

Federal Court



Cour fédérale

Date: 20251021

Docket: T-723-20

Ottawa, Ontario, October 21, 2025

PRESENT: Madam Justice McDonald

PROPOSED CLASS PROCEEDING

BETWEEN:

MARGORIE HUDSON

Plaintiff

and

HIS MAJESTY THE KING

Defendant

ORDER AND REASONS

[1] On this Rule 51 Motion, the Representative Plaintiff appeals the Order of Associate Judge (AJ) Ring (*Hudson v Canada*, 2025 FC 485 [AJ Order]). The only issue raised on this appeal is the AJ finding that the “Craig Evidence”, which consists of the Affidavit and attached Report of proposed expert lawyer, James Craig, was inadmissible for the purposes of the certification motion.

[2] The underlying proposed class proceeding concerns alleged systemic racism in the Royal Canadian Mounted Police (RCMP). The proceeding is not yet certified, and the certification motion and supporting materials have a lengthy procedural background, which the Order under appeal summarizes (AJ Order at paras 4-17).

[3] On the motion before the AJ, the Plaintiff sought leave to file a third evidentiary record in support of her certification motion. The evidence included in this third record that is relevant to this appeal is the Craig Evidence and an Affidavit from a paralegal attaching reports and academic articles. The AJ denied the Plaintiff's leave to file this evidence.

I. Order under appeal

[4] The AJ provided thorough and detailed reasons addressing the evidence the Plaintiff sought to introduce. As this appeal relates only to the admission of the Craig Evidence, I will only address those portions of the AJ Order. The Craig Evidence was found wholly inadmissible by the AJ.

[5] The AJ's findings on reports the Plaintiff sought to admit through the Affidavit of a paralegal are also relevant to the Craig Evidence. The AJ found that two reports were protected by parliamentary privilege. One of those reports (the Senate Canadian Human Rights Commission Report) is a focus of the Craig Report. On this point, the AJ held that paragraphs 60-65 of the Craig Report contain statements protected by parliamentary privilege and, therefore, inadmissible (AJ Order at para 65):

For these reasons, I conclude that the proposed expert reports cannot be used as a ‘back door’ through which to admit the Parliamentary Reports into evidence... paragraphs 60-65 of the Expert Report attached to the Craig Affidavit, are protected by parliamentary privilege, and are therefore inadmissible in this proceeding.

[6] The AJ also denied leave to file several other reports. She also found that the Craig Report was inadmissible because it summarizes and discusses the inadmissible reports (AJ Order at para 98):

In light of my conclusion in the preceding section of these Reasons denying leave to the Plaintiff to file the Reports and given that the whole purpose of the Craig Report is to summarize and discuss the impugned Reports, it follows that the Plaintiff’s motion to file the Craig Report must likewise be dismissed.

[7] The AJ further found that the Craig Report would nevertheless be inadmissible because Mr. Craig was expressing his legal opinion on whether the class proceeding is the preferable procedure, which offended the exclusionary rule against expert opinion on domestic law, and portions of the Craig Report amounted to hearsay.

II. Issue and standard of review

[8] The only issue on this appeal is whether the Motion Judge erred in finding the Craig Evidence inadmissible.

[9] The AJ's decision on the admissibility of the Craig Evidence is a question of law which is reviewable on the standard of correctness (*Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 223 at para 20).

[10] The AJ's factual findings related to the determination of admissibility are entitled to deference (*Gordillo v Canada (Attorney General)*, 2022 FCA 23 at para 66). Therefore, the Plaintiff bears the burden of identifying a palpable and overriding error in the AJ's application of the legal tests to the facts of their motion for leave to file the Craig Report. A palpable and overriding error is explained in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46:

Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 2006 CanLII 37566 (ON CA), 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman, supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

III. Analysis

[11] The Plaintiff argues that the AJ erred in law on her finding that the Craig Evidence was not admissible as expert evidence. Relatedly they argue that, to the extent the Craig Evidence references the reports that the AJ determined could not be placed into evidence or the paragraphs that contain hearsay, those paragraphs could be severed from the Affidavit.

[12] The admissibility of expert evidence is assessed based upon four threshold requirements, namely: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 19 [*White Burgess*]).

[13] The AJ appears to have found the Craig Evidence inadmissible under the third *White Burgess* criterion, absence of an exclusionary rule. Specifically, the Craig Evidence violated exclusionary rules against referencing inadmissible evidence, providing legal opinion evidence on domestic law, and hearsay. I will address these points below.

A. *Craig reference to inadmissible reports*

[14] The Plaintiff argues that the AJ erred in excluding the entirety of Mr. Craig's evidence on the basis that some sources he relied upon, including a Senate Report, were found inadmissible. The Plaintiff acknowledges that paragraphs 60, 61, and 65 of the Craig Report can be struck; however, they argue that paragraphs 62, 63, and 64 do not reference the inadmissible reports and therefore should remain.

[15] This submission fails to reconcile purpose and structure of the Craig Report. The June 24, 2023 letter (attached to the Craig Affidavit), where legal counsel instructs Mr. Craig about the subject matter of his Report, states:

Please comment on the discussion of the recourse mechanisms in these new reports and whether the information in these reports is consistent or inconsistent with your professional knowledge and experience as a labour lawyer.

[16] As instructed by legal counsel, paragraphs 60-65 are Mr. Craig's comments regarding the Senate Report. These paragraphs were thus written in contemplation of what was held to be inadmissible evidence, even if they do not explicitly reference the report.

[17] Further, the structure of the Craig Report demonstrates that it was written to provide comment on the inadmissible reports. Specifically, I note the subtitle before paragraphs 61-65 is: Reply to Discussions in Reports - Complaint to a human rights commission/tribunal". The structure of the report demonstrates that paragraphs 61-65 of the Craig Report contain a single continuous answer based entirely on the inadmissible Senate Report.

[18] Mr. Craig was retained to comment on the reports and his Report is structured in a manner that makes it clear that the impugned paragraphs are a discussion of the reports. Because these reports were found inadmissible, these paragraphs are also inadmissible. It was not the role of the AJ to attempt to parse these paragraphs to ascertain if parts could be extracted from the others so as to render them otherwise admissible.

[19] The Plaintiff has not established any palpable or overriding error by the AJ on this issue.

B. *Opinion on domestic law*

[20] The AJ excluded the Craig Report on the grounds that it impermissibly includes expert opinion on domestic law. She found as follows (AJ Order paras 99-101):

[99] Even if I had granted leave to the Plaintiff to file the three Reports which are the subject of the Craig Report, I would have found that the Craig Report is not admissible as expert evidence. In

his expert report, Mr. Craig agrees with the findings made in those Reports regarding the “frailties” of the recourse mechanisms referenced in those reports, and he further opines on additional “frailties” with those processes.

[100] In effect, Mr. Craig is expressing his legal opinion on whether the class proceeding is the preferable procedure to address the class members’ claims (the fourth requirement for certification) because the clear inference to be drawn from his expert report is that the recourse mechanisms discussed are all inadequate. On a motion for certification, the views of legal practitioners on whether the requirements of certification have been met are not admissible as evidence... Whether a class proceeding is the preferable procedure is a legal issue for the hearing judge to decide.

[101] Moreover, I agree with the Defendant that portions of the Craig Report offend the exclusionary rule against expert opinions on domestic law. It is well-established that “questions of domestic law (as opposed to foreign law) are not matters upon which a court will receive opinion evidence. Such matters clearly fall within the purview of the court’s expertise and opinion evidence on these issues would usurp the court’s role as expert in matters of law” [citations omitted].

[21] The Plaintiff asserts that the Craig Report does not purport to prove domestic law but rather offers expert opinion on the effectiveness of various recourse mechanisms available to racialized RCMP employees. While some legal context is necessary to evaluate those mechanisms, they argue that Mr. Craig’s references to the law are limited, non-controversial, and grounded in his experience. They suggest that any concern about overstepping into legal opinion can be addressed by removing a few specified paragraphs, without undermining the core value of the report. They insist the Report remains useful to assist the Court in understanding the practical functioning of these recourse avenues.

[22] This submission is essentially the Plaintiff rearguing their Motion to have this evidence entered into the record, rather than identifying any errors by the AJ. The AJ applied the appropriate legal principles in assessing this evidence and ultimately concluded that the Craig Report was an attempt to offer legal conclusions on matters within the Court's expertise, without providing necessary factual or technical context.

C. *Craig report contains hearsay evidence*

[23] The Plaintiff submits that the Craig Report does not contain improper hearsay, because it summarizes clients' general concerns, not their specific statements. They also submit that hearsay is permitted on motions under Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, and experts are entitled to rely on hearsay in forming their opinions. The Plaintiff argues that any hearsay concerns with the Craig Report should go to the weight afforded to the report and not its admissibility, relying on *Jones v Zimmer*, 2013 BCCA 21.

[24] The Plaintiff argues that the AJ erred by excluding the report on this basis and by suggesting the evidence was insulated from cross-examination due to privilege. Mr. Craig did not include privileged-client details, and it was unreasonable to discount his professional experience as a valid basis for expert opinion.

[25] The AJ's comments on this point are (AJ Order para 103):

Finally, Mr. Craig describes at some length the concerns and issues raised with him by his clients regarding various recourse mechanisms. This evidence is not opinion evidence. Rather, it is anecdotal hearsay evidence from Mr. Craig's clients that is likely

insulated from any rigorous testing on cross-examination by the Defendant due to solicitor-client privilege.

[26] In my view the Plaintiff's approach to hearsay would conflict with the principled approach to hearsay which extends to expert evidence (*R v Giesbrecht*, 1994 CanLII 96 (SCC) at para 2). Accordingly, the hearsay in the Craig Report should be assessed for its reliability and necessity. The threshold for reliability is high (*R v Furey*, 2022 SCC 52 at para 4) and the AJ had significant concerns with the reliability of the hearsay evidence in the Craig Report, noting that it would likely be insulated from rigorous cross-examination due to solicitor-client privilege. It was thus valid for the AJ to find the Craig Report's reliance on hearsay evidence impermissible.

[27] The Plaintiff has not identified a palpable or overriding error with the AJ's assessment of this evidence.

IV. Conclusion

[28] The substance and content in the Craig Evidence is properly excluded (1) as summarizing privileged or inadmissible evidence; (2) as hearsay; and (3) as legal opinion evidence on questions of domestic law. The Motion Judge's factual findings related to admissibility are accorded deference and I do not find any reviewable error.

[29] Further, I note the Federal Court of Appeal has confirmed that "case management judges must be afforded some 'elbow room' to manage cases. Consequently, the Court should only interfere with orders made in the course of case management in the clearest case of a misuse of

judicial discretion.” (*Lukács v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 55 at para 6; *Constant v Canada*, 2012 FCA 87 at para 12).

[30] In conclusion, the Plaintiff has not identified a palpable and overriding error in the AJ’s application of the relevant legal tests to the Plaintiff’s Motion for leave to file the Craig Evidence. The Plaintiff’s Motion is therefore dismissed.

ORDER IN T-723-20

THIS COURT ORDERS that:

1. The Appeal of the Associate Judge's Order is dismissed.
2. No costs are awarded.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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