

Federal Court



Cour fédérale

Date: 20190802

Docket: T-658-19

Citation: 2019 FC 1040

Ottawa, Ontario, August 2, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

KERRY FITZPATRICK

Plaintiff

And

**CODIAC REGIONAL RCMP FORCE,
DISTRICT 12 and HER MAJESTY THE
QUEEN**

Defendants

JUDGMENT AND REASONS

I. Introduction

[1] Kerry Fitzpatrick has launched an action seeking significant damages from the Defendants, claiming a variety of breaches of his rights as a custodial parent, and in relation to his rights under the *Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being

Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. These claims are described in more detail below.

[2] The Defendants have brought a motion in writing to strike the Statement of Claim, because they submit it is “void of material facts to support a cause of action” and therefore it is plain and obvious that the claim has no prospect of success.

[3] A motion to strike is a powerful instrument in civil litigation – it can put an end to a proceeding before the parties have to spend all of the time and effort associated with the procedural steps leading up to, and including, the trial of the action. It can also stop meritorious claims before they have had a chance to be heard fully, and as such can seem unfair to plaintiffs who genuinely believe they have been harmed. This may be particularly true for a plaintiff who chooses to represent himself, as is the case here.

[4] The law has developed rules to take these factors into account, as will be described below. A trial is generally a dispute between two (or more) parties, but it also involves the expenditure of public resources, including court staff, the cost of the courtroom itself, as well as the judge and staff who work with the judge. It is in the public interest, as well as the interest of both parties, that claims which have no chance of succeeding are not pursued – saving the parties, the court, and the state the time and resources that would otherwise be taken up with such matters. There is also another somewhat “hidden” cost to the parties pursuing meritorious claims, which comply with the applicable legal rules, but who are left waiting while less meritorious claims are dealt with. This refers to the cost to these parties of having their claims delayed while they wait for other cases – cases which are bound to fail – to work their way through the system.

[5] The question before me is whether the Plaintiff's claim fits into the category of claims that have no prospect of success, even assuming all of the facts alleged in the claim to be true. I have reviewed the claim in great detail, as well as the written representations of the Defendants and the Plaintiff. For the reasons that follow, I am striking the statement of claim, without leave to amend. If the Plaintiff wishes to pursue his grievances, he may wish to consider whether, where, and how he may wish to do so, in light of the reasons set out below.

II. The statement of claim

[6] The core of the Defendants' argument is that the statement of claim does not set out the necessary facts in sufficient detail to disclose a reasonable cause of action, and that it therefore fits within the definition of claims that are "vexatious." It is necessary to examine the claims carefully, and with regard to the fact that this statement of claim was drafted by a person who has chosen to represent himself, and is not a lawyer. The term that is often used, and that has guided me in my consideration of this case, is that the claim must be read "generously."

[7] The statement of claim filed sets out a series of incidents which form the basis of the claim of the Plaintiff. It must be stated at the outset that it is not entirely clear what these incidents relate to, since these details are not set out. However, reading the statement of claim together with the Plaintiff's reply to the motion to strike, a picture emerges that the Plaintiff had sole custody of his children and, following a series of interactions with certain police officers who work in the Moncton Codiak detachment of the Royal Canadian Mounted Police (RCMP), it appears that he no longer had custody of his children at the time the statement of claim was filed.

The Plaintiff claims that provincial authorities working for the New Brunswick Department of Social Development (NB DSD) had some involvement, but the details of this are not explained.

[8] The Statement of Claim refers to four specific incidents:

- February 4, 2019 – an RCMP constable responded to a 911 call placed by the Plaintiff, but failed to charge the appropriate person or to uphold the child custody order the Plaintiff had obtained on April 7, 2017.
- February 24, 2019 – another RCMP constable responded to a 911 call placed by the Plaintiff, but neglected to record the Plaintiff's statement in regard to a death threat he allegedly received.
- February 27, 2019 – a third RCMP constable responded to a 911 call placed by the Plaintiff and failed to charge the appropriate person or persons.
- March 24, 2019 – two other RCMP constables responded to a 911 call and, following this, the Plaintiff was charged for uttering threats, but these charges were withdrawn on March 25, 2019.

[9] In his statement of claim, the Plaintiff also refers to misrepresentation of facts which have influenced the RCMP, as well as the NB DSD (it should be noted that the latter organization is not named as a Defendant in the claim). There are also references to “defamation of character” and threats, but these are not specified.

[10] The Plaintiff claims damages in the amount of \$19,000,000 for: (i) breaches of his “fundamental liberty rights” under sections 7 and 15 of the *Charter*; (ii) malicious use of prejudiced and fabricated evidence which has resulted in false prosecution, abduction, and custodial interference; (iii) defamation of character through misrepresentations; and (iv) there is

a reference to an effort to cover up the abduction and false prosecution, which could be read as a claim related to malicious prosecution.

[11] In his response to the motion to strike, the Plaintiff further elaborates on the actions of the NB DSD “in their quasi-prosecutorial role while engaging the police/crown in excluding relevant evidence,” as well as allegations that the RCMP constables demonstrated a bias against him in breach of their obligation to undertake an impartial investigation. He seeks exclusion of certain unspecified evidence under subsection 24(2) of the *Charter* in relation to legal proceedings that are not described, and refers to *Criminal Code* offences relating to child abduction in a context where a child custody order is in place.

[12] This is a “generous” summary of the claims, as I have pieced them together from the statement of claim and the Plaintiff’s reply. A brief summary of the relevant legal principles is necessary before applying the law to the facts of this claim.

III. The law governing a motion to strike

[13] Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*], sets out the framework that applies to this motion:

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d’un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu’il ne révèle aucune cause d’action ou de défense valable;

(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[14] As noted above, the law governing a motion to strike seeks to protect the interests of the plaintiff in having his or her “day in court,” while also taking into account the important interests in avoiding burdening the parties and the court system with claims that are doomed from the outset. In order to achieve this, the courts have developed an analytical approach and a series of tests that apply in considering a motion to strike.

[15] The test for a motion to strike sets a high bar for defendants, and the onus is on the defendant to satisfy the Court that it is plain and obvious that the pleading discloses no reasonable cause of action, even assuming the facts alleged in the statement of claim to be true: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 980. Rule 221(2) reinforces this by providing that no evidence shall be heard on a motion. In view of this Rule, the further evidence submitted by the Plaintiff in his response to the motion to strike cannot be considered.

[16] The facts set out in the statement of claim must be accepted as true unless they are clearly not capable of proof or amount to mere speculation. The statement of claim must be read generously, and mere drafting deficiencies or using the wrong label for a cause of action will not be grounds to strike a statement of claim, particularly when it is drafted by a self-represented party.

[17] Further, the statement of claim must set out facts that support a cause of action – either a cause of action previously recognized in law, or one that the courts are prepared to consider. The mere fact that a cause of action may be novel or difficult to establish is not, in itself, a basis to strike a statement of claim. Related to this, the claim must set out facts that support each and every element of a statement of claim.

[18] As explained by Justice Roy in *Al Omani v Canada*, 2017 FC 786 at para 17 [*Al Omani*], “[a] modicum of story-telling is required.” The law requires, however, a very particular type of story to be set out in a statement of claim – one which describes the events which are alleged to have harmed the plaintiff, focused only on the “material facts,” and set out in sufficient detail that the defendant (and the Court) will know what the specific allegations are based on, and that they support the specific elements of the various causes of action alleged to be the basis of the claim.

[19] The Court generally shows flexibility when a party is self-represented, but this does not exempt the party from complying with the rules set out above: *Barkley v Canada*, 2014 FC 39 at para 17. The reason for this is simple – it is not fair to a defendant to have to respond to claims that are not explained in sufficient detail for them to understand what the claim is based on, or to have to deal with claims based on unsupported assumptions or speculation. Neither is it fair to

the Court that will have to ensure that the hearing is done in a fair and efficient manner. A court would have difficulty ruling that a particular piece of evidence was or was not relevant, for example, if the claim is speculative or not clear. This will inevitably lead to “fishing expeditions” by a party seeking to discover the facts needed to support their claims, as well as to unmanageable trials that continue far longer than is appropriate as both sides try to deal with a vague or ever-changing set of assertions.

[20] A degree of flexibility is needed to allow parties to represent themselves and to have access to the justice system; but flexibility cannot trump the ultimate demands of justice and fairness for all parties, and that is what the *Rules* and the principles set out in the cases seek to ensure.

IV. Applying the law to the facts of this case

[21] The main argument of the Defendants is that the statement of claim does not set out sufficient facts to meet the requirements of the law described in the last section. In technical terms, the Defendants argue that the claim does not disclose “a reasonable cause of action,” contrary to Rule 221(1)(a), and that it is “frivolous or vexatious,” contrary to Rule 221(1)(c) because the allegations are so vague and factually deficient.

[22] The Plaintiff has set out some further details in regard to his claims in his response to the motion to strike, but I find that the response raises more questions than it answers in regard to the statement of claim. It appears that, in his response, the Plaintiff has added new claims in regard to the exclusion of evidence and malicious prosecution, but neither of these are specified in enough detail for one to be able to understand what they are based on.

[23] I find that the statement of claim should be struck at this stage because it does not set out a sufficient factual basis to enable the Defendants and the Court to truly understand what the case is actually about. It does not disclose the material facts needed to support any of the causes of action that are alleged by the Plaintiff. It is simply not possible for the Defendants to respond to such vague or imprecise claims. In part, this is because the Plaintiff has not explained in sufficient detail the context for his claim; in part, this is also because the details that are provided do not support the causes of action he says support his claim for damages.

[24] To show a reasonable cause of action, a statement of claim must set out the material facts to satisfy every element of each and every cause of action alleged. It is often said that a plaintiff must explain the “who, when, where, how and what” giving rise to the defendant’s liability: see the discussion in *Al Omani* at paras 14-18. This is useful guidance and it underlines why the statement of claim in this case falls short of the requirements set by the law.

[25] I find that the statement of claim does not provide a sufficient context, or adequate details of the facts to support any of the causes of action the Plaintiff asserts. The Claim reads as a series of assertions, based both on a background story which is not told, and speculation about legal duties and harms which are not explained. This combination leads to the conclusion that the statement of claim does not disclose a reasonable cause of action as required by Rule 221(1)(a), and that it is “vexatious” as that term has been interpreted under Rule 221(1)(c): see *Carten v Canada*, 2010 FC 857 at para 33.

[26] A final question is whether the statement of claim should be struck with leave for the Plaintiff to amend. In effect, this allows a claim which has been found to be deficient in some way to be amended to address the specific problem. The law states that if a statement of claim

discloses a scintilla of a cause of action, it should be struck with leave to amend, so that the Plaintiff's claim can move forward: *Al Omani* at paras 32-35. It should be noted that certain claims alleging "negligent investigation" by the police have been recognized, in specific and limited circumstances, in Canadian law: see, for example *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41. This is not to say that the claims advanced by the Plaintiff here, to the extent they can be understood from the facts as submitted, fit within this legal framework; it is not necessary for me to make any determination on that question.

[27] I would note that the Plaintiff did not ask for leave to amend his pleadings. A more significant consideration is that it is not at all clear what amendment, short of filing an entirely new and different statement of claim, would solve the difficulties identified above. I find that this case does not lend itself to an amendment to the pleadings to cure the problems that I have identified, in view of the complete absence of a factual basis for the specific claims advanced.

V. Conclusion

[28] For these reasons, I am granting the Defendants' motion to strike the statement of claim. In the circumstances, no costs will be awarded, in exercise of my discretion under Rule 400.

[29] For the benefit of the Plaintiff, who is representing himself, I will add a few concluding thoughts.

[30] I strike the statement of claim, but without prejudice to the Plaintiff launching a new action if that is what he chooses to do. Any such action should be better focused and explained, and I repeat that the statement of claim must explain the "who, when, where, how and what" of

his claims, with reference to the specific allegations he decides to bring forward. The Plaintiff may find it worthwhile to read the *Al Omani* decision carefully; it is available on-line (indeed, all of the decisions referred to in this decision are available, free to anyone with internet access, on the respective courts' web sites, as well as the CanLII web site) and it discusses the general legal tests, then applies them to a claim involving, among other things, references to violations of the *Charter*.

[31] Finally, the Plaintiff may also wish to consider that there are a number of other questions related to the statement of claim, which were not necessary to explore in this decision but which may arise if he pursues his claims. These include whether the claim has a sufficient basis in fact to fit within any recognized cause of action; whether any such action should be pursued in the Federal Court of Canada, insofar as it relates to actions taken by provincial departments and agencies acting within their statutory frameworks and under provincial jurisdiction, or the RCMP when it is acting pursuant to an agreement to administer the *Criminal Code* as provided for by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, section 20, and section 2.1 of the *New Brunswick Police Act*, SNB 1977, c P-9.2. In this regard, the Plaintiff may wish to review the decision of the Supreme Court of Canada in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada*, 2008 SCC 15 (also available on the CanLII website), regarding the distinction between the RCMP acting federally, or pursuant to an agreement by which it is in effect the provincial or municipal police.

JUDGMENT in T-658-19

THIS COURT'S JUDGMENT is that:

1. The statement of claim is struck out, pursuant to Rule 221(1), without leave to amend.
2. No costs are awarded to either party.

“William F. Pentney”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-658-19

STYLE OF CAUSE: KERRY FITZPATRICK v CODIAC REGIONAL
RCMP FORCE, DISTRICT 12 AND HER MAJESTY
THE QUEEN

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES*, SOR/98-106.**

JUDGMENT AND REASONS: PENTNEY J.

DATED: AUGUST 2, 2019

WRITTEN REPRESENTATIONS BY:

Kerry Fitzpatrick

FOR THE PLAINTIFF
ON HIS OWN BEHALF

Ami Assignon

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FOR THE DEFENDANTS