

Federal Court



Cour fédérale

**Date: 20230830**

**Docket: T-1963-19**

**Citation: 2023 FC 1178**

**Ottawa, Ontario, August 30, 2023**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**PAULO STEIN**

**Plaintiff**

**and**

**HIS MAJESTY THE KING**

**Defendant**

**ORDER AND REASONS**

I. Overview

[1] The Plaintiff brings this motion pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 [the Rules] appealing the June 5, 2023 Order [Order] of Associate Judge Duchesne. The Order dismissed the Plaintiff's action after issuance of a Notice of Status Review [Notice]. The Notice cited the Plaintiff's repeated failures to comply with the Court's orders and

directions, the Plaintiff's failure to justify the lengthy delays in advancing the case and the Plaintiff's refusal to acknowledge his responsibility to move the case forward.

[2] The Plaintiff also seeks an extension of time to bring the Rule 51 appeal, not having done so within the 10-day period provided for at Rule 51(2) of the Rules.

[3] As explained in more detail below, the Plaintiff's appeal and motion seeking an extension of time are dismissed. The Plaintiff has failed to demonstrate any reviewable error on the part of the Associate Judge in dismissing the claim.

## II. Background

[4] The Plaintiff is an offender confined to Beaver Creek Institution [BCI], a medium security institution operated by the Correctional Service of Canada pursuant to the *Corrections and Conditional Release Act*, SC 1992, c 20.

[5] In December 2019, the Plaintiff filed a statement of claim commencing a simplified action for damages in connection with a slip and fall ankle injury that occurred at the BCI in December 2017. By Order, dated May 14, 2021, the proceeding was continued as a specially managed proceeding.

[6] On May 10, 2023, the Case Management Judge issued a Notice as he was of the view that the Plaintiff had been ignoring the Court's directions and orders for more than a year. The Associate Judge's Reasons set out the sequence of events preceding the issuance of the Notice

and describe instances where the Plaintiff failed to respect filing deadlines, comply with the Court's directions and explain or justify delays and non-compliance (Order at paragraphs 4 to 21).

[7] The Plaintiff's brief written representations filed in response to the Notice are cited at paragraph 20 of the Order. The Respondent concurred with the Plaintiff's position on the Notice and filed no additional representations.

### III. Order subject to appeal

[8] After summarizing the history of the proceeding and the Plaintiff's submissions, the Associate Judge identified the following matters to be considered and principles to be applied on a status review:

- A. The Court must address the following:
  - i. The reasons the proceeding has not moved forward and whether the reasons justify the delay (*Ladouceur v Banque de Montréal*, 2022 FC 440 at para 26 [*Ladouceur*]);
  - ii. The steps that are being proposed to advance the proceeding (*Ladouceur* at para 26);
- B. Outstanding matters relating to non-compliance with Court orders and directions must be addressed (*Roots v HMCS Annapolis (Ship)*, 2015 FC 1339 at para 27 [*Annapolis*]);
- C. Rule 382.1 of the Rules provides the Court a broad discretion in determining the outcome (*Suncor Energy Inc v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2019 FC 927 (CanLII) at para 10 [*Suncor*]);
- D. The need for a robust timetable will be impacted by the strength of the explanations provided for the delay (*Suncor* at para 10); and
- E. Proceedings should only be dismissed on status review in exceptional circumstances. The focus is on the overall interests of justice, which are to be

considered in light of whether the Plaintiff recognized their responsibility to move the proceeding forward and took steps to do so (*Annapolis* at para 28).

[9] The Associate Judge noted that the Plaintiff had failed to explain why the proceeding had not advanced, provided no justification for the delay since October 2022, did not explain repeated failures to comply with the Court's directions, and did not propose a schedule to advance the proceeding.

[10] In dismissing the claim, the Associate Judge recognized the possibility that the delay could have resulted from counsel's absence of diligence or their inability to obtain instructions from the plaintiff. The Associate Judge noted that these circumstances might have persuaded the Court to arrive at a different conclusion if such representations had been made.

#### IV. Standard of Review

[11] The standard of review applicable to a Rule 51 motion is the appellate standard described by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at paragraphs 7-37 (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 63-65, 79 and 83).

[12] Pursuant to the *Housen* standard, "questions of fact and mixed questions of 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; *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at para 33).

[13] A palpable error is one that is obvious, and an overriding error is one that affects the decision-maker's conclusion: *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64; see also *NCS Multistage Inc v Kobold Corporation*, 2021 FC 1395 at paras 32-33. As Justice Denis Gascon noted in *Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730, the “palpable and overriding error” standard is a highly deferential standard:

[43] The FCA has repeatedly declared that the “palpable and overriding error” standard is a “highly deferential standard” (*Figuroa v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12 at para 3; *Montana v Canada (National Revenue)*, 2017 FCA 194 at para 3; *1395804 Ontario Ltd (Blacklock's Reporter) v Canada (Attorney General)*, 2017 FCA 185 at para 3; *NOV Downhole Eurasia Limited v TLL Oilfield Consulting Ltd*, 2017 FCA 32 at para 7; *Revcon Oilfield Constructors Incorporated v Canada (National Revenue)*, 2017 FCA 22 at para 2). This is a heavy burden for an applicant to meet. As Justice Stratas metaphorically stated in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 [*Mahjoub*] and in *Canada v South Yukon Forest Corporation*, 2012 FCA 165 [*South Yukon*], in order to meet this standard “it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall” (*Mahjoub* at para 61; *South Yukon* at para 46), cited with approval by the SCC in *Benhaim v St-Germain*, 2016 SCC 48 [*Benhaim*] at para 38). [Emphasis added.]

## V. Analysis

[14] The Plaintiff acknowledges that the Associate Judge correctly identified the applicable law. Plaintiff's counsel also acknowledges that “he has been tardy in meeting deadlines and that his reasons for such were not made clear to the Court.”

[15] However, the Plaintiff submits that the Associate Judge nonetheless erred in dismissing the claim by failing to:

- A. Recognize that the missed deadlines and non-compliance with directions arose in the context of procedural documents and their filing, including requests for extensions of time;
- B. Consider that the Plaintiff's tardiness did not engage matters dispositive of the issues raised in the claim. The Parties' "intent to engage on the merits" of the issues raised in the claim was not in dispute, and as reflected by the Defendant's position on the Notice, the Defendant was not prejudiced by the Plaintiff's conduct;
- C. Acknowledge that the Plaintiff did address a schedule for future steps by making it clear that the Parties were prepared to accommodate whatever timing the Court were to direct;
- D. Correctly apply the exceptional circumstances principle, which required the Associate Judge to consider the Plaintiff's circumstances as an inmate as well as the health related aspects of the underlying claim.

[16] The Plaintiff's arguments reflect disagreement with the Associate Judge's conclusions but they do not disclose any error in law, or any palpable and overriding error of fact or mixed law and fact.

[17] The Associate Judge accurately set out the applicable law and summarized the Plaintiff's brief submissions. The Associate Judge did not err in concluding that the submissions failed to address the two main matters before the Court.

[18] The Plaintiff provided no explanation for the delay and repeated non-compliance with the Court's directions. Although the Plaintiff did identify dates of availability for participation in a pre-trial conference, the Plaintiff did not propose a schedule for the service and filing of a proper pre-trial conference requisition and pre-trial memorandum that was compliant with the Rules. The Notice expressly required a proposed timetable. The shortcomings with the Plaintiff's submissions reflected the very concerns that had triggered the Associate Judge to issue the Notice. It was not an error for the Associate Judge to consider the repeated instances of non-compliance, coupled with the absence of any explanation for the non-compliance, cumulatively.

[19] Nor did the Associate Judge err in reviewing and relying on jurisprudence considering continued patterns of disregard of the case management process, non-compliance with the Court's rules and directions, and a party's disregard for the responsibility to move a proceeding forward (*Annapolis* at paras 29 and 30, *Baksh v Sun Media (Toronto) Corp*, 2003 CanLII 64288 (ONSC) at para 16). This jurisprudence acknowledges that repeated non-compliance thwarts the objective of Rule 3 and may justify a determination of a party's position for procedural reasons arising from a failure to comply with Court directions.

[20] Finally, and contrary to the Plaintiff's submissions, the Associate Judge's reasons disclose that he was alert to the Plaintiff's circumstances and did recognize that dismissal as the outcome on a status review should only occur in exceptional cases. In concluding that dismissal was warranted, the Associate Judge balanced the repeated instances of non-compliance, the Plaintiff's repeated failures to provide a meaningful explanation for the non-compliance, the

absence of a concrete proposed schedule, and the overarching interest in ensuring that parties respect the Rules and Court directions.

[21] It is also evident that the Associate Judge was aware and took account of the Plaintiff's circumstances, having explicitly acknowledged that a different result may have been reached had submissions been made on the aforementioned issues (see paragraph 10 above).

[22] The Plaintiff has not demonstrated that the Associate Judge, in concluding that the dismissal of the action was appropriate, erred in a manner warranting intervention on appeal.

[23] With regard to the motion for an extension of time, one of the factors that a Court is to consider is the merit of the underlying claim (*Canada (Attorney General) v. Hennelly*, 1999 CanLII 8190 (FCA)). Having found no error warranting intervention on appeal, I find no merit in the claim. The motion for an extension of time is dismissed on that basis.

## VI. Conclusion

[24] The Applicant's motion is dismissed.

[25] The Defendant seeks costs in the fixed sum of \$500. Having considered the Plaintiff's circumstances and the complexity of the issues raised, I am of the view that costs in the fixed amount of \$250 are appropriate.



**ORDER in T-1963-19**

**THIS COURT ORDERS that:**

1. The motion by the Plaintiff for an order pursuant to Rule 51, appealing and setting aside the Order of Associate Judge Duchesne dated June 5, 2023, is dismissed.
2. The Respondent shall have their costs in the fixed and all-inclusive amount of \$250.

"Patrick Gleeson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1963-19

**STYLE OF CAUSE:** PAULO STEIN v HIS MAJESTY THE KING

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** AUGUST 16, 2023

**ORDER AND REASONS:** GLEESON J.

**DATED:** AUGUST 30, 2023

**APPEARANCES:**

J. Todd Sloan FOR THE PLAINTIFF

Eric Peterson FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

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