Federal Court  Cour fédérale

Date: 20250509

Docket: T-432-24

Citation: 2025 FC 862

Ottawa, Ontario, May 9, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

MR. RICHARD ARTHUR HUTCHESON

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff, a self-represented individual, has filed a motion, pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106, seeking to appeal an order of Associate Judge Cotter issued on December 5, 2024, striking the Plaintiff's Statement of Claim without leave to amend ("Order").

[2] The Plaintiff's motion materials appear seek an appeal *de novo*, in other words this appears to be an attempt re-argue the merits of the motion to strike. The motion materials do not

set out specific errors in the Associate Judge's Order. However, the Plaintiff clearly requests that the Order be set aside and that the Statement of Claim of February 29, 2024, be reinstated.

[3] The Defendant submits that the Associate Judge made no error and argues that discretionary orders of an Associate Judge should only be interfered with when the decision is incorrect at law or based on an overriding and palpable error with respect to the facts. Since the Plaintiff has pointed to no such error, the Defendant argues that the motion should be dismissed.

[4] For the reasons that follow, the motion to appeal is dismissed.

II. Background

[5] The Plaintiff filed a Statement of Claim ("Claim") on February 29, 2024.

[6] On April 2, 2024, the Defendant brought a motion pursuant to Rule 221(1)(a) to strike the Claim, without leave to amend, arguing that the Claim did not disclose a reasonable cause of action.

[7] As set out in the Order, the Claim was struck, without leave to amend, because the Claim did not disclose a reasonable cause of action.

III. Issues and Standard of Review

[8] The sole issue for determination in this Motion is: did Associate Judge Cotter err in striking out the Claim without leave to amend?

[9] The standard of review of an appeal of a discretionary order of an associate judge is "a palpable and overriding error" for questions of fact or mixed fact and law. The correctness standard applies to questions of law or questions of mixed fact and law where there is an

extricable legal principle at issue (see *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64 and 66, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 19–37).

[10] As affirmed by Justice Stratas in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] at para 72, "exercises of discretion are questions of mixed fact and law." Further, he notes that per the *Housen* framework, questions of mixed fact and law can be set aside only on the basis of palpable and overriding error, unless there is an error on a question of law (*Mahjoub* at para 74; see also *Murphy v Canada (Attorney General)*, 2023 FC 57 at paras 10–12).

[11] Palpable means an obvious error. Overriding means an error that effects the conclusion. This is a highly deferential standard of review. Conversely, the correctness standard affords no deference. See *Haida Tourism Partnership (West Coast Resorts) v Canada (Ship-Source Oil Pollution Fund)*, 2024 FC 439 at para 32.

IV. Preliminary Matter

[12] The Defendant raised a preliminary matter with respect to the Plaintiff's reliance on affidavit evidence in support of the current motion to appeal the Associate Judge's Order.

[13] The Plaintiff has included an affidavit in the motion record that he initially filed in response to the Defendant's motion to strike.

[14] On a motion to strike, affidavit evidence is not considered. Indeed, Rule 221(2) is clear that no evidence shall be heard on a motion for an order to strike pursuant to Rule 221(1)(a). Recently the Federal Court of Appeal noted that "[the] legislative prohibition against the use of

evidence on a motion to strike is underlined by solid policy considerations" (*Mohr v National Hockey League*, 2022 FCA 145 at para 57; see also paras 56–59 and *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at para 15).

[15] Associate Judge Cotter correctly found that while it was not clear on what basis the Plaintiff sought to have the affidavit evidence considered, to the extent that it was in response to the Defendant's motion to strike it would not be considered. The Plaintiff did not present any evidence that the limited exceptions for a Court to consider such evidence on a motion to strike were applicable; *Hutcheson v Canada*, 2024 FC 1975 at para 2(C).

[16] In addition to the affidavit evidence submitted in respect of the Defendant's motion to strike, the Plaintiff's motion materials include additional unsworn exhibits, or new evidence.

[17] An appeal of an Associate Judge's order is to be decided based on the record that was before the Associate Judge. In other words, new evidence may be admitted and considered only in the most exceptional circumstances; *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at paras 36–38; *Shaw v Canada*, 2010 FC 577 [*Shaw*] at paras 8–10.

[18] New evidence may be admissible where: it was not available to be considered by the court as part of the original motion; it will serve the interests of justice; it will assist the court; and it will not seriously prejudice the other party; *Shaw* at para 9.

[19] The Plaintiff has provided no evidence to address any of these factors, nor has the Plaintiff addressed any of these factors in his written representations in support of this motion.

[20] Therefore, I will not consider the affidavit or the supplemental evidence that was not before or considered by the Associate Judge in the motion to strike.

V. Analysis

[21] An Associate Judge's decision on a motion to strike is a discretionary ruling that involves a question of mixed fact and law and is reviewable on the standard of palpable and overriding error; *Elliott v Canada*, 2021 FC 1256 at para 12–13; *Moore v Canada*, 2020 FC 27 at paras 39–40 and 43–44.

[22] Associate Judge Cotter's Order striking the Plaintiff's Claim without leave to amend was a discretionary decision that turned on issues of mixed fact and law, in particular the absence of pleaded facts that would give rise to a reasonable cause of action at law or that would provide a basis in law for the remedies sought.

[23] After a careful review of the Associate Judge's Order and considering both parties' submissions on this motion, I do not find that any reviewable error was made in striking the Claim without leave to amend the Claim.

[24] The Plaintiff clearly does not agree with the Order; however, he has provided no legal basis or authority to ground a finding that the Associate Judge erred in a manner that would justify this Court's intervention on appeal.

[25] Associate Judge Cotter fairly reviewed the Plaintiff's Claim and gave the claim a generous and fair reading, however, he was "unable to identify any reasonable cause of action." He noted that "[t]he Claim merely sets out relief sought for each claim asserted but fails to plead any material facts."

[26] A review of the Order illustrates that the Associate Judge reviewed the applicable legal frameworks, principles, and jurisprudence for a motion to strike pursuant to Rule 221(1)(a).

After a careful consideration of these factors, Associate Judge Cotter found that "the Claim is completely devoid of any material facts to support any of the causes of action alleged and as a result, the Claim does not disclose a reasonable cause of action."

[27] The Plaintiff's motion materials do not identify a single reviewable error. I agree with the Defendant, that the Plaintiff is attempting to seek an appeal *de novo*, which is not an appropriate ground for appeal.

VI. Conclusion

[28] The Plaintiff has not satisfied me that the Associate Judge's Order contained a palpable and overriding error in the striking of the Claim without leave to amend.

[29] The Defendant has requested their costs in respect of this motion. The general rule for an award of costs is that the successful party should recover their costs. The Defendant did not provide submissions with respect to the quantum of costs, nor did they provide the Court with a specific amount.

[30] The principal objectives of an award of costs are to provide indemnification to the successful party; penalize a party refusing a reasonable settlement; and sanction behavior that increases the expense of litigation or is otherwise unreasonable or vexatious (*Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at paras 19–20).

[31] After considering Rules 400 and 401(1), including the factors set out in Rule 400(3) and Tariff B, and considering the success of the Defendant on this motion, the Defendant is awarded costs, fixed at a total of $500.00, to be paid by the Plaintiff.

JUDGMENT in T-432-24

THIS COURT'S JUDGMENT is that:

1. The motion to appeal is dismissed.

2. The Plaintiff shall pay costs to the Defendant in the amount of $500.00.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-432-24
STYLE OF CAUSE:	MR. RICHARD ARTHUR HUTCHESON v HIS MAJESTY THE KING

MOTION MADE IN WRITING PURSUANT TO RULES 51 AND 369 OF THE *FEDERAL COURTS RULES*, SOR/98-106, CONSIDERED AT OTTAWA, ONTARIO.

JUDGMENT AND REASONS:	BLACKHAWK J.
DATED:	MAY 9, 2025

WRITTEN SUBMISSIONS:

Richard Arthur Hutcheson	FOR THE PLAINTIFF ON HIS OWN BEHALF
Sara Quinn-Hogan	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT