurisdiction and, therefore, must be struck.

Abuse of Process

[23] The moving parties submit that the plaintiff's allegations, to the extent that they arise from her removal as a Minister of the Crown and as a member of caucus, constitute an abuse of

process. The moving parties submit that the plaintiff seeks to re-litigate the findings of the CHRC, in a recent decision dated November 16, 2011. In proceedings before the CHRC, the plaintiff alleged that her removal from cabinet and from the parliamentary caucus were the result of discrimination on the basis of marital status, family status and sex, contrary to ss. 5 and 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*]. The responding party to this complaint was the Prime Minister. A similar complaint was filed by the plaintiff against the Prime Minister's Office and the CPC.

[24] The CHRC refused to deal with the complaints under s. 41(1)(c) of the *CHRA*, on the basis that the doctrines of Crown prerogative and parliamentary privilege barred the CHRC from exercising jurisdiction over the subject matter of the complaints. Specifically, the CHRC ruled that, "all of the allegations flowing from the complainant's former position as Minister of the Crown, would fall outside the jurisdiction of the Commission pursuant to the doctrine of Crown prerogative" and "it is clear that those elements of the complaint relating to the complainant's former position as a member of the CPC caucus would fall outside the jurisdiction of the Commission pursuant to Parliamentary privilege." This decision was arrived at after receiving written submissions from all parties. I am satisfied that the jurisdictional issues dealt with by the CHRC, as far as they relate to Crown prerogative and parliamentary privilege, are identical to the issues raised before this Court.

[25] Based on the principles set out by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, I am of the opinion that it is an abuse of process for the plaintiff to seek to have the CHRC's determinations on the issue of Crown prerogative and parliamentary privilege re-litigated. While I appreciate that the plaintiff bases her allegations on a tortious conspiracy and certain specific torts (rather than a human rights violation), the issue remains whether the Prime Minister's actions, in removing the plaintiff from cabinet and from caucus, are subject to review by the courts. That issue, as it relates to the plaintiff and the Prime Minister and the senior advisors in his office, has been decided and creates an issue estoppel, at least with respect to these individuals. In other words, the ruling of the CHRC, although dealing with the Commission's

jurisdiction, was decided on general principles applicable to these two forms of privilege and apply equally to this Court.

[26] In the event that I am in error in applying abuse of process principles to this case, I have independently considered the application of the Crown prerogative and parliamentary privilege as discussed previously in these reasons. I respectfully agree with the CHRC's treatment of these issues.

Removal as a Candidate

[27] The plaintiff alleges that the National Candidate Selection Committee of the CPC removed her as the candidate for the CPC in the electoral district of Simcoe-Grey, and that such removal was effected at the direction of the Prime Minister in furtherance of a tortious conspiracy. The moving parties submit that even if this allegation is proven, the leaders of federal political parties in Canada are expressly authorized by statute to refuse the candidacy of any person seeking to run for that party. This Court has held that the leader of a political party has the statutory authority, pursuant to s. 67(4) of the *Canada Elections Act*, S.C. 2000, c. 9, to refuse to endorse a candidate. In *Grewal v. Conservative Party of Canada*, [2004] O.J. No. 2299 (Sup. Ct.), the plaintiff argued that, pursuant to s. 67(4), the leader cannot reject candidates arbitrarily. The Court rejected such a "restrictive application" of that section and instead stated, at para. 31, that:

> [T]he Party [*sic*] determines the candidates he wishes to have representing the Party. It is not for the Court to make those determinations. The Court should not interfere with a process that has been established by a Party or a process that has been established pursuant to a statute.

[28] In contrast with the Prime Minister's removal of the plaintiff from cabinet and from caucus, his refusal to endorse a candidate is contemplated by statute and cannot be tortious in and of itself. In theory, the refusal to endorse the plaintiff as a candidate for the CPC could be one step in a conspiracy involving tortious acts otherwise properly pleaded. Neither Crown prerogative nor parliamentary privilege directly apply. However, the Statement of Claim identifies the objects of the alleged conspiracy to be the removal of the plaintiff from cabinet,

from caucus and from her position as the CPC's candidate in the electoral district of Simcoe-Grey. While the Prime Minister's refusal to endorse the plaintiff as a candidate could be subject to judicial review in very narrow circumstances, it is combined in this pleading with two other non justiciable matters in such a manner as to render the alleged conspiracy non justiciable as a whole. It is plain and obvious that this conspiracy claim cannot succeed and must be struck.

Absolute Privilege

[29] The plaintiff alleges that the Prime Minister and his Chief of Staff, Mr. Giorno, and Principal Secretary, Mr. Novak, engaged in a series of conversations and communications, which were defamatory of the plaintiff. The moving parties' position on this motion is that these communications, as reflected in the Statement of Claim are the subject of absolute privilege and, therefore, should be struck.

[30] Absolute privilege has been accorded to communications within the executive branch of government when three conditions are satisfied: (1) the statement has been made by a high officer of state to another officer of state; (2) the communication relates to state matters; and (3) the communication is made by the officer of state in the course of his or her official duty.

[31] In *Dowson v. Canada*, 124 D.L.R. (3d) 260, [1981] 37 N.R. 127 [*Dowson*], the Federal Court of Appeal upheld a trial judge's decision striking the plaintiff's statement of claim for defamation. The allegation of defamation stemmed from a statement contained in a report from a Chief Superintendent of the RCMP to an Acting Assistant Deputy Attorney General for Ontario. The ground upon which the plaintiff's statement of claim was struck out was that the statement was protected by absolute privilege. The Court held that, the fact that the statement had been made in response to a question directed to the Solicitor General of Canada by the Attorney General for Ontario (concerning an RCMP investigation into the affairs of a political party), meant that the statement was to be regarded as a statement by the Solicitor General. The Solicitor General, being a Minister of the Crown, was a sufficiently high officer of state to enjoy

the protection of absolute privilege. That privilege also protected the senior official writing the correspondence on the Minister's instructions.

[32] In my opinion, the alleged defamatory statements made in conversations between the Prime Minister and his senior advisors, Mr. Giorno and Mr. Novak (outlined at paras. 60-64 of the Statement of Claim), fall squarely within absolute privilege accorded to officers of state and their senior advisors when communicating on matters within their official duties. The subject of the communications referenced in the Statement of Claim was the suspected improper conduct of a cabinet minister. The same rationale applies to the April 9, 2010 letter from Mr. Novak to the RCMP Commissioner and Minister Raitt's alleged defamatory statements concerning the plaintiff, made to senior officials in the Prime Minister's office.

Axelle Pellerin

[33] On the facts as pleaded, the alleged defamatory statements made by the defendant, Ms. Pellerin, to Mr. Giorno are also protected by the absolute privilege recognized in *Dowson*. The alleged statements were made by Ms. Pellerin, an employee of the Government of Canada, working at the direction of a Minister of the Crown, to the Chief of Staff to the Prime Minister. Therefore, the statements satisfy the *Dowson* requirement of a communication from one officer of state to another. The alleged defamatory statements related to state matters and were made by Ms. Pellerin within the scope of her duties as a federal public servant. It was in the ordinary course of affairs for Ms. Pellerin, as an employee of the Government of Canada, working at the direction of a Minister of the Federal Crown, to report to Mr. Giorno criminal conduct allegedly engaged in by another Minister of the Crown.

[34] The other causes of action (conspiracy, negligence and intentional infliction of mental suffering), pleaded against Ms. Pellerin, are all based on words spoken by Ms. Pellerin; they form the subject of the plaintiff's defamation allegations. I agree with Ms. Pellerin's submission that these additional tort claims are "dressed up" defamation claims, inserted in the pleading for the purpose of avoiding the application of the absolute privilege defence otherwise available to this defendant on the defamation claims. As such, these tort claims are improper and should be struck. The fundamental problem applies to the tort claims (other than defamation) pleaded

against each of the moving parties. This is, in substance, a defamation action based on the words spoken about the plaintiff by each of the moving party defendants. The case law establishes that it is improper to plead other torts together with defamation when the only damages arise from the allegedly defamatory words. In *Avalon Rare Metals Inc. v. Hykawy*, 2011 ONSC 5569, at paras. 15-16, this court addressed the proper approach to a motion to strike concurrent claims for defamation and negligence:

> It is common ground that there is no absolute bar to a plaintiff claiming damages for defamation and concurrently or in the alternative for other torts. At the same time, it is also undisputed that a claim for defamation cannot be "dressed up" as another claim to evade the defences available in a defamation action.
>
> In consequence, the questions to be determined on this motion are whether all of the pleaded causes of action are independent or whether they are subsumed under the law of defamation. In other words, do all of the pleaded claims rest on the impugned publications and do all of the damages claimed arise only as a result of those publications? [Emphasis added.]

[35] The plaintiff alleges that two defamatory letters, each dated April 9, 2010, were written by Mr. Giorno to the RCMP Commissioner and by Mr. Novak to the Conflict of Interest and Ethics Commissioner, on the instructions of the Prime Minister. I quote these letters in full:

> Dear Commissioner: [RCMP Commissioner William J.S. Elliott]
>
> The Prime Minister has asked me to provide the following information on his behalf.
>
> Late last night our office became aware of the specifics of allegations made by Mr. Derrick Snowdy, a private investigator, concerning the conduct of Mr. Rahim Jaffer and the Hon. Helena Guergis. The allegations are numerous and include fraud, extortion, obtaining benefits by false pretences and involvement in prostitution. The extent of the allegations makes it impossible for me to summarize them completely in this brief letter.
>
> Our office has no first-hand knowledge of these allegations and our office has not communicated directly with Mr. Snowdy. Communication was conducted through the Conservative Party's legal counsel, Mr. Arthur Hamilton of Cassels Brock, Toronto.

> I have been informed that Mr. Snowdy states that he has collected evidence to corroborate his allegations and that he can be reached by telephone at ... I understand that Mr. Snowdy says the information was already shared with the RCMP and the OPP, but I want to ensure that you are aware of it.
>
> Mr. Hamilton is also available to be contacted by members of the RCMP. He can be reached at ...
>
> If there is any more assistance that we can provide, please let me know.
>
> Sincerely, [V. Raymond Novak, Principal Secretary]

> Dear Commissioner: [Ms. Mary Dawson
> Conflict of Interest and Ethics Commissioner]
>
> I have been instructed by the Prime Minister to provide you with the following information on his behalf.
>
> Late last night our office became aware of the specifics of allegations made by Mr. Derrick Snowdy, a private investigator, concerning the conduct of the Hon. Helena Guergis. In particular, Mr. Snowdy alleges that Ms Guergis attended meetings at which she promised to advance private business interests. Mr. Snowdy makes additional allegations about the MP's conduct, allegations that may or may not be relevant to her responsibilities under the *Conflict of Interest Act* and/or the *Conflict of Interest Code for Members of the House of Commons*.
>
> Our office has no first-hand knowledge of these allegations and our office has not communicated directly with Mr. Snowdy. Communication was conducted through the Conservative Party's legal counsel. However, I am aware that Mr. Snowdy states that he has collected evidence to corroborate his allegations. I believe that Mr. Snowdy can be reached by telephone at ...
>
> Sincererly, [Guy Giorno, Chief of Staff]

[36] I am of the opinion that the April 9, 2010 letters written by Mr. Novak to the RCMP Commissioner and by Mr. Giorno to the Ethics Commissioner, both (as pleaded) on the instructions of the Prime Minister, are neither defamatory on their face nor are they reasonably capable of bearing the implications of criminal activity suggested at paras. 52 and 79 of the Statement of Claim. I make a similar observation with respect to the Prime Minister's statement of April 9, 2010, which is quoted at para. 72 of the Statement of Claim:

> Last night, my office became aware of serious allegations regarding the conduct of the Honourable Helena Guergis. These allegations relate to the conduct of Ms. Guergis and do not involve any other minister, MP, senator or federal government employee. I've referred the allegations to the Conflict of Interest and Ethics Commissioner and to the RCMP. Under the circumstances, I will not comment on them further.

Shelly Glover

[37] The plaintiff has pleaded, at para. 84 of the Statement of Claim, that the defendant, Shelly Glover, made defamatory statements during a media interview when she stated, "I can assure you that there is far more to come out," and, "[t]his isn't finished." Counsel for Ms. Glover contends that the statements clearly demonstrate that Ms. Glover was supporting the plaintiff rather than disparaging her. Counsel argues that nothing said by Ms. Glover can be taken to refer to or validate allegations in the public domain that the plaintiff had engaged in criminal conduct. Having reviewed the video and transcript of this interview, I am of the opinion that it is plain and obvious that Ms. Glover's statements cannot reasonably bear the implications pleaded (i.e., that the plaintiff had been or was involved in criminal conduct and that reliable evidence would be made available in the future, confirming that the plaintiff had been involved in such conduct).

[38] As against the defendants, Prime Minister Harper and Messrs. Novak and Giorno, the causes of action pleaded are conspiracy, defamation, misfeasance in public office, intentional infliction of mental suffering and negligence. The conspiracy and defamation allegations, as explained above, fall within the conduct protected by the principles of Crown prerogative, parliamentary privilege and absolute privilege. The Statement of Claim, at para. 56, pleads that Prime Minister Harper and Messrs. Novak and Giorno engaged in the tort of misfeasance in public office:

> In addition, or in the alternative, Novak's letter to the RCMP dated April 9, 2012 constituted misfeasance in public office, as it was prepared and sent by Novak, Giorno and Harper in an abuse of their power as public officeholders, in bad faith, maliciously and/or for the illegitimate purpose of discrediting the Plaintiff and justifying her removal from the CPC caucus and forced resignation from the position of Minister of State for the

> Status of Women. Though the RCMP's criminal investigation of the Plaintiff that resulted from Novak's letter was ultimately terminated in the Plaintiff's favour, the Plaintiff suffered damage as a result of that letter and the misfeasance in public office of Noval, Giorno and Harper in writing the letter and triggering the RCMP investigation.

[39] In my opinion, the Prime Minister's removal of the plaintiff from office as a member of cabinet and caucus is not justiciable. Moreover, the letter to the RCMP Commissioner is not defamatory and is the subject of an absolute privilege. Therefore, it necessarily follows that, sending the letter cannot constitute a misfeasance in public office on the part of the Prime Minister or Messrs. Giorno and Novak. I make the same observation with respect to the allegations of misfeasance in public office against these defendants in relation to the April 9, 2010 letter sent to the Conflict of Interest and Ethics Commissioner (Statement of Claim, at para. 82).

Conservative Party of Canada

[40] The plaintiff pleads, at paras. 105-109 of the Statement of Claim, that her removal as a candidate for the CPC in the electoral district of Simcoe-Grey contravened the principles of natural justice. Moreover, the plaintiff pleads that her removal as a candidate was done in bad faith, in contravention of a duty of care owed by the CPC to the plaintiff. It is further alleged that her removal, "was effected at the direction of Harper ... in furtherance of the conspiracy pleaded herein." Counsel for the CPC submits that the CPC, as an unincorporated association, cannot be sued in tort. I accept this submission. The CPC relies on Rule 21.01(3)(b) of the *Rules of Civil Procedure*, which provides that a defendant may move before a court to have an action stayed or dismissed on the ground that, "the defendant does not have the legal capacity to be sued."

[41] An unincorporated association is an organization that is not a legal entity, separate from the persons who compose it. It has no corporate existence or legal status apart from its members, cannot hold property in its own name, and is not capable of being sued. See: Hon. Madam Justice Eileen E. Gillese & Martha Milczynski, *The Law of Trusts,* 2nd ed. (Toronto: Irwin Law Inc., 2005), at p. 38.

[42] The case law has consistently held that political parties, as unincorporated associations, cannot be sued in tort. In *Zundel v. Liberal Party of Canada*, [1999] O.J. No. 74, the plaintiff sued the defendant, Liberal Party, for conspiracy. After a careful review of the jurisprudence, Chadwick J., at para. 11, held:

> The fact that the *Elections Act of Canada* provides for the Chief Agents to conduct affairs on behalf of the political parties does not vest the political parties with the capacity to sue or be sued. The Canada Elections Act does not go that far to provide them with that right and responsibility. It is common ground by counsel for all of the political parties that the political parties have no assets, hold no real estate, employ no people, and as such are not a legal entity. I agree with their position and on that basis I would dismiss the claim as against the political parties.

[43] More recently, in *MacAlpine v. Ontario Progressive Conservative Party*, 2003 CarswellOnt 3008 (Sup. Ct.), in relation to a similar claim, Pierce J. commented, at paras. 26 and 31:

> The claim is brought against the members of the Ontario Progressive Conservative Party caucus and the balance of the Ontario Progressive Conservative Party. The individual members are not named. Even if the claim were tenable, it would be impossible to know against whom judgment would lie, let alone against whom it could be enforced.
>
> *Rule 21.01(3)(b)* of the *Rules of Civil Procedure* permits a defendant to move for an order staying or dismissing an action if the defendant does not have the legal capacity to be sued. Such is the case here. It is "plain and obvious" the plaintiff cannot succeed against the Ontario Progressive Conservative Party and members of the Conservative Caucus. The plaintiff confuses the provincial government with the provincial Progressive Conservative Party.

[44] The common law rule that political parties, as unincorporated associations, do not have the status to sue or be sued in tort in their own name, has been affirmed by the Ontario Court of Appeal in *Longley v. Canada (Attorney General)*, 2007 ONCA 852, 88 O.R. (3d) 408 [*Longley*]. In *Longley*, certain political parties argued that s. 504 of the *Canada Elections Act* should be interpreted as having changed the common law, so as to permit political parties to sue or be sued in their own name. The court rejected this submission, holding that s. 504 of the *Canada*

Elections Act clothes political parties with such status only for the purpose of proceedings under the *Act*. Blair J.A., speaking for the court, stated, at paras. 117 and 121:

> The respondents argue that the language of the statute is clear and unambiguous on its face: in the case of judicial proceedings involving a political party, the party "is deemed to be a person". Canada submits, on the other hand, that the provisions of s. 504(a) do not infuse political parties with the status of legal entities entitled to sue or to be sued for all purposes; rather, s. 504(a) clothes them with that status only for purposes of proceedings under the *Act*, for example those relating to enforcement, compliance or prosecution. It follows, according to the appellant, that the political party respondents do not have the status to bring the proceedings.
>
> I would be more persuaded by the respondents' position if the "deemed person" provision had been placed in the portion of *Act* regulating the registration and activities of political parties. Were that the case, it might suggest more strongly that Parliament intended to create a free-standing right on the part of political parties to sue and to be sued, thus abrogating the common law disability of a political party, as an unincorporated association, to do so. Placing the provision in Part 19 of the *Act* – dealing with enforcement, offences and compliance – signals a more limited intention on the part of Parliament, in my opinion, and bolsters the argument that the "deemed person" provisions of s. 504(a) are designed to give political parties the status of legal entities for the purposes of proceedings under the *Act* only.

[45] It follows, from the holding of the Court in *Longley*, that it is plain and obvious that the CPC cannot be sued in tort, as the plaintiff has attempted to do in this action. The claims against the CPC (Statement of Claim, at paras. 9, 105-109), are struck on the basis that the CPC lacks the status to be sued.

Arthur Hamilton and Cassels Brock

[46] The allegations against Arthur Hamilton (and his law firm, Cassels Brock) are found at paras. 45-50 of the Statement of Claim. Mr. Hamilton is said to have been "the lawyer for CPC and Harper" (Statement of Claim, at para. 14). The allegations against him include conspiracy, defamation, breach of fiduciary duty, breach of duty of good faith, breach of confidence, and negligence (Statement of Claim, at para. 2).

[47] It is pleaded that Mr. Hamilton and his law firm owed a fiduciary duty and a duty of good faith to the plaintiff, requiring him to, "act with regard to the Plaintiff's interest" and "keep and protect the Plaintiff's confidences" (Statement of Claim, at para. 45). This was as a result of a "relationship" arising from legal advice provided by Mr. Hamilton to the plaintiff. The legal advice was provided the day prior to the conversation in which Mr. Hamilton is alleged to have conveyed the false information concerning the plaintiff's criminality to Mr. Giorno or Mr. Novak in the Prime Minister's office. Details of the "relationship," the nature of the "advice" by Mr. Hamilton, and the basis for asserting that Mr. Hamilton was under a duty not to convey the information received from Snowdy to his client, the Prime Minister, is not explained. It is not explained what confidential information is referred to. It is not suggested in the pleading that the information received from Snowdy was confidential. Moreover, the Statement of Claim alleges, at para. 36, as the principal allegation against Mr. Hamilton, that he spoke defamatory words about the plaintiff (being the allegations of criminal behaviour) which had been conveyed to him by Snowdy, to the Prime Minister and Messrs. Giorno and Novak. At paras. 39(c)-(e), it is pleaded, "in the alternative," that Snowdy never communicated any such allegations to Mr. Hamilton, and this same alternative allegation is then repeated at paras. 54(d)-(f) and paras. 63(c)-(e). Finally, at para. 67, the plaintiff pleads that the Prime Minister never became aware of the allegations of criminal conduct, but falsely advised the plaintiff of such allegations in order to cause her to resign from cabinet.

[48] In my opinion, the allegations are contradictory, rather than alternative allegations as pleaded. As related to Mr. Hamilton, the pleading essentially says that he conveyed false information about the plaintiff to the Prime Minister. In the "alternative," it is subsequently pleaded that he did not do so, with no alternative basis of liability suggested. It is pleaded that the Prime Minister received this information from Mr. Hamilton and, "in the alternative," that he did not receive this information from Mr. Hamilton. Respectfully, this is incomprehensible as pleaded.

[49] Moreover, there is an almost complete absence of particulars to support the claim that Mr. Hamilton and his law firm breached the plaintiff's confidences or as to the basis of their obligations to the plaintiff. Once again, the tort claims, other than defamation, are based entirely

on the alleged defamatory communications and, as such, are "dressed up" defamation claims as currently pleaded.

Disposition

[50] In summary, I am of the opinion that the conspiracy allegation and the specific torts constituting the wrongful acts alleged to constitute this conspiracy, are based on the plaintiff's removal from office as a Minister of the Crown, by the Prime Minister of Canada. The subject of this alleged conspiracy is conduct protected by the doctrine of Crown prerogative and is, therefore, beyond the jurisdiction of this Court. The plaintiff's removal from caucus is similarly protected from review by the doctrine of parliamentary privilege and, on the same basis, is beyond review by this Court. Accordingly, I order that the allegations of conspiracy be struck and the action dismissed as against Prime Minister Harper, Guy Giorno and Raymond Novak, without leave to amend.

[51] The claim against Arthur Hamilton and Cassels Brock & Blackwell LLP is struck out, with leave to amend in accordance with these reasons.

[52] The claim against the Conservative Party of Canada is struck, without leave to amend as this organization is a non-sueable entity.

[53] The defamation claims which are subject to absolute privilege, as identified at paras. 29-33 of these reasons, are struck, without leave to amend. The action as against Minister Raitt and Axelle Pellerin are struck, without leave to amend.

[54] The defamation claims arising from the letters of April 9, 2010 to the RCMP Commissioner and the Ethics Commissioner, the Prime Minister's statement of April 9, 2010, and the statements of the defendant, Shelly Glover, are struck without leave to amend.

[55] The plaintiff may, if so advised, file a Fresh as Amended Statement of Claim, consistent with these reasons within 30 days of the release of these reasons or of the final disposition of any appeal herein. The defendants may make responding amendments to their pleadings in accordance with the *Rules of Civil Procedure*.

[56] Any of the moving parties who wish to seek costs of this motion may submit a claim in writing to this Court within 21 days of the release of these reasons and the plaintiff may respond within 21 days of receipt of the defendants' costs submissions.

"Hackland R.S.J."

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Mr. Justice Charles T. Hackland

Released: **August 24, 2012**

CITATION: Guergis v. Novak et al, 2012 ONSC 4579
COURT FILE NO.: 11-53210
DATE: 20120824

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HELENA GUERGIS

– and –

V. RAYMOND NOVAK, ARTHUR HAMILTON, CASSELS BROCK & BLACKWELL LLP, THE RIGHT HONOURABLE STEPHEN HARPER, GUY GIORNO, SHELLY GLOVER, THE HONOURABLE LISA RAITT, AXELLE PELLERIN, CONSERVATIVE PARTY OF CANADA and DERRICK SNOWDY

REASONS FOR DECISION

HACKLAND R.S.J.

Released: August 24, 2012