Federal Court  Cour fédérale

Date: 20240116

Docket: T-2181-23

Citation: 2024 FC 60

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 16, 2024

PRESENT: Mr. Associate Judge Benoit M. Duchesne

BETWEEN:

SEJ ESTATE TRUST # T39406183

Applicant

and

MINISTER OF FINANCE CANADA

Respondent

ORDER AND REASONS

[1] There are two motions before the Court.

[2] The first is a motion to strike brought by the Minister of Finance Canada (the "respondent") pursuant to Rule 369 of the *Federal Courts Rules* (the "Rules") for an order striking out the applicant's application without possibility to amend pursuant to Rule 4 of the Rules and the principles explained in *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 (CanLII), [2014] 2 FCR 557, and in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, 1994 CanLII 3529 (FCA), [1995] 1 FC 588 (CA).

[3] The second motion is a motion by the applicant seeking leave from the Court to allow it to amend its application and the notice of application the respondent is seeking to have struck out.

[4] For the reasons that follow, the applicant's motion seeking leave from the Court to allow it to amend its application and its notice of application is dismissed, and the motion to strike brought by the respondent is granted.

I. ANALYSIS

A. The applicant's motion

[5] The applicant filed a motion for an order granting it leave to amend its application and its notice of application.

[6] The burden of proof on the applicant's motion is borne by the applicant. It has the burden of demonstrating to the Court that the Court should grant it leave to amend its application and its notice of application in light of the proposed amendments knowing that the Court must consider whether the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs, that it would serve the interests of justice, and that the proposed amendment must have a reasonable prospect of success (*McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 (CanLII) at paras 19—23). The interests of justice are determined by considering, among other things, the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to

follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits (*Janssen Inc v Abbvie Corporation*, 2014 FCA 242 (CanLII) at para 3).

[7] It is impossible for the Court to proceed with the required analysis without an evidentiary record that sets out the factors that the Court must consider, including the proposed amendments.

[8] The applicant's motion contains no affidavit, therefore no evidence, and no draft amended pleading. It follows that the applicant has not met its burden of proof and its motion must be dismissed.

[9] On January 8, 2024, the applicant served and filed written representations in reply pursuant to Rule 369(3). The written representations contain a draft amended notice of application for judicial review with a draft affidavit from the applicant. Rule 369(3) allows the moving party to make additional written representations only. Rule 369(3) does not allow the moving party to add documents, documentary evidence or affidavits to its motion record, which was served and filed under Rule 369(1). It follows that the draft amended notice of application for judicial review and the draft affidavit from the applicant submitted in the applicant's reply record under Rule 369(3) are inadmissible and are dismissed.

[10] While the Court is not required to determine whether the applicant must be represented by counsel in the disposition of the applicant's motion, it is still useful for the parties that the Court address the issue.

[11] Rule 120 of the Rules specifies that a corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be. However, the applicant, being a trust, is neither a partnership nor an unincorporated association.

[12] A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer (art 1260, *Civil Code of Québec*). A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation. A trustee acts as the administrator of the property of others charged with full administration (art. 1278, *Civil Code of Québec*). It is clear that the trustee may take part in judicial proceedings for the trustee.

[13] Rule 112(1) of the Rules provides that a proceeding may be brought by or against the trustees, executors or administrators of an estate or trust without joining the beneficiaries of the estate or trust. While the notice of application is unclear in this regard and the pleading does not contain any allegations to that effect, the signature on the notice of application suggests that Sacha Evenotte Joseph is the authorized representative of the applicant's trust. Nevertheless, Ms. Joseph cannot act in person as the trust's representative in litigation: Rule 121 requires that

Ms. Joseph, as a trust representative, shall be represented by a solicitor unless the Court orders otherwise.

II. The respondent's motion

[14] The respondent is asking the Court to strike the applicant's application because, among other things, it is not based on any provision of substantive federal law and the relief sought is not consistent with the applicable legislation.

[15] Although served with the motion to strike on December 14, 2023, as appears from the Court record, the applicant neither served nor filed a respondent' motion record (reply record) within the time limit set by Rule 369(2). Given that no request for an extension of time has been received by the Court since the expiration of the time limit for service and filing of a reply record, the Court is proceeding on the respondent's motion without representations to the contrary from the applicant.

[16] The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue*), 2013 FCA 250 (CanLII), [2014] 2 FCR 557 at para 50 (*"JP Morgan"*)) to determine whether the notice of application for judicial review is "so clearly improper as to be bereft of any possibility of success" or affected by an obvious, fatal flaw striking at the root of this Court's power to entertain the application (*JP Morgan* at para 47 and the authorities citied therein). In other words, the Court must determine whether it is plain and obvious, assuming that the facts pleaded are true, that the applicant's

pleadings disclose a reasonable cause of action (*Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 (CanLII) at para 15; *Canada (Attorney General) v Jost*, 2020 FCA 212 (CanLII) at para 29 and the authorities citied therein).

[17] In its analysis, the Court must only consider the notice of application and any other document referred to and incorporated by reference therein. Affidavit evidence is not permitted on motions to strike unless it is filed to append a copy of the document referred to and incorporated by reference in the notice of application (*JP Morgan* at paras 51 to 54).

[18] The applicant's notice of application seeks an order that

(a) orders the Minister of Finance to honour the claim of the lawful beneficiary of the security;

(b) orders the Minister of Finance to honour the claim of the lawful beneficiary to hold rights to the account and the security entitlements; and

(c) orders the Minister of Finance to pay damages in the sum of $100,000.

[19] The allegations of fact contained in the notice of application show that the Minister of Finance did not answer the applicant and that therefore, the Minister had failed to honour his obligations as a public officer. A broad reading of the notice of application to understand its essential nature reveals that the applicant had communications with the Minister of Finance and submitted requests, endorsements, orders and instructions to him in relation to bills of exchange and the transfer of securities, but that these were not followed up on.

[20] The notice of application does not articulate any legal basis for the claim being advanced. Apart from the allegation that, as a public official, the Minister of Finance has a special duty towards the applicant, which is clearly not the case in law, the notice of application does not develop a cause of action or basis for an administrative law claim that is within the jurisdiction of the Court to decide.

[21] Moreover, there is no allegation in the notice of application that provides a legal basis for an award of damages against the Minister of Finance.

[22] Even assuming that the allegations contained in the notice of application are true, it is still plain and obvious that the applicant's notice of application has no prospect of success and is doomed to fail. Since the nature of the cause of action and the basis of the claim dooms the application to failure, there is no reason to believe that any amendments to the notice of application can restore the claim as a proper claim without the applicant's pleading a new cause of action or basis for an administrative remedy (*Collins v Canada*, 2011 FCA 140 (CanLII) at para 26). There is no need to give the applicant a chance to amend its claim.

[23] The respondent's motion is therefore granted.

THIS COURT ORDERS as follows:

1. The applicant's motion for leave of the Court to allow it to amend its application and its notice of application filed on December 13, 2023, is dismissed.

2. The respondent's motion to strike dated December 14, 2023, is granted, and the applicant's application commenced in the notice of application dated October 17, 2023, is struck.

3. The award of costs is reserved. The parties are encouraged to settle the costs of both motions by **January 26, 2024**, and to notify the Court by letter or informal request on consent. If the parties do not settle the costs **by January 26, 2024**, the respondent will have **until January 31, 2024**, to serve and file its representations as to costs, not exceeding three double-spaced pages, excluding annexes and authorities, with proof of service, and the applicant will have **until February 7, 2024**, to serve and file its representations as to costs, not exceeding three double-spaced pages, excluding annexes and authorities, with proof of service.

"Benoit M. Duchesne"
Associate Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2161-23
STYLE OF CAUSE:	SEJ ESTATE TRUST #39406183 v MINISTER OF FINANCE CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO (IN WRITING)
DATE OF HEARING:	DECEMBER 13 AND 14, 2023
ORDER AND REASONS:	ASSOCIATE JUDGE BENOIT M. DUCHESNE
DATED:	JANUARY 16, 2024

SOLICITORS OF RECORD:

Sacha Evenotte Joseph Trust Representative Montréal, Quebec	FOR THE APPLICANT
Béatrice Stella Gagné and Hubert Nunes (student-at-law) Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT