

Federal Court



Cour fédérale

Date: 20251212

Docket: T-2366-25

Citation: 2025 FC 1962

Ottawa, Ontario, December 12, 2025

PRESENT: The Honourable Mr. Justice Lafrenière

SIMPLIFIED ACTION

BETWEEN:

KEVIN J.S. DUSKA JR.

Plaintiff

and

**HIS MAJESTY THE KING
IN RIGHT OF CANADA**

Defendant

ORDER AND REASONS

I. Overview

[1] On July 8, 2025, Plaintiff, Kevin J.S. Duska Jr., commenced a simplified action by way of Statement of Claim against the Defendant, “His Majesty the King in Right of Canada, as represented by the Office of the Information Commissioner of Canada” [the Crown].

[2] The Crown moved in writing to strike the Statement of Claim on August 6, 2025. The motion was dismissed by Order of Associate Judge Catharine Moore dated August 22, 2025, on the basis that the Crown's motion record was deficient in that it failed to contain the Statement of Claim as required by Rule 364(2)(f) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The Order was without prejudice to a further motion being brought on proper materials.

[3] On August 27, 2025, the Crown brought a second motion in writing to strike the Statement of Claim. This time, the motion record included a copy of the impugned pleading, as well as the affidavit of a paralegal, Charlotte Harper, sworn August 6, 2025, that was previously filed in support of the first motion [Harper Affidavit]. The affidavit merely attaches the documents referred to in the Statement of Claim.

[4] On September 2, 2025, the Plaintiff, who is self-represented, filed written representations in response to the Crown's motion. No objection was raised regarding the admissibility of the Harper Affidavit. The same day, the Crown filed written representations in reply.

[5] By Judgment dated October 28, 2025 [the Decision], Associate Judge Catherine Coughlan [AJ Coughlan] struck the Statement of Claim without leave to amend. She awarded costs in favour of the Crown and also ordered that the name of the Defendant be amended by removing "as represented by the Office of the Information Commissioner of Canada."

[6] The Plaintiff now appeals the Decision and seeks the following relief:

- 1) An order setting aside the Judgment and Reasons of the Honourable Madam Justice Coughlan dated October 28, 2025, striking the Plaintiff's Statement of Claim.
- 2) An order granting the Plaintiff leave to file an Amended Statement of Claim within 30 days of the date of this Order.
- 3) In the alternative, an order reducing or eliminating the costs of \$1,500 awarded against the Plaintiff in the said Judgment.
- 4) Costs of this motion in favour of the Plaintiff, or in the alternative, that no costs be awarded to either party.
- 5) Such further and other relief as this Honourable Court may deem just.

[7] As I will explain in the reasons below, I have concluded that the Plaintiff has not demonstrated an error on the part of the learned Associate Judge warranting this Court's intervention. Consequently, the Plaintiff's motion is dismissed.

II. Plaintiff's Affidavit

[8] In support of his motion, the Plaintiff filed an affidavit affirmed on November 17, 2025 [Duska Affidavit]. None of the evidence contained in the Duska Affidavit was before AJ Coughlan when she rendered her decision. The evidence is therefore *prima facie* inadmissible as a party cannot withhold evidence in the first instance and later seek to have it introduced on appeal: *Shire Canada Inc v Apotex*, 2011 FCA 10 at paras 17–18, and *Shaw v Canada*, 2010 FC 577 at paras 8–9.

[9] Exceptionally, new evidence may be admitted on appeal if: (1) it could not have been available earlier; (2) its admission will serve the interests of justice; (3) it will assist the Court; and (4) its admission will not cause serious prejudice to the other side: *Canjura v Canada (Attorney General)*, 2021 FC 1022 at para 12 [*Canjura*], citing *David Suzuki Foundation v Canada (Health)*, 2018 FC 379 at para 37. However, the Plaintiff's evidence falls well short of satisfying the circumstances detailed above for the exceptional admission of new evidence.

[10] For example, at paragraphs 3 through 18 of the Duska Affidavit, the Plaintiff seeks to apologize for the language he used in his written representations filed in response to the Crown's second motion to strike. The Plaintiff's long-winded explanation and apology, as well as the email attached as Exhibit A, not only post-date the Decision but are also irrelevant to any material issue arising from the appeal.

[11] Another example would be paragraphs 19 to 54 of the Duska Affidavit and Exhibits B, C, D, E, F, and G which relate to the Plaintiff's failed attempt to file an amended Statement of Claim and an alleged "Rule 200 error" by the Registry. In summary, the Plaintiff states that: (a) he "e-filed" an amended Statement of Claim on August 5, 2025; (b) the Crown's motion record to strike was served on him on August 6, 2025; (c) he immediately contacted Crown counsel to advise him that it was his understanding that since his amended pleading was filed with the Registry prior to the filing of the Crown's motion record, the amended pleading was "the operative version before the Court for the purposes of any Rule 221 analysis"; (d) Crown counsel responded that he would address the Plaintiff's Amended Statement of Claim in reply; (e) the Registry refused to accept his amended pleading for filing on August 7, 2025 based on Rule 76;

and (f) he emailed Crown counsel on August 7, 2025 to advise him that he would be seeking direction of the Court regarding the amended Statement of Claim.

[12] The above information was clearly available to the Plaintiff before he filed his written representations in response to the Crown's second motion to strike on September 2, 2025; however, he did not bring any of it to the Court's attention. He instead tendered a separate motion for leave to amend on September 3, 2025. The motion was ultimately accepted for filing on October 6, 2025; however, Associate Judge Kathleen Ring directed that it be held in abeyance pending disposition of the Crown's motion.

[13] As for the balance of the Duska Affidavit, I find that the admission of the exhibits and information that either pre-date and post-date the Decision will not serve the interests of justice or assist the Court in assessing whether there are errors in the Decision.

[14] In the circumstances, AJ Coughlan cannot be faulted for not considering documents and submissions that were not put to her. Further, this Court cannot consider them either as they are not properly before this Court.

[15] I would also observe that Rule 221(2) of the *Rules* specifically precludes the use of evidence on a motion to strike a pleading under Rule 221(1)(a) for failing to disclose a reasonable cause of action. It is clear that the motion before AJ Coughlan was based on Rule 221(1)(a). In my view, the Plaintiff is attempting to "bootleg" into the record on appeal affidavit evidence that is in direct breach of the prohibition contained in Rule 221(2).

[16] For the above reasons, the entirety of the Duska Affidavit shall be disregarded.

III. Facts Asserted in the Statement of Claim

[17] For the purposes of a motion to strike, the allegations in the pleading must, as a general rule, be taken to be true. However, the Court need not accept at face value bare allegations, factual allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as factual allegations: *Carten v Canada*, 2009 FC 1233 at para 31.

[18] The facts alleged by the Plaintiff may be summarized as follows.

[19] The Plaintiff is the President of Prime Rogue Inc., a corporation engaged in journalism, private intelligence and transparency advocacy activities: paragraph 1 of the Statement of Claim.

[20] The Plaintiff alleges that he operates a public website, “primerogueinc.com” [Website] which publishes journalism and commentary critical of government transparency practices, including articles specifically addressing the conduct of Innovation, Science, and Economic Development Canada [ISED] and the handling by the Office of the Information Commissioner of Canada [OIC] of access complaints: paragraph 6.

[21] The Plaintiff alleges that between March and May 2025, he filed numerous access to information and privacy requests [ATIP Requests] with ISED concerning government surveillance activities and institutional transparency: paragraph 4.

[22] In response to the ATIP Requests, ISED filed an application under subsection 6.1(1) of the *Access to Information Act*, RSC 1985, c A-1 [ATIA] seeking dismissal of 126 ATIP Requests on grounds of abuse of process: paragraph 5.

[23] The Plaintiff alleges that on June 2, 2025, “the Defendant” accessed the Website: paragraph 8. There is no dispute between the parties that the actions of the OIC are the ones targeted by the Plaintiff and not the Crown itself.

[24] It is alleged that the access by the OIC comprised 299 individual requests “targeting the Plaintiff’s /blog/ directory structure and article metadata, including content specifically critical of ISED, the OIC, and Canada’s institutional transparency architecture.”: paragraph 9.

[25] On June 2, 2025:

1. the Plaintiff filed a formal rebuttal requesting dismissal of ISED’s application and flagging ISED’s “failure to acknowledge over 70% of request withdrawals”: paragraph 10;
2. ISED replied that files were “on hold” pending OIC’s direction: paragraph 11.
3. the Plaintiff rebutted ISED’s response, noting prejudicial filing of outdated inventory and alleging breach of section 4(2.1) of the ATIA: paragraph 12.
4. The OIC conducted a secondary spike in access traffic to the Plaintiff’s infrastructure from the same IP address.

[26] On June 5, 2025, the OIC again accessed the Plaintiff's infrastructure.

[27] The Plaintiff alleges that the OIC failed to disclose this "surveillance" to him or to recuse himself from the proceedings despite the clear conflict of interest and appearance of bias: paragraph 18.

[28] On July 4, 2025, the OIC issued a decision refusing to investigate the Plaintiff's surveillance complaint on grounds of jurisdiction: paragraph 23.

[29] The Plaintiff claims that the OIC's conduct created a reasonable apprehension of bias by demonstrating institutional monitoring of a complainant's public criticism during active adjudicative proceedings. He further claims that the OIC's surveillance constituted collection of personal information without lawful authority under the *Privacy Act*, RSC 1985, c P-21 and violated his section 7 Charter rights to security of the person by creating a chilling effect on his journalistic activities and freedom of expression.

[30] The Plaintiff alleges at paragraph 25 that he was harmed by OIC's conduct:

25. As a direct and proximate result of the Defendant's surveillance and procedural breaches, the Plaintiff has suffered: a) Material exacerbation of diagnosed anxiety and panic disorders; b) Sustained psychological distress from institutional monitoring; c) Diminished professional capacity due to chilling effect on journalistic activities; d) Reputational harm from institutional profiling and monitoring; e) Interruption of core legal advocacy activities.

[31] In the prayer for relief, the Plaintiff seeks various declarations, an order of mandamus, damages “for mental distress, reputational harm, and Charter violations” and punitive damages against the Crown arising from “the breach of procedural fairness, natural justice, and Charter rights during the adjudication of access to information complaints.”

IV. The Decision

[32] The Decision under appeal was issued on October 28, 2025.

[33] The first matter addressed by AJ Coughlan was the Crown’s request pursuant to Rule 8 of the *Rules* for an extension of time of the deadline fixed in Rule 298(2)(b) to bring the motion to strike. The request was vigorously opposed by the Plaintiff. AJ Coughlan granted the extension of time, noting that the dismissal of the first motion to strike with leave to reapply “largely obviated the need for an extension of the time.” The Plaintiff has not disputed this finding on appeal.

[34] AJ Coughlan proceeded to strike the Statement of Claim on the basis that it did not disclose a reasonable cause of action. She outlined the applicable legal principles at paragraphs 15 to 23 of the Decision. After considering the arguments raised by the parties, she concluded that the essential character of the Plaintiff’s claim was to improperly and prematurely challenge the ongoing OIC administrative process concerning the ISED Request and the Plaintiff’s complaint. She further found that the Plaintiff was seeking relief that the Court could not grant.

V. Issues and Standard of Review

[35] The only issues to be determined in the present appeal is whether AJ Coughlan erred in striking the Statement of Claim without leave to amend and in granting costs of the motion to the Crown.

[36] Decisions made on motions to strike are discretionary in nature (*Feeney v Canada*, 2022 FCA 190 [*Feeney*]). Similarly, costs awards are “fully discretionary”: *Johnson v Canadian Tennis Association*, 2025 FCA 127 at para 11.

[37] The applicable standard of review for an appeal under Rule 51 of a discretionary order of an associate judge is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraphs 64, 66 and 79 [*Hospira*]. Such orders are to be reviewed on the civil appellate standard (*Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]) and “should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.” (*Hospira* at para 64.)

[38] Questions of mixed fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness (*Worldspan Marine Inc v Sargeant III*, 2021 FCA 130 at para 48).

[39] An exercise of discretion by an associate judge involves applying legal standards to the facts as found. For the purposes of the *Housen* framework, exercises of discretion are questions of mixed fact and law (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 72 [*Mahjoub*]). Such questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error unless an error on an extricable question of law or legal principle is present (*Mahjoub* at para 74).

[40] The palpable and overriding error standard is a highly deferential one (*Feeney* at para 4). “Palpable” means an error that is obvious, while “overriding” means an error that goes to the very core of the outcome of the case (*Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46 [*South Yukon*]). When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing, rather the entire tree must fall (*South Yukon* at para 46; *Mahjoub* at para 61).

VI. Analysis

[41] The Plaintiff submits that AJ Coughlan erred in law by applying the doctrine of exhaustion of administrative remedies to *ultra vires* conduct that falls outside the statutory mandate of the OIC. He further submits that AJ Coughlan struck a non-operative pleading due to a Registry error in applying Rule 76 of the *Rules* instead of Rule 200. In the alternative, the Plaintiff requests that the costs awarded against him be reduced or eliminated “given his status as a first-time self-represented litigant pursuing public interest litigation in good faith.” I find that there is no merit to any of these arguments.

[42] I am not persuaded that AJ Coughlan committed any error, let alone a palpable and overriding error, in concluding that the Statement of Claim was fundamentally concerned with challenging OIC's administrative processes. Quite the opposite, I consider that she was amply justified in so concluding. The Decision is consistent with the case law in this Court and the Federal Court of Appeal in maintaining the doctrine of exhaustion. This Court has recently held that there is no reasonable cause of action in alleged unreasonableness or want of procedural fairness by administrative decision makers: *Nagle v Canada*, 2025 FC 909 at para 36. Further, this Court has struck proceedings brought by way of action where the relief sought should properly be pursued through judicial review of OIC or other administrative decisions: *Oleynik v Canada (Attorney General)*, 2014 FC 896 at paras 10, 14, 17, and 18. These decisions follow the Federal Court of Appeal's guidance in the judicial review context, where it has noted that this Court "should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted": *CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 [*CB Powell*]; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 13–15.

[43] The Plaintiff submits that AJ Coughlan erred in applying *CB Powell*. He argues the decision does not require exhaustion of administrative remedies "when the challenged conduct is *ultra vires* - outside statutory authority and therefore void *ab initio*." According to the Plaintiff, *ultra vires* acts are tortious conduct lacking any legal foundation. I disagree. The Plaintiff's argument focusses exclusively on alleged "torts" that were not pleaded in the Statement of Claim and on information that was not before AJ Coughlan when the Decision was rendered.

[44] For the sake of completeness, I have reviewed the Plaintiff's proposed amended pleading attached as Exhibit G to the Duska Affidavit which includes newly alleged torts of negligence, misfeasance in public office, and abuse of process. In my view, the amendments do not change the essential nature of the Plaintiff's claim and would not cure the deficiencies noted in the Decision. I would also note that the Plaintiff has not pleaded or suggested sufficient, or any, material facts that would support any of the asserted torts.

[45] The Plaintiff's claim at its core is that employees of the OIC accessed his company's public website on numerous occasions while the company was seeking recourse before the Information Commissioner. The Plaintiff attempts to portray the employees' actions as nefarious by using the term "unauthorized surveillance." However, this is nothing more than a bare allegation. The Plaintiff does not allege covert monitoring by the OIC or its employees to gather intelligence for unlawful purposes, such as espionage or intimidation, or the use of tactics to exploit vulnerabilities, steal data, or disrupt the company's systems. There is nothing untoward about simply accessing a website that is available to the public.

[46] I note, parenthetically, that the question whether the Plaintiff had standing to bring the action was not raised before AJ Coughlan, nor on appeal. It is unclear how the Plaintiff could possibly claim that his privacy or Charter rights were breached given that it was the company's website that was accessed. Moreover, the Plaintiff has failed to plead a causal link between the alleged breaches and his personal claim for damages.

[47] The Plaintiff claims that “because of the Rule 200 error,” his motion to amend should have taken precedence over the Crown’s motion to strike. I disagree. The Plaintiff was fully aware that his proposed amended pleading had been rejected for filing prior to the Crown bringing its second motion to strike. It is only logical that a matter properly before the Court should not be defeated by a subsequent step taken by another party: *Viiv Healthcare Company v Gilead Sciences Canada, Inc*, 2020 FC 11 at para 26, citing *Bruce v John Northway & Son Ltd*, [1962] OWN 150 (Ont Master), [1962] CCS No 1108. In the present case, the Crown’s right to bring a motion to strike the Statement of Claim, as it then stood, was crystallized by the service of its motion record. The Plaintiff should have included his proposed amended Statement of Claim in a responding motion record and sought leave to amend; however, he failed to do so.

[48] I would also add that the Plaintiff’s claim that he was entitled as of right to amend his pleading is not supported by the *Rules*. The proposed amended pleading includes a correction to the name of the Defendant. However, the Plaintiff was not entitled to unilaterally modify the style of cause in light of paragraph 76(a) of the *Rules* that provides that an amendment to correct the name of a party can only be made with leave of the Court. Since the Plaintiff had not obtained leave of the Court to correct the style of cause, the Registry quite properly refused to file the document.

[49] Finally, the Plaintiff has not established any error by AJ Coughlan in awarding costs in favour of the Crown. The general rule is that costs should follow the event. Moreover, the amount awarded was well within the reasonable range, regardless of the Plaintiff’s personal circumstances, purported motivations, and selective case law concerning general costs quantum.

The Plaintiff claims that he pursued the litigation in good faith, believing it raises important questions of public interest regarding governmental digital surveillance. I disagree. There is no public interest here. The Plaintiff's case is so weak that it borders on frivolous and vexatious.

VII. Conclusion

[50] For the above reasons, and for the reasons set out in more detail in the Crown's written representations, which I adopt and make mine, I conclude that there is no reason to intervene.

[51] AJ Coughlan was correct in finding that the facts alleged in the Statement of Claim do not give rise to a cause of action and in denying leave to amend.

[52] The Plaintiff's motion is accordingly dismissed, with costs in favour of the Crown fixed in the amount of \$2,000.00, inclusive of disbursements and taxes.

ORDER IN T-2366-25

THIS COURT ORDERS that:

1. The appeal is dismissed.
2. The Defendant is awarded costs of \$2,000.00, inclusive of taxes and disbursements, to be paid by the Plaintiff.

“Roger R. Lafrenière”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2366-25

STYLE OF CAUSE: KEVIN J.S. DUSKA JR. v HIS MAJESTY THE KING
IN RIGHT OF CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: LAFRENIÈRE J.

DATED: DECEMBER 12, 2025

WRITTEN REPRESENTATIONS BY:

Kevin J.S. Duska Jr.

FOR THE PLAINTIFF
(ON HIS OWN BEHALF)

Daniel Vassberg

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada
Edmonton, Alberta

FOR THE DEFENDANT