

Federal Court



Cour fédérale

Date: 20210106

Docket: T-1483-18

Citation: 2021 FC 20

Ottawa, Ontario, January 6, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

**SEAN D. JOHNSTON
THOMAS MCDOWELL
KURT LAUDER
DONALD CAMPBELL**

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

JUDGMENT AND REASONS

I. Overview

[1] Sean D. Johnston, Thomas McDowell, Kurt Lauder and Donald Campbell [collectively the Plaintiffs] are current or former inmates of Joyceville Institution, Minimum Security Unit [JI Minimum]. Joyceville Institution is a federal penitentiary operated by the Defendant Her Majesty

the Queen in right of Canada [Defendant]. The Plaintiffs ask this Court to certify a class action on behalf of approximately 1,210 individuals who were inmates of JI Minimum between January 2008 and August 7, 2018, when this proposed class proceeding was commenced.

[2] The Plaintiffs seek damages, including punitive damages, and specific performance in relation to the provision of cable television services to inmates of JI Minimum. The cable television services were provided by Bell Canada pursuant to a contract with the Defendant, and paid for by contributions to Joyceville Institution's Inmate Welfare Fund [IWF].

[3] The Plaintiffs allege that the quality of the cable television services was generally poor, causing the inmates to suffer frustration and financial loss. The Plaintiffs do not allege breach of contract against either the Defendant or Bell Canada. Rather, they maintain that the Defendant is liable to the proposed class in negligence, and for breach of constructive trust.

[4] The Defendant opposes certification of the proposed class action. The Defendant says that the Plaintiffs' Statement of Claim fails to disclose reasonable causes of action; the proposed class cannot be identified or is overly broad; there are no common issues of fact or law; a class action is not the preferable procedure for resolving the Plaintiffs' claims; and the proposed representative Plaintiff is not suitable.

[5] For the reasons that follow, the Plaintiffs have not satisfied the requirements of Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The motion for certification of the proposed class proceeding is therefore denied.

II. Background

[6] Joyceville Institution is a federal penitentiary operated on behalf of the Defendant by the Correctional Service of Canada [CSC] pursuant to the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA]. JI Minimum is a “releasing facility”, where most inmates are preparing for their return to the wider community. While there are some longer-term residents, the inmate population changes frequently.

[7] The IWF’s revenues are derived from deductions from inmates’ income, canteen profits, and interest on the fund’s cash balance. The activities and amenities funded by the IWF are not limited to cable television services. The head of the institution may authorize monies to be disbursed from the IWF for a range of educational, social, cultural and recreational activities, and for related purposes such as donations to approved causes.

[8] The Plaintiffs are current or former members of the Inmate Committee [IC], convened under Commissioner’s Directive [CD] 083 to represent the inmate population with respect to matters that may affect them. This includes the provision of cable television services.

[9] Inmates of JI Minimum have access to cable television services in their individual cells or common areas in living units. The Defendant notes that JI Minimum has several “neighbourhoods”, each comprising a number of “houses”, and the quality of cable television services may vary depending on the point of reception.

[10] The Plaintiffs allege that, at all material times, the inmates of Joyceville Institution were required to pay a fixed monthly amount into the IWF for cable television services at a rate of approximately \$12 per month. The inmate population of JI Minimum is typically 300, and the annual rate of departure is around 30%. The Plaintiffs therefore estimate the total number of inmates who paid for cable television services during the 12 year period to be 1,210.

[11] The Plaintiffs allege that the poor quality of cable television services at JI Minimum adversely affected inmates at different times, often for extended periods. They assert that the Defendant neglected to implement sufficient measures to address the deficiencies by improving the infrastructure, changing the service provider, or other means.

[12] The Plaintiffs rely on inmate surveys to establish shortcomings in the quality of cable television services, and numerous complaints communicated to CSC staff. The Plaintiffs, individually and as members of the IC, lodged several complaints and grievances respecting problems with cable television reception.

[13] A grievance submitted by the Plaintiff Sean D. Johnston was referred to the third and final level on August 8, 2016. A similar grievance submitted by the Plaintiff Kurt Lauder was referred to the final level on January 9, 2017.

[14] An Assistant Commissioner of the CSC responded to Mr. Lauder's grievance on May 8, 2017, and to Mr. Johnston's grievance on May 18, 2017. The Assistant Commissioner acknowledged the documented problems with cable television reception, but found that

institutional staff and the service provider were taking steps to address them and no further action was required. It does not appear that either Mr. Johnston or Mr. Lauder sought judicial review of the Assistant Commissioner's decisions respecting their grievances.

[15] According to the Defendant, complaints would vary during the relevant time period regarding the quality of cable television reception, which house was affected, and how often. Generally, only one to three channels were affected at a time, although occasionally inmates complained that all channels were affected. The number of complaints over a particular timeframe also varied. There may have been many complaints in a single week, followed by several weeks without complaints.

[16] The CSC does not track which inmates watch television, the amount of television they watch, or the channels they watch. The Plaintiffs admit that "it would be extremely difficult to even identify the degree to which any specific individual inmates have been affected" (Affidavit of Sean D. Johnston at para 14).

III. Analysis

[17] The test for certification of a proposed class action is found in Rule 334.16(1):

334.16(1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

334.16(1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:

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| <p>(b) there is an identifiable class of two or more persons;</p> <p>(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;</p> <p>(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and</p> <p>(e) there is a representative plaintiff or applicant who</p> <ol style="list-style-type: none"> i. would fairly and adequately represent the interests of the class, ii. has prepared a plan for the proceeding that sets out a workable method of advancing the proceedings on behalf of the class and of notifying class members as to how the proceeding is progressing, iii. does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and iv. provides a summary of any agreements respecting fees and disbursements between the representative plaintiff of application and the solicitor of record. | <p>(a) les actes de procédure révèlent une cause d'action valable;</p> <p>(b) il existe un groupe identifiable formé d'au moins deux personnes;</p> <p>(c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;</p> <p>(d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;</p> <p>(e) il existe un représentant demandeur qui:</p> <ol style="list-style-type: none"> i. représenterait de façon équitable et adéquate les intérêts du groupe, ii. a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement, iii. n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs, iv. communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier. |
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A. *Reasonable Causes of Action*

[18] As the Federal Court of Appeal explained in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*], it is fundamental to the trial process that a plaintiff plead

material facts in sufficient detail to support the claim and the relief sought. Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action. If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso* at paras 16-17).

[19] A plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars (*Mancuso* at paras 19-20).

[20] The normal rules of pleading apply with equal force to a proposed class action. The Court must view the pleading as it has been drafted, not as it might be drafted. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; it is mandatory and essential (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40).

(1) Negligence

[21] The Plaintiffs allege that the Defendant's servants owed a duty of care, as reflected in law and policy, to provide the inmates of JI Minimum with "a reasonable return on the funds that they provided for services, including clear and uninterrupted television services through contracts with providers" (Statement of Claim at para 22). They further allege that the Defendant's breach of this duty resulted in the foreseeable harms of (a) loss of appropriate television reception and consideration for the funds paid by the inmates; and (b) on-going emotional stress and loss of enjoyment of life incurred in the constant, frustrating attempts to cause staff to provide the services for which inmates were paying (Statement of Claim at para 23).

[22] Prison authorities owe a duty to take reasonable care for the health and safety of the inmates in their custody (*Bastarache v Canada*, 2003 FC 1463 [*Bastarache*] at para 23). However, the duty alleged in the Statement of Claim goes well beyond this and is not established in law.

[23] The Plaintiffs have not pleaded material facts in sufficient detail to establish the existence of a duty of care on the part of the Defendant to provide offenders with cable television services of a particular quality, or at all. Nor have they pleaded material facts in sufficient detail to establish a breach of any duty of care that might be owed respecting the provision of cable television services to inmates in a federal penitentiary.

[24] The Plaintiffs cite CD 341, which states that the cost of improving television infrastructure will be borne by the CSC, while monthly service charges for the distribution of television signals will be paid from the IWF. The Plaintiffs also rely on CD 083, which governs the establishment and functions of the IC. Neither of these documents demonstrates the existence of a duty of care on the part of the Defendants to ensure “clear and uninterrupted” television service, or an obligation to “optimize, facilitate and improve television service”, as alleged in the Statement of Claim. The Defendant notes that, while statutory duties may inform the standard of care, they do not establish the existence of a duty (citing *The Queen (Can) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205).

[25] The Statement of Claim pleads insufficient material facts to support the allegation that the Defendant breached any duty of care that may have been owed to inmates respecting the quality of cable television services. The Statement of Claim states only that, despite numerous complaints and attempts to resolve the matter, the quality remained generally poor. CD 083 obliged CSC officials to meet periodically with the IC to address matters of mutual concern, but there is no allegation in the Statement of Claim that this did not occur; only that the problems persisted. A plaintiff seeking to establish negligence on the part of prison officials must demonstrate that they acted in a way that a reasonable person in that position would not have, thereby creating a foreseeable risk of harm (*Bastarache* at paras 19, 23).

[26] The Plaintiffs plead that the foreseeable and resulting harm was the “loss of appropriate television reception and consideration of funds paid by inmates”, and “ongoing emotional stress and loss of enjoyment of life”. However, mental injury is not proven by the existence of mere

psychological upset. Claimants must show much more: that the disturbance suffered was serious and prolonged, and beyond the ordinary annoyances, anxieties and fears of everyday life (*Saadati v Moorhead*, 2017 SCC 28 at para 37, citing *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27 at para 9). In oral argument, counsel for the Plaintiffs conceded that they are not alleging mental distress comparable to what might result, for example, from solitary confinement.

[27] The Plaintiffs' Statement of Claim therefore fails to plead material facts in sufficient detail to support a claim of negligence against the Defendant.

(2) Constructive Trust

[28] The Plaintiffs allege that, as a party to the contract with Bell Canada, the Defendant owed a duty of care to represent the Plaintiffs' and the proposed class' interests in the contractual relationship. As such, CSC officials "were constructive trustees for the benefit of the inmate consumers of television services and were obliged to administer the funds provided by [them] so as to provide and maintain expected clear and uninterrupted services and to respond in an effective and timely fashion to cable problems and complaints" (Statement of Claim at paras 24-25). The Plaintiffs assert that the Defendant's servants breached their obligations as constructive trustees, and knowingly permitted the previously identified harms to occur.

[29] The constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property, particularly in the marital context. Where a plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation,

maintenance or improvement of disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Kerr v Baranow*, 2011 SCC 10 at para 50). The Plaintiffs' Statement of Claim pleads insufficient material facts to support the allegation that the Defendant held any property belonging to the Plaintiffs or proposed class members in a constructive trust, or breached any fiduciary obligations that may have been owed with respect to the handling of that property.

[30] Where there is no referential property and the claim is purely monetary, there can be no constructive trust (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 92). Here, no proprietary interest is alleged, and there is no allegation of unjust enrichment. Nor could there be, given that the Defendant paid all monies received from the IWF on account of the provision of cable television services to Bell Canada. There is no allegation of fraud or unlawful conversion of funds.

[31] It is plain and obvious that the Plaintiffs' Statement of Claim fails to disclose any reasonable causes of action. The motion to certify the proposed class action must therefore be denied.

[32] This is sufficient to dispose of the motion. There is, however, another aspect of the test for certification that provides an equally strong basis upon which to deny the motion: whether a class proceeding is the preferable procedure for the just and efficient resolution of any common questions of law or fact raised by the Plaintiffs' Statement of Claim.

B. *Preferable Procedure*

[33] The preferability analysis requires the Court to look to all reasonably available means of resolving the class members' claims, not just the possibility of individual actions. This entails consideration of other potential court procedures, and also non-court proceedings (*AIC Limited v Fischer*, 2013 SCC 69 [*Fischer*] at para 35).

[34] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and procedural aspects of access to justice, recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37).

[35] The Plaintiffs admit that "it would be extremely difficult to even identify the degree to which any specific individual inmates have been affected" by the poor quality of cable television services at JI Minimum. The Plaintiffs therefore seek an award of aggregate damages, as well as "specific performance". The Defendant notes that specific performance is not a remedy that may be granted against the Crown, although declaratory relief may be available (*Crown Liability and Proceedings Act*, RSC, 1985, c C-50, s 22(1)).

[36] The Plaintiffs commenced this proposed class action only after numerous complaints and grievances failed to resolve the problems surrounding the provision of cable television services to their satisfaction. Despite the Plaintiffs' evident loss of faith in the grievance process, this remains the mechanism prescribed by Parliament for the resolution of inmate complaints such as the ones in issue here. The grievance process, coupled with judicial review if necessary, is a preferable procedure to the proposed class action.

[37] The inmate grievance process is designed to address situations where offenders are dissatisfied with the actions or decisions of CSC officials. It is a comprehensive process established by sections 90 and 91 of the CCRA, and further particularized in CD 081, "Offender Complaints and Grievances". Grievances may be submitted on behalf of a group, and may then be given high priority (CD 081 at paras 24-30).

[38] An inmate, or group of inmates, may submit a grievance to seek corrective action and, if dissatisfied with the response, seek judicial review in this Court. A broad range of corrective action is available through the offender complaint and grievance process, including financial compensation in appropriate cases (CD 81 at paras 31, 41-44). The Defendant notes that most of the incidents alleged in this proposed class action are statute-barred and a grievance would have resulted in a much more efficient and timely resolution of complaints than a class proceeding, with all of its procedural complexity.

[39] In *Lauzon v Canada (Attorney General)*, 2014 ONSC 2811 [*Lauzon*], the Ontario Superior Court refused to certify a proposed class action brought on behalf of inmates at

Joyceville Institution on the ground that it was not the preferable procedure, in light of the availability of the grievance process. The plaintiffs in *Lauzon* sought *Charter* damages, and the proposed class proceeding was commenced well after the time in which to submit a grievance had expired. The Ontario Divisional Court nevertheless affirmed the motion judge's decision, holding as follows (*Lauzon et al v The Attorney General of Canada*, 2015 ONSC 2620 at para 65):

Her Honour [the motion judge] concluded that access to justice was more readily and appropriately sought through the grievance process, that judicial economy would be promoted by having this dispute addressed through that process and that the Crown's behaviour would have been modified had the inmates successfully grieved. These conclusions do not reflect an error in principle. [...]

[40] A plaintiff cannot invoke the class action procedure merely by including a particular remedy in the claim, such as monetary or punitive damages. To hold otherwise would undermine the Court's discretion in determining whether a class action is preferable in a given case (*Lauzon* at para 67).

[41] Considering the objectives of class proceedings, access to justice in this case is more readily and appropriately sought through the offender grievance process. This will also serve the interests of judicial economy. The corrective action or other relief available through the grievance process, coupled with judicial review, is sufficient to recognize and vindicate the inmates' rights in this case. To the extent this might be necessary, it is also sufficient to promote behaviour modification on the part of the Defendant (*Lauzon* at paras 69-70).

IV. Conclusion

[42] The Defendant objects to the certification motion on three further grounds: the proposed class cannot be identified or is overly broad; there are no common issues of fact or law; and the proposed representative Plaintiff is not suitable. The Defendant notes the complete absence of any litigation plan, as required by Rule 334.16(1)(e)(ii).

[43] It is possible that, with sufficient care and attention, the remaining grounds of objection raised by the Crown could be rectified. However, this would not cure the failure of the Statement of Claim to disclose any reasonable causes of action. Nor would it overcome the barrier of the offender grievance process as the preferable procedure for resolving the Plaintiffs' complaints.

[44] The burden of satisfying the requirements of Rule 334.16 is solely upon those seeking certification. While the role of the Court in managing proposed class actions is to be active and flexible, this does not extend to permitting those seeking certification to "cooper up" their motion or to help them meet the substantive requirements of certification. The Court must remain a neutral arbiter of whether those requirements have been met (*Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12-13).

[45] The motion for certification must therefore be denied without leave to amend. In keeping with Rule 334.39, no costs will be awarded to any party.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion for certification is denied without leave to amend.
2. No costs are awarded to any party.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1483-18

STYLE OF CAUSE: SEAN D. JOHNSTON, THOMAS MCDOWELL, KURT LAUDER AND DONALD CAMPBELL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA

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