Federal Court of Appeal | Cour d'appel fédérale

**Date: 20221107**

**Docket: A-318-21**

**Citation: 2022 FCA 190**

**CORAM:** **GAUTHIER J.A.**
**MACTAVISH J.A.**
**LEBLANC J.A.**

**BETWEEN:**

**KEENAN A. FEENEY**

**Appellant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

Heard at Calgary, Alberta, on October 26, 2022.

Judgment delivered at Ottawa, Ontario, on November 7, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: GAUTHIER J.A.
MACTAVISH J.A.

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## REASONS FOR JUDGMENT

**LEBLANC J.A.**

[1] This is an appeal from a decision of Justice Simon Fothergill of the Federal Court (the motion judge), reported at 2021 FC 1213 (the Decision), granting the respondent's motion (the Federal Crown) for an order:

a) striking out the Statement of Claim brought by the appellant against the Federal Crown (without leave to amend) pursuant to subsection 221(1) of the *Federal Courts Rules*, SOR/98-106 (the Rules), and

b) declaring the appellant to be a vexatious litigant pursuant to section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act).

[2] The appellant, who acts on his own behalf, has brought an action against the Federal Crown. In his claim, he alleges that he was "the victim of an intentional, malicious, and perverted course of justice" on the part of "Crown Actors, within the Court of Queens Bench of Alberta and the Alberta Court of Appeal". According to the appellant, these "Crown Actors" (who are mainly judges) deprived him of "the ability to seek justice for damages inflicted through a malicious attack to [his] character and reputation". The appellant's claim stems from his unsuccessful attempts – going back to 2014 – to set aside a civil contempt order for perjury which was rendered against him in the course of proceedings in the Alberta courts. These underlying proceedings challenged an Emergency Protection Order which was made against him by the Alberta Court of Queen's Bench (as it then was).

[3] The appellant seeks judgment for $25 million in aggravated and punitive damages.

[4] Decisions made on motions brought under subsection 221(1) of the Rules or section 40 of the Act are discretionary in nature (*Lafrenière v. Canada (Attorney General)*, 2020 FCA 110 at para. 2; *Olumide v. Canada*, 2017 FCA 42 at paras. 23 and 31 (*Olumide*); *Simon v. Canada (Attorney General)*, 2019 FCA 28 at paras. 8-20 (*Simon*)). In order to intervene in such matters,

this Court must be satisfied that the Federal Court erred on a question of law or committed a palpable and overriding error on a question of fact or of mixed fact and law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 23; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215). The palpable and overriding error standard is a highly deferential one; the Court will only interfere with a decision under appeal where an error is obvious and affected the outcome of the case (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 at para. 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at paras. 55-56 and 69-70; *Contact Lens King Inc. c. Canada*, 2022 CAF 154 at paras. 76 and 84).

*The Order Striking Out the Statement of Claim*

[5] The motion judge struck out the appellant's Statement of Claim on the ground that it is bereft of any chance of success. The motion judge based his conclusion on this issue on the following points:

a) the appellant's claim is based on numerous bald allegations and fails to plead sufficient material facts or provide particulars founding the appellant's allegations of negligence, misrepresentations, fraud, and fraudulent intent;

b) nothing in the claim ties the appellant's allegations to the Federal Crown or establishes how the Federal Crown could be held liable for the actions of Alberta judges or other public officials; and last, but not least;

c) the Federal Court lacks jurisdiction to consider the allegations against Alberta judges and other pubic officials comprising the claim.

[6] The appellant contends that it is "absurd" to conclude that "[f]ederally appointed justices are not within the Jurisdiction of the Federal Court of Canada" and that the Federal Crown is not vicariously liable for their tortious conduct. He claims that federally appointed judges represent Canada and are therefore employees of the Federal Crown. This conclusion is further evidenced, he says, by the fact that "[t]he appointment of Justices is handled by the Office of the Commissioner for Federal Judicial Affairs Canada" (Appellant's Memorandum at para. 2).

[7] For the reasons that follow, the appellant's contentions cannot succeed.

[8] According to paragraph 221(1)(*a*) of the Rules, a pleading in the Federal Court may be struck where it "discloses no reasonable cause of action". In order to succeed on a motion brought under that rule, it must be "plain and obvious" – assuming the facts as pleaded are true – that the impugned pleading fails to disclose such a cause of action *(R. v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17 (*Imperial*)). As the Supreme Court explained in *Imperial*, although motions to strike must be used with care, they remain a "valuable housekeeping measure essential to effective and fair litigation [as they] unclutter [sic] the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial." (*Imperial* at para. 19).

[9] Although the motions judge did not lay out the *Imperial* test verbatim in his reasons, it is nonetheless clear that he applied the proper test in granting the motion. The motion judge's reasons make clear that he was satisfied that the appellant's Statement of Claim was "bereft of

any chance of success" (Decision at para. 4). As such, there is no doubt that the motion judge did not err in his application of the *Imperial* test.

[10] Further, as was determined by the motion judge, it is plain and obvious that the Federal Court lacks jurisdiction to hear the appellant's allegations against Alberta judges and other public officials. These judges and officials are simply not "employees of Canada" in the sense of being employees of the government of Canada. Their alleged tortious conduct therefore cannot be said to engage the liability of the Federal Crown in any way, shape, or form.

[11] As this Court said in *Crowe v. Canada (Attorney General)*, 2008 FCA 298 at para. 16 (*Crowe*) – a case which similarly involved the striking of an action in damages filed in the Federal Court against a number of defendants, including federally appointed judges – the Federal Court "is a statutory court and, as such, has only the jurisdiction conferred upon it by statute. It is not a court of inherent jurisdiction as are the provincial superior courts…" (See also, *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437 at para. 46.).

[12] In other words, jurisdiction in the Federal Court cannot be presumed. Rather, it must be positively demonstrated (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paras. 46-46). On the facts before me, such jurisdiction has not been demonstrated.

[13] As stated in *Crowe*, Parliament has not granted jurisdiction to the Federal Court over the alleged tortious conduct of judges (*Crowe* at para. 18). That the Federal Court has concurrent jurisdiction with the superior provincial courts to entertain claims in tort against the Federal

Crown through the combined effect of subsection 17(1) of the Act and subsection 21(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (CLPA), does not alter this.

[14] Indeed, the Federal Crown – which, until the enactment of the *Crown Liability Act*, S.C. 1952-53, c. 30 in 1953, could not be sued in tort as of right – can only be held liable for the fault of its servants, and not on its own account (*Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621 at para. 58 ; Peter W. Hogg, Patrick J. Monahan and Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011)). Importantly, however, judges – including federally appointed judges – are not employees of the Federal Crown. They are also not "servants" or "agents" of the Crown within the meaning of the CLPA, as these terms refer to someone working under the control or direction of the Crown (*Northern Pipeline Agency v. Perehinec*, 1983 CanLII 167 (SCC), [1983] 2 S.C.R. 513 at 519-521 ; *R. v. Eldorado Nuclear Ltd.; R. v. Uranium Canada Ltd*., 1983 CanLII 34 (SCC), [1983] 2 S.C.R. 551 at 573-574).

[15] In *Crowe*, this Court explained why judges are not truly employees, servants, or agents of the Crown in the following paragraph:

> [24] The pleadings quoted above do not refer to servants of the Crown as such, though they do refer to judges and the Canadian judiciary. Judges are not servants of the Crown. They are not employees of the Federal Government. The principle of judicial independence is a constitutional principle: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 106. Its application requires that judges be, and be seen to be, free of interference from the government of the day. That independence is incompatible with the status of an employee. As a result, even if a judge behaves extra-judicially and without jurisdiction, his or her conduct would not engage the liability of the Federal Government. The motions judge correctly held that the claim against the Federal Government must fail for failure to disclose a reasonable cause of action because, assuming Mr. Crowe's allegations to be true, they do not engage the liability of the Crown.

[16] The appellant urges the Court to consider this question anew. However, in the interests of the certainty, consistency and predictability of the law, the Court normally follows its prior decisions (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 9 (*Miller*)). It is only in "exceptional circumstances" that it will overrule the decision of another panel. This will generally occur when "the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed…" (*Miller* at para. 10).

[17] The appellant has failed to establish the presence of any such "exceptional circumstances". Notably, there may be other avenues available to him for addressing what he considers to be "persistent and cruel treatment at the hands of negligent and abusive Alberta Superior Court Justices". However, a claim in damages in the Federal Court is clearly not one such avenue. As the Federal Court lacks jurisdiction to entertain the appellant's claim, the questions of judicial immunity raised by the appellant in his Statement of Claim and in his submissions in this appeal do not arise "since there is no liability enforceable in the Federal Court to which that immunity could apply". Such allegations simply do "not create jurisdiction in the Federal Court" (*Crowe* at para. 18).

[18] Finally, the appellant's reference to the Office of the Commissioner for Federal Judicial Affairs Canada in his submissions before this Court is of no assistance to him for two reasons. First, there is no such reference in the impugned Statement of Claim, and as such this argument was not properly pled. Second, even if there was such a reference, that Office – contrary to the appellant's submissions at the hearing – plays no role in the actual appointment of federally

appointed judges. Such appointments, according to section 96 of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c. 3, s. 96, reprinted in R.S.C. 1985, Appendix II, No 5, are within the sole purview of the Governor General.

[19] Based on the foregoing, I see no reason to interfere with the motion judge's finding that the appellant's Statement of Claim is bereft of any chance of success. Nothing in the Statement of Claim ties the appellant's allegations to the Federal Crown. Further – and crucially – "the Federal Court lacks jurisdiction to entertain [the appellant's] allegations against Alberta judges and other officials" (Decision at para. 4), something which cannot be cured by amendments (*Simon v. Canada*, 2011 FCA 6, at paras. 8-10). I would therefore dismiss the appellant's appeal on this point.

*The Vexatious Litigant Order*

[20] I also see no reason to interfere with the vexatious litigant Order. As the motion judge correctly noted, vexatious litigant orders may be based on various, non-exhaustive, criteria (Decision at para. 15). In *Olumide*, Stratas J.A. referred to these criteria as "hallmarks of vexatious litigants" or "badges of vexatiousness" (para. 34). These "hallmarks" include the following (*Olumide v. Canada*, 2016 FC 1106 at para. 10):

a) being admonished by various courts for engaging in vexatious and abusive behaviour;

b) instituting frivolous proceedings (including motions, applications, actions, and appeals);

c) making scandalous and unsupported allegations against opposing parties or the Court;

d) re-litigating issues which have been already been decided against the vexatious litigant;

e) bringing unsuccessful appeals of interlocutory and final decisions as a matter of course;

f) ignoring court orders and court rules; and

g) refusing to pay outstanding costs awards against the vexatious litigant.

[21] As the motion judge correctly pointed out, vexatious litigant orders emanating from other courts regarding the litigant who is the subject of a motion under section 40 of the Act are deserving of significant weight (*Simon* at para. 25). Here, as noted by the motion judge, the appellant is the subject of such an order by the Alberta Court of Appeal, and is also subject to interim court access restrictions in the Alberta Court of King's Bench (*Feeney v. Her Majesty the Queen in Right of Alberta,* 2021 ABCA 255 at para. 38). The appellant contends that these orders of the Alberta courts should be given no weight as they are under appeal (Appellant's Memorandum at para. 9). However, until and unless they are overturned on appeal or suspended pending appeal (which has yet to occur) I see no reason why the motion judge was prohibited

from considering these orders in deciding the motion that was before him. There is no indication in the record before this Court that these orders no longer have full force and effect.

[22] The motion judge also based his decision to grant this motion on the appellant's litigation history at the Federal Court. After observing that vexatious litigants were often prone to "forum shopping", he determined that the present proceeding was "a transparent attempt to re-litigate the allegations struck in Court File No T-272-20 and previously adjudicated in [the appellant's] protracted disputes before the Alberta courts". The motion judge characterized this as "vexatious and abusive" (Decision at para. 20).

[23] The motion judge also referred to the procedural history of an unrelated, pending matter before the Federal Court between the appellant and his former employer, the Canadian Armed Forces, regarding the reimbursement of education and welfare expenses. He noted that these proceedings were commenced by the filing of an action (Court File No. T-19-20) that the appellant subsequently discontinued when faced with an objection from the defendant that this action was a veiled attempt to judicially review the impugned decision. Shortly thereafter, the appellant filed an application for judicial review (Court File No 1515-20) and also a second action concerning the same subject matter (Court File No T-275-21) (Decision at para. 21).

[24] As stated in *Olumide*, at paragraph 32, vexatiousness need not be precisely defined as it "comes in all shapes and sizes". The motion judge was satisfied – based on the appellant's litigation history in both the Alberta courts and the Federal Court – that the appellant is a vexations litigant. I see no palpable and overriding error in that conclusion. Given the wide

margin of appreciation bestowed on the Federal Court in determining what vexatious behavior is under the Act's section 40 regime, this is a finding that the motion judge was entitled to make in the circumstances of this case.

[25] At the hearing of this appeal, the appellant insisted that the Federal Crown's motion under section 40 of the Act must fail because his pursuit of justice is legitimate and will ultimately prevail. Unfortunately for the appellant, this argument is of no assistance to him. As this Court stated in *Olumide*, section 40 of the Act is not only aimed at litigants who pursue unacceptable purposes and litigate to cause harm. It is also aimed at those who have good intentions but "litigate in a way that implicates section 40's purposes" (*Olumide* at para. 33). This is what the motion judge found to be the case here in his decision on this motion, and I once again see no basis upon which to interfere with that finding.

[26] Before concluding, it is worth reminding the appellant that a vexatious litigant Order made under section 40 of the Act does not bar the litigant's access to the courts. Rather, such an order only regulates the litigant's access by requiring him – as permitted by subsection 40(3) of the Act to seek–and obtain–leave before starting or continuing a proceeding (*Olumide* at para. 27). In this case, this means that the outstanding matter stayed by the motion judge's vexatious litigant Order (that is, Court File No T-275-21) may be continued, provided the appellant obtains leave to do so from the Federal Court.

[27] I would therefore dismiss the appeal. The Federal Crown seeks its costs in this appeal in a fixed amount of $1,500.00, all inclusive. Given the outcome of the appeal, I would award costs accordingly.

"René LeBlanc"

J.A.

“I agree.
Johanne Gauthier J.A.”

“I agree.
Anne L. Mactavish J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-318-21 |
| **STYLE OF CAUSE:** | KEENAN A. FEENEY v. HIS MAJESTY THE KING |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
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| **REASONS FOR JUDGMENT BY:** | LEBLANC J.A. |
| **CONCURRED IN BY:** | GAUTHIER J.A.<br>MACTAVISH J.A. |
| **DATED:** | NOVEMBER 7, 2022 |

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