In the Court of Appeal of Alberta

Citation: Alberta Health Services v McDonald, 2025 ABCA 341

Date: 20251020
Docket: 2403-0148AC
Registry: Edmonton

2025 ABCA 341 (CanLII)

Between:

Alberta Health Services, His Majesty the King in right of Alberta, and 1285486 Alberta Ltd.

Respondents

- and -

Chad Dallas McDonald and Ape Parkour Inc.

Appellants

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Alice Woolley
The Honourable Justice Tamara Friesen

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.D. Millsap
Dated the 2nd day of July, 2024
Filed on the 9th day of August, 2024
(2024 ABKB 406, Docket: 2204 00582, 2204 00128)

Memorandum of Judgment

The Court:

Introduction

[1] The appellants, Chad McDonald and Ape Parkour Inc ("Ape Parkour"), appeal a Court of King's Bench decision striking their claim, and in the alternative, summarily dismissing it.[1]

[2] For following reasons, the appeal is dismissed.

Background

[3] Chad McDonald owned and operated Ape Parkour, a fitness centre specializing in parkour activities. In October 2020, Ape Parkour entered a 10-year lease with 1285486 Alberta Ltd.

[4] In 2020, the Chief Medical Officer of Health ("CMOH") issued several orders in response to the Covid-19 pandemic. CMOH Order 42-2020 was issued in December 2020 and required the temporary closure of fitness facilities.

[5] Alberta Health Services ("AHS") Executive Officers inspected Ape Parkour on December 14, 2020 pursuant to s 59 of the ***Public Health Act***, RSA 2000, c P-37 [*PHA*] and found it was in contravention of CMOH Order 42-2020. The investigating Executive Officer issued a verbal closure order on December 14, 2020 and a formal written closure order on December 15, 2025 (the "Closure Order") pursuant to s 62 of the *PHA*. On January 19, 2021, an AHS Executive Officer conducted a second investigation and determined that Ape Parkour had remained open to the public in contravention of the Closure Order and CMOH Order 42-2020. On February 23, 2021, CMOH Order 02-2021 came into force, which rescinded CMOH 42-2020 and lifted the mandatory closure of fitness facilities. On the same day, AHS rescinded the Closure Order, permitting Ape Parkour to reopen to the public.

[6] In February 2022, the appellants began Court of King's Bench Action No 2204-00128 (the "128 Action") against AHS and His Majesty the King in right of Alberta ("HMTK"). The 128 Action alleged that Ape Parkour suffered financial losses resulting from AHS' enforcement of CMOH Order 42-2020 against it, which caused it to default on its contractual obligations to 1285486 Alberta Ltd. In the fall of 2022, AHS and HMTK filed motions to strike the 128 Action pursuant to r 3.68 of the ***Alberta Rules of Court***, Alta Reg 124/2010 due to a failure to disclose a

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[1] Mr McDonald clearly brought the appeal on his own behalf and on behalf of Ape Parkour. He is not a lawyer and cannot represent Ape Parkour even though he was its owner and operator: see ***ATB Financial v 1719091 Alberta Ltd,*** 2025 ABCA 291 at paras 22-23. We therefore exercised our discretion under r 2.23(4) of the *Rules* to grant him a limited audience to speak on behalf of Ape Parkour. As such, the style of cause has been edited to include Ape Parkour Inc as an appellant rather than as a respondent.

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reasonable cause of action. In the alternative, they sought summary dismissal of the 128 Action pursuant to r 7.3(1)(b) of the *Rules* on the basis that there was no evidence on the record that would support a finding of AHS' or the Executive Officers' misfeasance, and HMTK was not properly a party to the 128 Action.

[7] In September 2022, 1285486 Alberta Ltd began Court of King's Bench Action No 2204-00582 (the "582 Action") against the appellants for non-payment of rent. In October 2022, the appellants added AHS as a third-party defendant to that claim. AHS applied to strike the third-party claim in April 2023, shortly before the appellants consented to a judgment in the 582 Action later that month. In August 2023, the appellants applied to add HMTK as an additional third-party defendant to the 582 Action.

Chambers Judge's Decision

[8] The chambers judge distilled the matter into three issues: (1) whether the 128 Action should be struck pursuant to r 3.68; (2) whether the 128 Action should be summarily dismissed pursuant to r 7.3(1)(b); and (3) whether the Court should allow the appellants to add HMTK as a third-party defendant to the 582 Action.

[9] The chambers judge granted AHS' and HMTK's application to strike the 128 Action pursuant to r 3.68(2)(b) and granted AHS' application to strike the third-party claim against it in the 582 Action. While the appellants suffered financially from Covid-19 restrictions, the chambers judge found that the pleadings did not contain a reasonable cause of action against AHS or HMTK. The chambers judge found in the alternative that even if it was an error to strike the claim, the respondents had also successfully illustrated that it should be summarily dismissed. He found that as there was no evidence that HMTK had any interaction with the appellants, there could be no cause of action against them. With respect to the claim against AHS, he reasoned that there must be evidence of bad faith on the part of AHS or its Executive Officers for it to have any prospect of success. He found "AHS did not engage in bad faith when it deemed the facility to be captured by CMOH Order 42-2020, nor did it engage in bad faith when it sought compliance with the Order" and summarily dismissed the claim against AHS on that basis: ***1285486 Alberta Ltd v Ape Parkour Inc***, 2024 ABKB 406 at para 28 [*Chambers Decision*].

[10] The chambers judge also refused to permit the 582 Action third-party claim against HMTK, finding that it would be manifestly unfair and would contravene the *Rules* to add a third-party claim at that late stage of the proceedings. Rule 3.45(c)(i) prevents the addition of a third-party claim more than six months after the defendant files a statement of defence. Further, r 3.45(c)(ii) requires a third-party claim to be brought before judgment is entered against the defendant.

Issues

[11] While the appellants raised a number of grounds in their notice of appeal and factum, in oral argument they narrowed their appeal significantly, and focused on the issue of whether the

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chambers judge erred in summarily dismissing the appellants' claim against AHS pursuant to r 7.3(1)(b); specifically, whether the chambers judge erred in finding there was no bad faith on the part of AHS or the AHS Executive Officers.

Parties' Submissions

[12] In oral argument, the appellants focused their submissions on the sole issue of whether AHS' enforcement actions against Ape Parkour were in bad faith and whether the chambers judge's findings on this point disclose a reviewable error. In particular, the appellants submit they implemented changes to Ape Parkour's business structure to comply with CMOH Order 42-2020. These changes included:

- Entering into lease agreements with Ape Parkour's clients to use single rooms of the facility at a given time, rather than offering memberships;
- Posting signs on Ape Parkour's doors that the facility was closed to the public;
- Changing the job description of coaches so that they were instead private contractors with the title of "janitor", and were responsible for sanitizing the building between clients;
- Modifying Ape Parkour's policy about capacity to permit only one individual or individuals from one household to access the space at a time, and solely by appointment;
- Adding televisions and furniture to the space so clients could use it for activities aside from physical activity.

[13] The appellants argue AHS Executive Officers ignored these significant changes to their operation and unfairly targeted Ape Parkour, and were therefore acting in bad faith. Furthermore, the chambers judge erred by failing to engage with the facts of Ape Parkour's efforts to comply with CMOH Order 42-2020, ignoring AHS' bad faith conduct, and unreasonably finding Ape Parkour was still operating as a fitness facility.

[14] AHS submits that the appeal is moot because the appellants only contest the chambers judge's findings about the summary dismissal, and not the motion to strike.

[15] In the alternative, AHS takes the position that the chambers judge made no reviewable error because the pleadings do not disclose a cause of action. The legislation establishing AHS shields it and its Executive Officers from liability in enforcing CMOH Orders where they do so in good faith: ***Provincial Health Agencies Act***, RSA 2000, c P-32.5, s 22 [*PHAA*] (formerly the ***Regional Health Authorities Act***, RSA 2000, c R-10); *PHA*, s 66.1. AHS argues the evidentiary record does not establish that either it or its Executive Officers acted with an absence of good faith.

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[16] HMTK submits that the chambers judge was correct in striking the 128 Action because it discloses no cause of action against HMTK. Furthermore, they argue the 128 Action did not raise a reasonable claim against HMTK and or a genuine issue requiring trial. They point out the claim focuses on AHS' enforcement of CMOH Order 42-2020 and does not allege bad faith against HMTK or challenge the issuance of CMOH Order 42-2020. Finally, HMTK argues the chambers judge properly refused to permit the third-party claim against it in the 582 Action.

Analysis

Dismissal of Application to Bring a Third-Party Claim Against HMTK

[17] In oral argument, the appellants did not press their challenge to the dismissal of their application to bring a third-party claim against HMTK. However, we agree with the respondent HMTK that there is no reviewable error in the chambers judge's determination that allowing HMTK to be added to the 582 Action after judgment was entered would cause significant prejudice to HMTK and should not be permitted.

Summary Dismissal

[18] A judge may summarily dismiss a claim when, on the record, they are able to make a fair and just determination on the merits and determine that there is no genuine issue requiring a trial: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 21, citing ***Hryniak v Mauldin***, 2014 SCC 7 at para 49. The process must allow the court to make the necessary findings of fact and apply the law to the facts, and summary disposition must be a proportionate means to achieve a just result: ***Weir-Jones*** at para 21, citing ***Hryniak*** at para 49. The party requesting summary dismissal bears the burden of proving that the claim has no merit or no defence through establishing the relevant facts on a balance of probabilities. If the applicant meets this burden, the burden shifts to the opposing party to demonstrate that there is a genuine issue requiring a trial: ***Weir-Jones*** at para 47.

[19] Whether the chambers judge properly stated the test for summary dismissal is a question of law reviewable on the standard of correctness. The chambers judge's findings of fact with respect to the summary dismissal are entitled to deference on appeal, as is the chambers judge's application of the law to the facts and the ultimate determination of whether summary resolution is appropriate: ***Weir-Jones*** at para 10, citing ***Hryniak*** at paras 81–84; ***Amack v AW Holdings Corp***, 2015 ABCA 147 at para 27.

[20] While the chambers judge's discussion of the issue of summary dismissal engaged both HMTK and AHS, as noted above, the appellants focused this appeal narrowly on his findings with respect to AHS and whether its Executive Officers acted in good faith in their enforcement actions. We find that there is no reviewable error in the chambers judge's analysis of the issue of summary dismissal of the claim as against AHS.

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[21] As noted above, *PHA* s 66.1 and *PHAA* s 22 insulate AHS and AHS Executive Officers from liability for actions taken in good faith while exercising powers that are granted by the legislation. The chambers judge did not err in finding that the appellant failed to establish that the conduct of AHS and AHS Executive Officers fell outside the scope of these provisions.

[22] In July 2023, CMOH Order 42-2020 was found to be *ultra vires* section 29 of the *PHA* in ***Ingram v Alberta (Chief Medical Officer of Health)***, 2023 ABKB 453. As noted by the chambers judge, the AHS Executive Officers' enforcement of CMOH Order 42-2020 with respect to the appellants occurred before it was deemed *ultra vires*. CMOH Order 42-2020 was presumed to be valid at the time of the enforcement action. The chambers judge properly rejected the argument that the subsequent finding of invalidity supported a finding of bad faith on the part of AHS Executive Officers.

[23] Further, even if the pleadings alleged AHS was liable because it enforced an order subsequently found to be invalid (which they do not) and even if the subsequent finding of invalidity complicates the application of the statutory immunity provisions to AHS' enforcement actions, the chambers judge still applied the correct legal standard in determining whether the finding that the CMOH Order was *ultra vires* impacted the appellants' case against AHS. The appellants are not entitled to damages for the enforcement of legislation that is subsequently deemed invalid unless they show the government acted in bad faith or exhibited other wrongful conduct: ***Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick***, 2002 SCC 13 at para 78. Again: the appropriate inquiry is whether the government acted in good faith. The chambers judge looked to whether there was evidence of bad faith by AHS and found there was none. We can find no palpable and overriding error in the chambers judge's application of the law to the facts before him.

[24] The majority of the appellants' arguments challenge the chambers judge's fact-finding, most significantly, the finding that Ape Parkour had not substantially changed its operations after the CMOH 42-2020 Order was issued, and that Ape Parkour was not in compliance with CMOH Order 42-2020.

[25] As outlined above, the appellants submit they made changes in response to CMOH Order 42-2020, repurposing parts of the facility for other activities, implementing health and safety protocols, reducing capacity, modifying policies, and making visits by appointment only. The chambers judge found that despite these changes, the appellants were still operating a physical fitness facility and "[b]y their own admission, the only thing that changed about the operation after December 15, 2020, was the way fees were collected from the users of the gym and how those users would be permitted to use the facility": ***Chambers Decision*** at para 26. The appellants' facility adaptations could have reasonably fallen within the two categories of changes articulated by the chambers judge. He did not commit a palpable and overriding error in concluding that the

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appellants were operating a fitness facility despite the changes and adaptations they had made in response to the CMOH order.

[26] In any event, the claim against AHS, in substance, seeks to challenge the validity of the Closure Order and avoid its effects. Section 5 of the *PHA* grants the Public Health Appeal Board the authority to hear appeals of people who are directly affected by an order issued under s 62 of the *Act*: *PHA*, ss 5(1), 5(2). Upon receiving notice of an order that affects them, individuals have 10 days to serve a notice of appeal: *PHA*, s 5(3). The appellants did not appeal the Closure Order to the Public Health Appeal Board; instead, they filed this claim. The claim, therefore, ultimately amounts to an impermissible collateral attack on the Closure Order, and could have been struck or dismissed on that basis alone: ***Togstad v Alberta (Surface Rights Board)***, 2015 ABCA 192 at paras 6–10; ***Garland v Consumers' Gas***, 2004 SCC 25 at para 72. In oral argument, the appellants admitted they did not seek a review of the Closure Order but explained the statutory appeal process was not brought to their attention at the time, even though they were then represented by counsel. While this Court recognizes that this must be frustrating for the appellants, the Court cannot disregard the legislator's choice of a statutory appeal process for challenges to orders under s 62 of the *PHA*.

[27] Finally, we must address AHS' argument that the entire appeal is moot because the appellant did not appeal the chambers judge's findings under r 3.86 that no reasonable cause of action had been pleaded against them. We consider this to be a technical argument based on what is clearly an error or oversight committed by the self-represented appellant in drafting his Notice of Appeal. As such, we have exercised our discretion to deal with the entirety of the appeal involving AHS despite the identified deficiency. The chambers judge's summary dismissal issue was fully argued and resolving it will provide clarity and finality to the parties, and in particular, the appellant: ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 at 353, 1989 CanLII 123 (SCC).

Conclusion

[28] There is no reviewable error in the chambers judge's analysis of summary dismissal in respect of the 128 Action against AHS. We decline to deal with the other moot issues in this appeal, particularly the chambers judge's summary dismissal analysis of the claim against HMTK in the 128 Action. Since the chambers decision issued, the Court of King's Bench has certified a class proceeding against HMTK for liability to business owners affected by CMOH orders including CMOH Order 42-2020, a matter the appellants noted in oral argument they do not wish to disturb: ***Ingram v Alberta***, 2024 ABKB 631. In this case, the chambers judge's r 3.68 finding was dispositive in respect of the claim against HMTK and was not appealed; we decline to make any further comment on the claim against HMTK.

[29] The appeal is dismissed.

[30] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order or judgment.

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Appeal heard on September 5, 2025

Memorandum filed at Edmonton, Alberta
this day of October, 2025

Strekaf J.A.

Woolley J.A.

Friesen J.A.

Appearances:

J.M. Jackson, KC
K. Fu
for the Respondent, Alberta Health Services

A.M. Simmonds
F. Chiu (no appearance)
T. Uygun (no appearance)
for the Respondent, His Majesty the King in right of Alberta

R. Belanger
for the Respondent, 1285486 Alberta Ltd.

Appellant C.D. McDonald

Appellant Ape Parkour Inc. (limited audience)

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