

Federal Court



Cour fédérale

Date: 20230404

Docket: T-2680-22

Citation: 2023 FC 475

Ottawa, Ontario, April 4, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

ANATOLY KIMAEV

Plaintiff

and

**MINISTER OF TRANSPORTATION
ONTARIO**

Defendant

JUDGMENT AND REASONS

I. Overview

[1] Anatoly Kimaev claims that in 2004, representatives of Ontario's Minister of Transportation failed to inform him that the visual acuity requirements for a commercial driver's licence could be waived. He asserts the Minister is liable for failing to ensure that information was known to representatives and conveyed to applicants like him. His Majesty the King in right of Ontario [Ontario] asks that Mr. Kimaev's claim be struck, without leave to amend, because

(i) the Federal Court has no jurisdiction over the claim; and (ii) Mr. Kimaev did not provide prior notice of his claim as required by section 18 of Ontario's *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sched 17. In response, Mr. Kimaev asks that Ontario's motion be quashed and that he be granted default judgment since Ontario has not defended his claim.

[2] For the reasons given in further detail below, I conclude it is plain and obvious that this Court has no jurisdiction to entertain Mr. Kimaev's claim. The Federal Court's jurisdiction is limited to that which is conferred upon it by statute. Contrary to Mr. Kimaev's arguments, neither the *Federal Courts Act*, RSC 1985, c F-7, nor any other statute confers on the Federal Court the jurisdiction to hear his claim against a Minister of the Crown in right of Ontario. Both the *Federal Courts Act* and the federal *Crown Liability and Proceedings Act*, RSC 1985, c C-50, define the "Crown" for the purposes of those statutes as "[His] Majesty in right of Canada," *i.e.*, the federal Crown: *Federal Courts Act*, s 2(1); *Crown Liability and Proceedings Act*, s 2. As a result, neither section 17 of the *Federal Courts Act* nor section 21 of the federal *Crown Liability and Proceedings Act* grants jurisdiction to the Federal Court to hear claims against the provincial Crown, whether styled as "His Majesty in right of Ontario" or as a Minister of the provincial Crown.

[3] It follows that Ontario's motion to strike must be granted and Mr. Kimaev's motion to quash Ontario's motion and for default judgment must be dismissed. In the circumstances, I need not address the issue of compliance with section 18 of Ontario's *Crown Liability and Proceedings Act, 2019*.

II. Analysis

A. *Principles on a motion to strike*

[4] Ontario’s motion is brought pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106. Rule 221(1)(a) provides that a pleading may be struck on the ground that it “discloses no reasonable cause of action,” a description that captures claims that do not disclose a cause of action within the jurisdiction of the Federal Court: *Hodgson v Ermineskin Indian Band No 942*, 2000 CanLII 15066 (FC) at paras 9–10, aff’d 2000 CanLII 16686 (FCA); *Sokolowska v Canada*, 2005 FCA 29 at para 15. On such a motion, the defendant must demonstrate that it is “plain and obvious” the Court lacks jurisdiction: *Hodgson* at para 10.

[5] Rule 221(2) provides that no evidence can be filed on a motion for an order under Rule 221(1)(a). Nonetheless, where the motion is based on a want of jurisdiction, it has been accepted that affidavits may be filed in support of the motion: *Hodgson* at para 9, citing *MIL Davie Inc v Société d’Exploitation et de Développement d’Hibernia Ltée*, 1998 CanLII 7789 (FCA) at para 8. In the present case, Ontario has filed an affidavit from Amanda Benson, Acting File Assignment & Case Management Coordinator with Ontario’s Ministry of the Attorney General, Crown Law Office – Civil. This affidavit speaks to Ontario’s receipt of the claim, and the absence of any record in Ontario’s database of Mr. Kimaev having served a notice under section 18 of Ontario’s *Crown Liability and Proceedings Act, 2019*. However, it does not set out any evidence going to the broader issue of the Federal Court’s jurisdiction over the substance of the dispute. The jurisdictional issue must therefore be determined based on the Statement of Claim as drafted.

B. *The Statement of Claim*

[6] Mr. Kimaev's Statement of Claim was issued on December 21, 2022. It seeks to recover damages in the total amount of approximately \$1.75 million from the Minister of Transportation of Ontario. The facts alleged in the claim relate to Mr. Kimaev's efforts to obtain Province of Ontario driver's licenses at a Services Ontario office in Toronto in the summer of 2004, shortly after he arrived in Canada as a permanent resident. In accordance with regulations made under the *Highway Traffic Act*, RSO 1990, c H.8, as they then stood, Mr. Kimaev was required to pass visual acuity tests to obtain a driver's license: O Reg. 340/94 [*Drivers' Licenses Regulation*].

[7] Mr. Kimaev has perfect vision in his left eye, but has had no vision in his right eye since his infancy. He was able to pass the vision tests for a category G license, since the tests were based on having both eyes open. However, after expressing an interest in a Class A commercial driver's license, Mr. Kimaev did not pass the vision tests for that license since they required a minimum degree of visual acuity in the weaker eye.

[8] In July 2021, Mr. Kimaev again tried to obtain a commercial driver's license. After taking vision tests, in early 2022 he received forms from the Ontario Ministry of Transportation pertaining to a potential waiver of the visual acuity requirements pursuant to subsection 21.3(1) of the *Drivers' Licenses Regulation*. Mr. Kimaev alleges that the Ontario Minister of Transportation acted negligently by not telling him about the possibility of a waiver of the visual acuity requirements in 2004, including in the application form for a Class A license, and that this amounts to discrimination. As statutory authority for the claim, the Statement of Claim refers to

sections 6(2)(b) and 15(1) of the *Canadian Charter of Rights and Freedoms*, paragraph 32(14)(f) of the *Highway Traffic Act*, and on certain sections of the “*Contract and Commercial Law Act, 2017*.” The Statement of Claim also indicates that the action is brought under subsection 17(1) and paragraph 17(2)(a) of the *Federal Courts Act*.

[9] Although not included in the motion records filed on these motions, the Court file reveals that Mr. Kimaev filed an affidavit of service stating that he served the Statement of Claim on the defendant by sending a registered letter to the address of the Ontario Minister of Transportation on December 21, 2022. Ms. Benson’s affidavit indicates that the Crown Law Office – Civil received the claim around January 18, 2023, by interoffice mail. In his motion for default judgment, Mr. Kimaev also relies on Rule 133 of the *Federal Courts Rules*, which pertains to personal service of an originating document on “the Crown, the Attorney General of Canada or any other Minister of the Crown.”

C. *The Federal Court does not have jurisdiction over the claim*

[10] For the following reasons, it is plain and obvious that the Federal Court does not have jurisdiction over Mr. Kimaev’s claim.

(1) The jurisdiction of the Federal Court

[11] The Federal Court is a statutory court created by Parliament pursuant to section 101 of the *Constitution Act, 1867*, as a court “for the better Administration of the Laws of Canada.” As a result, the Federal Court’s jurisdiction is confined to that which is expressly or implicitly

conferred upon it by statute: *Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at paras 31–33, citing, among others, *R v Cunningham*, 2010 SCC 10 at para 19, *Commonwealth of Puerto Rico v Hernandez*, [1975] 1 SCR 228 at p 233, and *Roberts v Canada*, [1989] 1 SCR 322 at p 331. Any such statutory grant must also be within the constitutional boundaries of section 101: *Windsor (City)* at para 33.

[12] The *Federal Courts Act* is the primary statutory source of the Federal Court’s jurisdiction. As noted, the Statement of Claim asserts that it is brought under subsection 17(1) and paragraph 17(2)(a) of the *Federal Courts Act*. Subsection 17(1) grants the Federal Court “concurrent original jurisdiction in all cases in which relief is claimed against the Crown.” Paragraph 17(2)(a) provides an example of such a claim, namely cases in which “land, goods, or money of any person is in the possession of the Crown.” However, as Ontario notes, the term “Crown” that is used in each of these provisions is defined in subsection 2(1) of the *Federal Courts Act*: “**Crown** means [His] Majesty in right of Canada” [emphasis added]. As a result, subsection 17(1) and paragraph 17(2)(a) only grant concurrent jurisdiction to the Federal Court in respect of cases in which relief is claimed against the *federal* Crown. They do not grant jurisdiction in respect of cases in which relief is claimed against the *provincial* Crown.

[13] The Federal Court of Appeal has recently confirmed these principles. Citing a long line of authority, the Court of Appeal stated clearly that neither the *Federal Courts Act* nor the federal *Crown Liability and Proceedings Act* “makes the Crown in right of a province amenable to suit before the Federal Court” and that as a result, “the provincial Crown may not be sued in

the Federal Court”: *Pasqua First Nation v Canada (Attorney General)*, 2016 FCA 133 at paras 49–50, leave to appeal refused 2016 CanLII 89832 (SCC).

[14] Mr. Kimaev argues that subparagraph 3(b)(ii) of the federal *Crown Liability and Proceedings Act* requires that the “Crown” in section 17 of the *Federal Courts Act* includes “[His] Majesty in right of Ontario.” That subparagraph provides that the Crown is liable for the damages for which, if it were a person, it would be liable in any province other than Quebec, in respect of a breach of duty attaching to ownership, occupation, possession or control of property. I cannot accept Mr. Kimaev’s argument. The definition of “Crown” in the federal *Crown Liability and Proceedings Act* is the same as that in the *Federal Courts Act*, and is limited to His Majesty in right of Canada. Subparagraph 3(b)(ii) of the federal *Crown Liability and Proceedings Act* therefore only provides for the liability of the federal Crown for a breach of duty by the federal Crown arising in Ontario or another common law province. In other words, the reference to provinces in subparagraph 3(b)(ii) refers only to the place where the claim arises, and thus the applicable law, and not to the definition of the Crown or to the liability of the provincial Crown.

[15] The federal *Crown Liability and Proceedings Act* expressly recognizes the distinction between the federal and provincial Crown, noting in section 2.1 that for the purposes of sections 3 to 5, the term “person” means a natural person “other than [His] Majesty in right of Canada or a province” [emphasis added]. However, the federal *Crown Liability and Proceedings Act* pertains only to the liability of the federal Crown. It does not, and cannot be read to, bestow on the Federal Court any jurisdiction in respect of conduct by, or proceedings against, the

provincial Crown. While Mr. Kimaev cites section 21 of the federal *Crown Liability and Proceedings Act*, this section addresses the jurisdiction of provincial superior courts over claims against the federal Crown. Neither it nor section 17 of the *Federal Courts Act* grants jurisdiction to the Federal Court over claims against the provincial Crown.

[16] The foregoing provisions may be contrasted with those in Ontario's *Crown Liability and Proceedings Act, 2019*. Subsection 1(1) of that statute defines the "Crown" to mean "the Crown in right of Ontario." The remainder of the statute addresses the liability of the provincial Crown, and the process for making claims against the provincial Crown. Ontario's *Crown Liability and Proceedings Act, 2019* does not bestow jurisdiction on the Federal Court in respect of such a claim.

(2) Mr. Kimaev's claim is a claim against the provincial Crown

[17] Mr. Kimaev's claim seeks damages against the "Minister of Transportation Ontario" in respect of acts by representatives of that Minister and the asserted negligence and breach of statute by that Minister. Ontario's Minister of Transportation is a Minister of the Crown in right of Ontario, as Mr. Kimaev recognizes. His claim is thus a claim against the provincial Crown and not the federal Crown.

[18] Since the Federal Court has no jurisdiction over such a claim, it is plain and obvious that it has no jurisdiction over Mr. Kimaev's claim, and thus that his Statement of Claim does not disclose a reasonable cause of action within the jurisdiction of this Court.

[19] I note for completeness that since Mr. Kimaev's claim is not a claim against the federal Crown, it is not a claim for damages under the federal *Crown Liability and Proceedings Act*, and thus not a claim over which the Federal Court has jurisdiction under paragraph 17(2)(d) of the *Federal Courts Act*. I also note that nothing in this decision pertains to the scope of sections 19, 20, 22 or 23 of the *Federal Courts Act*, which are plainly inapplicable, and are addressed in cases such as *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84; *Dableh v Ontario Hydro*, [1990] FCJ No 913; *Canada v Toney*, 2013 FCA 217; and *Windsor (City)*.

(3) Other statutory grounds

[20] Mr. Kimaev cites sections 1 and 2 of Ontario's *Public Transportation and Highway Improvement Act*, RSO 1990, c P.50, and section 2 and paragraph 32(14)(f) of Ontario's *Highway Traffic Act*. Neither of these statutes confer any jurisdiction on this Court, nor change the clear definition of "Crown" in the *Federal Courts Act*.

[21] Mr. Kimaev also asserts that the provincial Minister of Transportation has breached his rights under paragraph 6(2)(b) and subsection 15(1) of the *Charter*. The fact that he asserts breaches of the *Charter* does not bring the matter within the Federal Court's jurisdiction, as his claim remains one against the provincial Crown. To be a "court of competent jurisdiction" able to grant a remedy under subsection 24(1) for a breach of the *Charter*, the Federal Court must have jurisdiction over the parties, the subject matter, and the remedy sought: *R v Conway*, 2010 SCC 22 at para 24, citing *Mills v The Queen*, [1986] 1 SCR 863. For the reasons set out above, the Federal Court does not have jurisdiction over the parties, in that it has no jurisdiction

over a civil claim against the Crown in right of a province. This does not change simply because the *Charter* is invoked.

[22] Finally, Mr. Kimaev's Statement of Claim refers to several sections of the "*Contract and Commercial Law Act 2017*." The only statute by this name that the Court has been able to find is a statute of New Zealand, which has section numbers that align with those cited by Mr. Kimaev: *Contract and Commercial Law Act 2017* (NZ), 2017/5. This statute can have no application to the actions of the Ontario Minister of Transportation and, in any event, confers no jurisdiction on this Court.

(4) Conclusion

[23] For the foregoing reasons, it is plain and obvious that this Court has no jurisdiction over Mr. Kimaev's claim. This is not simply a matter of drafting, but a fundamental question of jurisdiction over the defendant and the subject matter of the claim, such that there would be no benefit to allowing Mr. Kimaev an opportunity to amend his Statement of Claim: *Federal Courts Rules*, s 221(1); *Toumani v Canada (Revenue Agency)*, 2022 FC 1770 at paras 20–23, 52–53. The Statement of Claim will be struck, without leave to amend.

[24] It follows that Mr. Kimaev's request to quash Ontario's motion to strike must be dismissed as unfounded. I note that the proper way to respond to a motion is through a response on the merits, and not through a motion to dismiss or strike the motion: *McCarthy v Canada (Attorney General)*, 2020 FC 930 at para 4. Regardless, Mr. Kimaev's request to quash Ontario's motion to strike must be dismissed for the same reasons that Ontario's motion must be granted.

[25] It also follows that Mr. Kimaev's motion for default judgment pursuant to Rule 210 of the *Federal Courts Rules* must also be dismissed. On such a motion, a plaintiff must establish that (1) the defendant is in default; and (2) the evidence shows that judgment should be granted against the defendant for the causes of action in the claim: *McInnes Natural Fertilizers Inc v Bio-Lawncare Services Inc*, 2004 FC 1027 at para 3; *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at paras 35–36. The second of these requirements cannot be met where the Court has no jurisdiction over the claim: *Toumani* at paras 7, 52. As Justice Strickland noted in *Toumani*, a motion to strike “cannot be circumvented by moving for default judgment”: *Toumani* at para 52.

[26] As was the case in *Toumani*, Mr. Kimaev is also not entitled to default judgment since (a) he did not effect proper service on the defendant, and (b) he filed no evidence to support his motion for default judgment: *Toumani* at paras 6, 30–48, 52. With respect to the former, Mr. Kimaev argues that he effected service of his Statement of Claim by leaving the original and two copies with the Registry of the Federal Court, pursuant to Rule 133 of the *Federal Courts Rules*. However, as Ontario correctly argues, Rule 133 only pertains to service on the federal Crown and not the provincial Crown. Justice Strickland decided this point clearly in *Toumani*, noting that “it is beyond question that service as effected pursuant to Rule 133 of the [*Federal Courts Rules*] applies only to personal service of an originating document on the Federal Crown, that is, Canada”: *Toumani* at paras 37–38. Service on the Crown in right of Ontario must be made pursuant to section 15 of Ontario's *Crown Liability and Proceedings Act, 2019*: *Toumani* at paras 37, 42.

[27] I endorse and adopt Justice Strickland’s analysis and conclusions from *Toumani*, which appear unassailable. I would only add that section 16 of the *Interpretation Act*, RSC 1985, c I-21, confirms that expressions used in regulations (such as the *Federal Courts Rules*) have the same meanings as in their authorizing enactment. As a result, the “Crown” referred to in Rule 133 of the *Federal Courts Rules* means the same thing as the “Crown” in the *Federal Courts Act*, namely His Majesty in right of Canada. This simply provides further support for the conclusion that service of an originating document on the Crown in right of Ontario cannot be effected through the Registry of the Federal Court.

[28] As the foregoing conclusions are sufficient to determine the parties’ motions, I need not address Ontario’s argument that the claim is a nullity for failure to comply with subsection 18(1) of Ontario’s *Crown Liability and Proceedings Act, 2019*, which requires notice of a claim to be given to Ontario prior to commencing the action: see *Corrigan v Ontario*, 2023 ONCA 39 at paras 3, 13–15, 23.

III. Conclusion

[29] Ontario’s motion to strike the Statement of Claim is granted. Mr. Kimaev’s requests to quash Ontario’s motion and for default judgment are dismissed.

[30] Ontario seeks its costs of the motion although it makes no submissions on quantum. Considering Rule 400 of the *Federal Courts Rules* and the factors identified therein, I conclude that, as the successful party, Ontario should be granted its costs in the inclusive amount of \$500.00.

JUDGMENT IN T-2680-22

THIS COURT'S JUDGMENT is that

1. The defendant's motion is granted and the Statement of Claim is struck out, without leave to amend.
2. The plaintiff's motion to quash the defendant's motion and the plaintiff's motion for default judgment are dismissed.
3. The plaintiff shall pay costs to the defendant in the inclusive amount of \$500.00.

"Nicholas McHaffie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2680-22

STYLE OF CAUSE: ANATOLY KIMAEV v MINISTER OF
TRANSPORTATION ONTARIO

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

JUDGMENT AND REASONS: MCHAFFIE J.

DATED: APRIL 4, 2023

WRITTEN REPRESENTATIONS BY:

Anatoly Kimaev

ON HIS OWN BEHALF

Marcus Campbell

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Ministry of the Attorney General
Crown Law Office – Civil
Toronto, Ontario

FOR THE DEFENDANT