Federal Court Cour fédérale

Date: 20240304

Docket: T-1909-18

Citation: 2024 FC 324

Ottawa, Ontario, March 4, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

RAKESH SAXENA

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

[1] The Plaintiff, Rakesh Saxena, claims that Canada violated his rights under section 7 of the *Canadian Charter of Rights and Freedoms* [the *Charter*] in the context of his extradition to Thailand. He seeks a declaration that his rights have been infringed, and damages under the *Charter*.

[2] This decision concerns the Defendant's motion to strike the Statement of Claim because it was filed outside of the applicable time limit, and in the alternative to grant summary judgment because the claim is doomed to fail since it was filed beyond the limitation period.

[3] For the reasons that follow, the Defendant's motion is granted insofar as it relates to the Plaintiff's claim for personal damages under the *Charter*, because I find that claim to be barred by the applicable limitations period. However, the Defendant's motion to strike the Plaintiff's claim for declaratory judgment is denied, because limitations periods do not apply to this type of relief. The Defendant's motion for summary judgment is dismissed.

I. Background

[4] The Plaintiff is an Indian national who worked for various financial institutions in Thailand from 1985 to 1996. He worked as a personal advisor to the President of the Bangkok Bank of Commerce ("BBC") for a period of time, and the events underlying this case occurred during this period. He came to Canada in 1996.

[5] On June 5, 1996, Thai police issued an arrest warrant for the Plaintiff, accusing him of "conspiring with accomplices to embezzle properties" arising from allegations of fraudulent loans at the BBC. Thai police then asked Canadian authorities to arrest the Plaintiff pending the presentation of a formal diplomatic request for extradition. He was arrested by Canadian

authorities on July 7, 1996, pursuant to a warrant of apprehension issued by an extradition judge under to the *Extradition Act*, RSC 1985, c E-23. The warrant was based on a charge accusing him of conspiracy to embezzle money. A further warrant was issued for offences under the Thai *Securities and Exchange Act* relating to the same set of facts.

[6] On August 30, 1996, Thai authorities presented an extradition request to Canada, seeking the Plaintiff's return to face charges under both the Thai *Criminal Code* and the Thai *Securities and Exchange Act*. These charges related to a loan made by the BBC in 1995 to the City Trading Corporation (the "City Trading" case).

[7] On September 15, 2000, the Supreme Court of British Columbia concluded that there was evidence on which a trier of fact, properly instructed and acting reasonably, could convict the Plaintiff of fraud, which is an extraditable offence: *Kingdom of Thailand v Saxena*, 2000 BCSC 1360. On November 18, 2003, the Minister of Justice of Canada issued a surrender order for the Plaintiff. On December 1, 2005, the surrender order was amended to remove the alleged offences based on the Thai *Criminal Code*, because the statutory limitation period for those offences had expired.

[8] In March 2006, the British Columbia Court of Appeal upheld both the committal order and the Minister's amended surrender order: *Thailand v Saxena*, 2006 BCCA 98 (leave to appeal

to the Supreme Court of Canada dismissed: 2006 CanLII 39423). In September 2006, the Minister of Justice advised the Plaintiff that he would reconsider the surrender order, in light of the fact that a coup had occurred in Thailand giving rise to concerns about increased risk upon his return.

[9] The Minister confirmed the surrender order on December 19, 2008. In May 2009, the British Columbia Court of Appeal dismissed the Plaintiff's application to review the decision of the Minister to maintain the amended surrender order: *Saxena v Canada (Minister of Justice)*, 2009 BCCA 223. His application for leave to appeal to the Supreme Court of Canada was dismissed on October 29, 2009, thus exhausting his recourse against his extradition from Canada: 2009 CanLII 59421. The Plaintiff was then surrendered to Thai authorities and returned to Thailand.

[10] The Plaintiff's extradition was done pursuant to the *Treaty between the United Kingdom and Siam Respecting the Extradition of Fugitive Criminals*. Article 6 of that treaty stipulates that a person surrendered to the requesting state cannot be detained or tried for any crime other than those that were the subject of the extradition request. This is known as the "rule of specialty". It serves as a safeguard against violations of due process and is part of the understanding between states that underlies the extradition system. The rule of specialty can be waived by consent of the surrendering state.

[11] Following the Plaintiff's return to Thailand, the Thai Attorney General's office requested that Canada waive the rule of speciality in regard to a number of other charges. On July 29, 2010, the Minister of Justice agreed to waive speciality with respect to two other cases involving charges of financial misconduct arising from dealings with the BBC: the "Silver Star Investment" case, and the "Special Passing Card" case. Both of these cases involve charges under the Thai *Criminal Code* and new charges under the Thai *Securities and Exchange Act*.

[12] In March 2011, Thailand subsequently initiated criminal proceedings in two other cases (including one known as the "Somprasong" case) in which it obtained a waiver of specialty from Canada. I note here that the Plaintiff alleges the charges were filed before Thailand obtained the waiver of specialty.

[13] In October 2011, the Plaintiff filed a complaint with the United Nations Human Rights Committee ("UNHR Committee"), claiming that Canada's failure to provide him an opportunity to be heard before it waived specialty violated his rights under articles 9(1) and 13 of the *International Covenant on Civil and Political Rights* [*ICCPR*]. This complaint was ultimately upheld by the UNHR Committee, which found that the denial of any opportunity for the Plaintiff to comment on the request to waive speciality, and the lack of any judicial recourse in Canada, violated his rights under article 13 of the *ICCPR*.

[14] On June 8, 2012, the Plaintiff was convicted of the charges for which he was originally surrendered to Thailand – the City Trading case – and he was sentenced to 10 years in prison and a fine of approximately $40,000 CAD. He was also ordered to compensate the BBC in the amount of approximately $44.5 million CAD. This sentence expired on October 30, 2019.

[15] On December 20, 2016, the Plaintiff was convicted on the charges in the three cases for which Canada granted a waiver of speciality (the Silver Star Investment case, the Special Passing Card case, and the Somprasong case). As a result of the three convictions, the Plaintiff was sentenced to 20 years in prison to be served consecutively after the completion of the 10 year sentence for the City Trading case. This additional sentence will expire in October 2039.

[16] On October 30, 2018, the Plaintiff filed a Statement of Claim against Canada. He describes his claim in the following way:

> The present action raises the question of whether Mr. Rakesh Saxena's rights under section 7 of the *Canadian Charter* were breached by Canada's decision to allow the state of Thailand to charge him with offences not listed in its original extradition request and Canada's surrender order, in breach of the specialty rule and of specific assurances given by Canada and Thailand prior to Mr. Saxena's extradition.

[17] In the Statement of Claim, the Plaintiff seeks a declaration that the process by which Canada agreed to waive specialty violated his rights under section 7 of the *Charter*, as well as damages pursuant to s. 24(1) of the *Charter*.

[18] The Defendant says that the Statement of Claim was filed after the expiry of the applicable limitation period, and asks that it be struck out, or in the alternative that summary judgment be granted in the Defendant's favour.

II. Issues and Standard of Review

[19] The issues in this case are: (a) whether the Statement of Claim should be struck out on the basis that it was filed outside of the applicable limitation period; and (b) whether summary judgment should be granted in favour of the Defendant, because the Claim is doomed to fail on the basis that it was filed out of time.

III. The Legal Framework

[20] Before discussing the two issues, it is important to start with a discussion of the legal principles that guide the analysis of the two remedies the Defendant seeks. There are important differences between them, which are worth setting out at the outset.

A. *Motions to Strike*

[21] The fundamental question on a motion to strike a statement of claim is whether it is plain and obvious that the pleaded claims have no reasonable prospect of success: *Atlantic Lottery Corp Inc v Babstock,* 2020 SCC 19 [*Babstock*] at paragraph 14; *Odhavji Estate v Woodhouse*,

2003 SCC 69; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980. The analysis is guided by three principles. First, the facts as pleaded are taken to be true, unless they are manifestly incapable of proof. No affidavit evidence is allowed on a motion to strike: Rule 221(2) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. Second, the Statement of Claim must be read generously to understand its real nature, and mere technical failings should not lead to a claim being struck. Third, a motions judge should err on the side of permitting novel but arguable claims to proceed to trial; motions to strike should not be used to stifle the appropriate and necessary evolution of the law: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 21; *Babstock* at paragraph 19.

[22] In assessing a motion to strike, a motion judge must seek to balance complex and sometimes competing considerations. On the one hand, courts need to allow novel claims to proceed to nourish the development of the law. On the other hand, courts should weed out unmeritorious claims that have no reasonable prospect of success to avoid requiring the parties to waste their time and money, and to free up the limited resources of the Court and its staff to deal with claims that have a chance of success.

B. *Motions for Summary Judgement*

[23] On a motion for summary judgment, the title of the proceeding provides a strong clue: a party is seeking a judgment from the court on either the whole or a substantial part of the case,

but wants it decided in a summary way, to avoid a full trial and all of the expense, time and energy it entails.

[24] When a motion for summary judgment is brought, the motion judge is asked to determine whether there is no genuine issue to be tried, on the evidence and arguments put forward by both sides. The purpose of summary judgment is to ensure proportionality in the expenditure of resources by the parties and by the Court itself, and thereby to improve access to justice: *Hryniak v Mauldin*, 2014 SCC 7; *Milano Pizza Ltd v 6034799*, 2018 FC 1112; *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524.

[25] Both sides are required to put their best foot forward on both the evidence and the arguments on the point in dispute in the context of a motion for summary judgment. Difficult issues of credibility should not be determined on a motion for summary judgment. However, summary judgment is available where the motion judge can make findings regarding the necessary facts to make a determination on all or a substantial part of a claim. A dispute about the facts does not bar this relief, in appropriate cases. In this way, summary judgment is a mechanism to avoid wasting further time pursuing claims that are doomed to fail or that can be determined (in whole or in substantial part) based on the record as it stands at the time of the motion.

[26] In contrast to motions to strike, where the analysis must take the facts set out in the pleadings as true, a motion for summary judgment seeks a decision by the Court on the basis of the evidence and arguments put forward by both sides. The motions judge is required to assess

the evidence and make findings on the facts and the law, if that is possible and appropriate at the summary judgment stage. If not, the matter should be allowed to proceed to trial.

[27] With this context in mind, I turn to an analysis of the issues raised by the parties.

IV. Analysis – The Motion to Strike

A. *The Submissions of the Parties*

[28] The Defendant submits that the Statement of Claim should be struck out because it was filed outside of the applicable limitation period. In this case, the Defendant submits that it is beyond dispute that limitation periods apply to personal claims for *Charter* damages: *Ravndahl v Saskatchewan*, 2009 SCC 7 at paragraphs 16-17 [*Ravndahl*].

[29] Section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c-C50 [*CLPA*] provides that provincial limitation periods apply to proceedings by or against the Crown "in respect of any cause of action arising in that province." Under that provision, a residual six year limitation period applies "in respect of a cause of action arising otherwise than in a province."

[30] The Defendant also points to section 39 of the *Federal Courts Act*, RSC 1985, c F-7, which uses very similar language to that set out in section 32 of the *CLPA*. The Defendant submits that the relevant case-law has determined that "[a] cause of action is a set of facts that provides the basis for an action in court. A cause of action arises in a province when all of the elements of the cause of action are present in that province": *Canada (Attorney General) v Liang*, 2018 FCA 39 at paragraph 19; *Canada (Attorney General) v Whaling*, 2018 FCA 38 at paragraph 19.

[31] In the Defendant's view, the most favourable limitation period that could apply to the Plaintiff's claim is six years, if it is found to arise "otherwise than in a province" under s. 32 of the *CLPA*. In this case, the Plaintiff's *Charter* claims arose after his extradition from Canada, and for the purposes of the motion, the Defendant is prepared to accept that the six-year period applies. The Defendant says that the Plaintiff has not alleged any facts that would suspend the running of the limitation period, and therefore the key question is when the time period began to run.

[32] The Defendant submits that the jurisprudence has found that the limitation period under the *CLPA* begins to run when an applicant knew or ought to have known that a cause of action existed: *Doig v Canada*, 2011 FC 371 at paragraph 31. This principle known as "discoverability" applies to *Charter* claims for personal damages: see, for example, *Newman v Canada*, 2016 FCA 213 [*Newman*].

[33] The potential harshness of the rule is tempered by an objective component, and an applicant's delay may be excused if a reasonable litigant exercising due diligence could not have been expected to act sooner: *Novak v Bond*, [1999] 1 SCR 808 [*Novak*] at paragraph 9; *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Lameman*] at paragraphs 16-17. The Defendant argues that once this test is met, the limitation period must be applied, in order to achieve the policy goals they serve, which have been described as "certainty, evidentiary and diligence rationales": *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at paragraph 57. Limitation legislation is "based on a recognition that limitation periods, in order to be effective, need to be final" (*CIBC* at paragraph 58). Although the effect of barring a claim from being heard because of the passage of time may appear harsh, it serves important purposes in our legal system: *Novak* at paragraphs 8-9, 67; *Lameman* at paragraph 13.

[34] The general principles regarding discoverability were discussed by the Supreme Court of Canada in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 [*Grant Thonton*], which described the common law rule as an interpretive tool for construing limitations statutes, and noted that the general rule could be ousted by clear legislative language. The Court described the general principle in the following way at paragraph 3:

> In my view, a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim.

[35] The Defendant asserts that a limitation period begins to run when the claimant has experienced some harm or loss that is cognizable as giving rise to a cause of action. The fact that the full extent of losses are not known does not delay the running of the limitation period: *Grant Thornton* at paragraph 46; *Peixeiro v Haberman*, [1997] 3 SCR 549, 1997 CanLII 325 (SCC) at paragraph 18.

[36] According to the Defendant, the Plaintiff had the requisite knowledge and ability to pursue his claim at the latest on October 8, 2011, when he filed his complaint with the UNHR Committee. That complaint rests on largely the same facts and is based on legal claims that are similar to the *Charter* claims set out in his Statement of Claim. The Defendant points out that in examination for discovery, the Plaintiff admitted that he had discussed the possibility of filing a legal case in Canada with his legal counsel many years ago, but made a strategic choice to pursue his case before the UNHR Committee instead.

[37] Because the limitation period issue does not turn on any disputed facts, the Defendant submits that it is ripe for determination on a motion to strike, to avoid the additional time and expense of a full trial. In previous cases, this Court and the Federal Court of Appeal have struck out pleadings where there was no arguable issue as to the timing of the events that trigger the running of the limitation period and it is plain and obvious that the claim is time-barred: *Mahoney v Canada*, 2020 FC 975 at paragraphs 38-41; *Burke v Canada*, 2021 FC 634 at

paragraphs 44-46; *Deng v Canada*, 2019 FCA 312 at paragraphs 10, 15-19 (application for leave dismissed: SCC No. 39209).

[38] Insofar as the Statement of Claim also seeks a declaratory judgment, the Defendant acknowledges that limitation periods ordinarily do not apply to such claims, but submits that the Court should exercise its discretion to stay this aspect of the proceeding. The Defendant argues that the declaratory relief is ancillary to the principal element of the Plaintiff's Statement of Claim, which is a claim for damages. If the damages claim does not proceed, the Defendant submits that it would be more appropriate for the Plaintiff to pursue his case by means of judicial review, and therefore the Court should stay the action he has launched.

[39] In response, the Plaintiff argues that the Defendant's motion to strike is based on a fundamental misconception about when the limitation period started to run. He submits that the jurisprudence is unanimous that for actions in damages, limitation periods can only start to run once sufficient knowledge is acquired that a loss occurred. This reflects the principle that damages must be sufficiently certain to be claimed.

[40] The Plaintiff says that the Supreme Court of Canada endorsed the principle that a limitation period in a claim for damages begins when knowledge that a loss had occurred (*Grant Thornton*):

> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.
>
> …
>
> [50] Grant Thornton submits that the Province discovered its claim on February 4, 2011, when it received the draft Richter Report. I agree. At that point, the Province had actual or constructive knowledge of the material facts — namely, that a loss occurred and that the loss was caused or contributed to by an act or omission of Grant Thornton. Nothing more was needed to draw a plausible inference of negligence.
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> [Emphasis added by Plaintiff]

[41] The Plaintiff contends that this principle has also been applied to *Charter* damages claims, citing *Newman*. In that case, the claim related to an assault of the plaintiff in a federal prison following his release from solitary confinement into the general population. Both the Federal Court and the Federal Court of Appeal found that the limitation period began to run when the inmate was assaulted, not when Correctional Service of Canada officials made the decision to transfer him to the general population despite knowing he might face risks: *Newman* at paragraph 37. It was only when the damages actually occurred that the limitation period triggered. It should be noted, for the sake of completeness, that in *Newman*, the Federal Court of Appeal found that summary judgment should not have been granted because there was a genuine issue for trial as to whether the running of the limitation period was suspended by operation of a particular provision in the British Columbia *Limitation Act*, RSBC 1996, c 266. That question

involved a credibility determination which should not have been resolved on an application for summary judgment: see *Newman* at paragraphs 57-58.

[42] The Plaintiff advances two additional arguments. First, he asserts that limitation periods start to run separately for each cause of action or head of damages, once the material facts relevant thereto have become known to the claimant. Second, he claims that his pursuit of a resolution through the UNHR Committee should not be held against him, by application of the "appropriateness" criterion that has been recognized in prior jurisprudence. Under this approach, pursuit of an alternative dispute resolution mechanism can suspend the running of a limitation period if that alternate recourse was an appropriate means to seek to address the wrong otherwise than through civil litigation.

[43] Applying these principles to the case at bar, the Plaintiff argues that his claims do not fall outside the limitation period. He agrees with the Defendant that the six-year limitation period applies, under section 32 of the *CLPA*, because he suffered the losses for which damages are claimed while in Thailand. He states that he is claiming non-pecuniary damages for the pain and suffering he experienced in the course of: (a) the 20-year prison sentence he has been serving in Thailand; (b) his conviction for the three additional cases for which Canada waved specialty; and (c) his continuing damages in having to defend himself against the prosecutions in these three cases.

[44] The Plaintiff contends that the pain and anguish he has experienced as a result of Canada's waiver of specialty only occurred as a result of the events listed above. Although Canada's fault occurred when it waived speciality without giving him an opportunity to make submissions or to seek review of the decision, his losses only occurred when he was convicted, and began to serve the additional prison sentence. The Plaintiff submits that in addition to the particular damages he has suffered as a consequence of his conviction and extra sentence arising from the additional charges, he has suffered continuing losses as he has sought to overturn the convictions and to be released from prison.

[45] The Plaintiff argues that none of these claims are barred by the limitation period and that it was appropriate for him to seek relief through the UNHR Committee process. Based on this, the Plaintiff asserts that the Court should find the limitation period did not run against him during the time he pursued that avenue of redress.

[46] Finally, the Plaintiff asserts that even if his damages claim is time-barred, his action for declaratory relief is not, based on the Supreme Court of Canada decision in *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14 [*Manitoba Metis Federation*] at paragraphs 134-143.

B. *Discussion*

[47] The analysis of the Defendant's limitation argument involves a careful examination of the Plaintiff's claims as articulated in the Statement of Claim, assessed in light of the principles that shape our understanding of claims for individual damages arising as a result of an alleged breach of a *Charter* right or freedom. It bears repeating at this stage that on a motion to strike, the material facts put forward in the pleadings must be taken as true, assuming they are capable of proof and not mere speculation or assumption.

[48] On the basis of this, I begin with the claims as articulated by the Plaintiff, which must be examined with a realistic and practical appreciation of their true nature. In this instance, the Plaintiff is represented by experienced counsel, and so the challenge of finding the true meaning of pleadings drafted by someone without legal training does not arise.

(1) The Plaintiff's Claim for Declaratory Relief

[49] I will start with the first claim listed in the Plaintiffs Statement of Claim, which seeks "a declaration that [Canada] infringed his rights and freedoms guaranteed by section 7 of the [*Charter*]." The infringement that the Plaintiff sets out in the body of the Statement of Claim is, in essence, that the process by which Canada deals with requests to waive the rule of speciality in extradition proceedings denies the person who has been extradited procedural fairness because they cannot make submissions before the decision is taken nor can they challenge it after it is

taken. The Plaintiff claims this violates section 7 of the *Charter* because it can lead to a deprivation of liberty through a process that is not in accordance with the principles of fundamental justice.

[50] This claim seeks a ruling on a claim that the process Canada follows in dealing with a request for waiver of speciality in extradition cases violates section 7 of the *Charter*. It is not a claim for personal relief, but rather seeks to clarify the constitutional norms that apply in regard to this particular aspect of the extradition process. I note here that many different aspects of the extradition process have been subject to *Charter* claims, and so it is beyond question that the process is subject to constitutional review on rights grounds: see, for example, *United States v Burns*, 2001 SCC 7*; Schmidt v The Queen*, [1987] 1 SCR 500, 1987 CanLII 48 (SCC) at paragraph 35; *Boily v Canada*, 2022 FC 1243; *Sheck v Canada (Minister of Justice)*, 2019 BCCA 364.

[51] The Plaintiff's claim for a declaration under the *Charter* is not subject to the limitation period set out in the *CLPA* or any other statute. On this point, the Supreme Court of Canada's pronouncement in *Manitoba Metis Federation* leaves no room for doubt:

> [135] Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

[52] I reject the Defendant's argument that the claim for declaratory relief is only ancillary to the Plaintiff's "real" claim which is for *Charter* damages. First, the Plaintiff has outlined a clear basis for his argument that the procedural protections and rights he was granted at an earlier stage in the extradition process (i.e. before he was removed to Thailand) should have been extended to him when Thailand asked Canada to waive specialty in regard to the new charges. His request for declaratory judgment challenges this aspect of the extradition process, and he does not claim that the *Charter* breach that occurred in his case involved different treatment than that accorded to others. Rather, his *Charter* damages claim rests on a specific application of the general rule, and his claim for declaratory judgment seeks a judicial declaration that the process infringes the *Charter*. The claim for declaratory relief stands on its own, and does not depend on a favourable outcome on his personal claim for *Charter* damages.

[53] Insofar as the Defendant relies on *Canada (Attorney General) v Telezone Inc*, 2010 SCC 62, I am not persuaded that it provides useful guidance here. The Plaintiff's claims for declaratory relief and *Charter* damages do not seek an order overturning the decisions to waive specialty in the instant case. Judicial review is not a more suitable alternative avenue for the Plaintiff to pursue his challenge to the extradition process writ large. Furthermore, *Charter* claims – and in particular claims for declaratory relief – must be based on a fulsome factual record, and it is not evident why an application for judicial review would be a more appropriate means of bringing the Plaintiff's claim before the Court as compared with the action he has already launched.

[54] For all of these reasons, I find the Plaintiff's claim for declaratory relief is not subject to the limitation period. Even if I find that the Plaintiff's *Charter* damages claim should not proceed, I would not exercise my discretion to stay the claim for declaratory judgment under s. 50 of the *Federal Courts Act*, RSC 1985, c F-7.

(2) The Plaintiff's Claim for Damages

[55] Turning to the *Charter* damages claim, I will begin with a discussion of the general principles before examining the particulars of this case.

[56] In *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*], the Supreme Court of Canada set out the principles and framework that guide consideration of *Charter* damages. Several elements of this decision are particularly instructive here. First, the Supreme Court stated that *Charter* damages should not be equated to private law damages; they are distinct because the claim lies directly against the state and it is the state rather than individual actors that is liable (*Ward* at paragraph 22; and see also, on this point: *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at paragraph 34).

[57] Second, the purposes of *Charter* damages was described as follows in *Ward* at paragraph 25:

> I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three

> interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.
>
> [Italics included in the original decision.]

[58] In elaborating on the key elements of the description set out above, the Supreme Court offered the following guidance which is particularly relevant to the case at bar: the compensation function of damages focuses on the claimant's personal loss, including harm to the claimant's intangible interests, which has variously been described as "distress, humiliation, embarrassment and anxiety" (*Ward* at paragraph 27).

[59] The function of vindication seeks to affirm constitutional values by focusing on the harm the infringement causes to society. Violations of constitutional rights harm not only their particular victims but society as a whole (*Ward* at paragraph 28).

[60] On the third function, deterrence, the Supreme Court stated at paragraph 29:

> Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution… [D]eterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

[61] Finally, the Court observed that "the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award" (*Ward* at paragraph 30).

[62] Turning back to the case before the Court, the parties have presented starkly different positions regarding when the limitation period triggers. The Defendant invokes cases where it has been recognized that a limitation period will begin to run once a plaintiff has experienced some damage or loss, arguing that this happened when the Plaintiff was denied the opportunity to make submissions on Thailand's first request to waive speciality.

[63] For his part, the Plaintiff points to a line of cases that find that where damages is a part of a cause of action, the limitation period will only trigger when ascertainable losses have occurred. He says that he started to suffer damages when he was convicted of the additional offences for which Canada waived specialty, which occurred on December 20, 2016. As a consequence of this, according to the Plaintiff, his damages claim was not barred by the limitation period when the statement of claim was filed on October 30, 2018.

[64] The assessment of the *Charter* damages claim requires a close examination of the way the Plaintiff has framed this aspect of his case. In his written submissions, the Plaintiff described his *Charter* damages claim in terms that are identical to those in his Reply to the Defendant's Statement of Defence:

[65] 11. The underlying action to the present proceedings raises the question of whether Mr. Saxena's rights under section 7 of the *Canadian Charter* were breached by Canada's decision to allow the Kingdom of Thailand to charge him with offences not listed in its original extradition request and in Canada's surrender order, in breach of the specialty rule and of specific assurances given by Canada and Thailand prior to Mr. Saxena's extradition.

[66] The Plaintiff's damages claim rests on his assertion that Canada breached his right to liberty under section 7 of the *Charter*. His entitlement to damages under section 24(1) of the *Charter* hinges on whether his *Charter* rights were breached. In his Statement of Claim, the Plaintiff lays out the procedural history of his case, and then asserts that his section 7 *Charter* rights were breached because Canada took the position that the procedural guarantees he was entitled to prior to his extradition to Thailand ceased to apply once he was removed from Canada. The denial of any opportunity for him to make submissions in response to Thailand's subsequent request that Canada waive speciality breached his rights, according to the Plaintiff.

[67] The Plaintiff's *Charter* damages claim is based on the following propositions, set out in the Statement of Claim:

- His right to liberty under section 7 of the *Charter* is engaged, because but for Canada's consent to waive the specialty rule, his prison sentence would have expired in October 2019. Instead, he now faces a prison sentence that will run until October

2039. Moreover, the initiation of new charges made it impossible for him to obtain bail in respect of the charges for which he was originally extradited;

- Canada waived speciality without ever providing him with ay opportunity to make representations regarding the offences in respect of which Thailand had requested the waiver of specialty;

- The procedural safeguards contained in the *Extradition Act*, such as the right to be heard and make submissions and the right to judicial scrutiny when an administrative decision leads to a deprivation of liberty, were circumvented by the process Canada followed in dealing with Thailand's requests for waivers of specialty.

[68] Two important points flow from the manner in which the Plaintiff has framed his claim. First, he states that the *Charter* breach occurred when Canada did not provide him with an opportunity to make submissions in response to Thailand's initial request for a waiver of specialty. That occurred in late 2009. Second, although the Plaintiff asserts that his damages have increased and continued as a result of being convicted of the additional charges, which resulted in an additional period of incarceration, the first "harm" he experienced was the loss of an opportunity to convince Canada that it should not waive speciality.

[69] This gives rise to the important question of whether the Plaintiff would be entitled to damages for this sort of breach of his rights, or whether other more tangible harms (for example, being incarcerated for a significantly longer period of time) is required.

[70] Applying the guidance from *Ward* to the instant case confirms the view that the Plaintiff's initial losses occurred when his *Charter* rights were first allegedly breached. His claim for declaratory relief, and an aspect of his *Charter* damages claim, seeks to underline the importance of *Charter* rights (the vindication function), as well as to deter state agents from committing future breaches (the deterrence function).

[71] On this view of the matter, the fact that the Plaintiff may have suffered other, subsequent damages arising from the same state conduct does not delay the running of the limitation period. The other harms for which he seeks compensation – namely his additional loss of liberty because of the additional convictions and the consecutive sentence, as well as the anxiety and expense associated with defending himself against these further charges – do not constitute separate causes of action. The Plaintiff's *Charter* damages claims is directed to Canada, and all of his losses are said to be consequences that flowed from the decision to waive speciality. The Plaintiff does not claim damages flowing from a series of independent, unrelated *Charter* violations. To the contrary, he says that the source of all of his damages was the process by which Canada decided to waive speciality.

[72] On this point, I find the following explanation to be apt. In *Hamilton (City) v Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156, a case involving a motion to strike an action in tort and equity due to a two-year limitation period, the Court of Appeal noted at paragraph 54:

> The City's position [on damages]…fails to appreciate the distinction between damage and damages. Damage is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. Damages, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was damage.

[73] In a similar vein, all that the Plaintiff needed to establish to be in a position to launch a claim for *Charter* damages was a violation of his rights. The fact that other losses flowed from the initial violation may have increased his potential damage claim, but did not delay the start of the limitation period.

[74] For the reasons set out above, I find that: (a) the Plaintiff's claim for *Charter* damages is barred by the limitation period in s. 32 of the *CLPA*, and will therefore be struck out; and (b) the Plaintiff's claim for a declaratory judgment is not barred by the limitation period, and will not be struck out at this stage.

V. Analysis – The Motion for Summary Judgment

[75] Based on my findings set out above, it is not necessary to discuss the Defendant's motion for summary judgment at any length, because that motion was based on the assertion that the Statement of Claim was time-barred. I have found that the claim for declaratory relief is not subject to the limitation period.

[76] It would not be appropriate to rule on this for two key reasons. First, the Defendant's motion for summary judgment asserted only that the claims were time-barred. The Defendant did not seek summary judgment on the merits of the claim that the process for dealing with requests for the waiver of specialty in the context of extradition violates section 7 of the *Charter*.

[77] Second, it has long been accepted that *Charter* claims should not be decided in a factual vacuum, and in this case I find that the evidentiary record before me at this stage in the litigation does not include relevant information that would be needed to assess the merits of the case. For example, there is little evidence regarding the actual process followed in dealing with requests to waive specialty, and even less to explain the rationale for the procedures that were in place at the relevant time.

[78] For this reason, I will not grant the motion for summary judgment.

VI. Conclusion

[79] For the reasons set out above, the Plaintiff's claim for a declaratory judgment that the process by which Canada agreed to waive specialty breached his *Charter* rights will not be struck out. However, his claim for personal damages will be struck, because it was filed beyond the applicable statutory time limit.

[80] The Defendant's motion for summary judgment rests on the claim that the Plaintiff's action is out of time, which I have partially rejected on the motion to strike. It is not appropriate to rule on the *Charter* declaration at this early stage of the proceeding, and therefore I will not grant the motion for summary judgment.

[81] The Defendant sought its costs on the motion, and asked for the opportunity to make submissions following the release of the decision. The Plaintiff sought costs as well. For the reasons set out above, the results on this motion are divided, and in my view the parties should each absorb their costs related to this motion. In exercise of my discretion under Rule 400, no costs are awarded on this motion.

[82] Finally I want to acknowledge the delay in issuing this judgment and reasons, and to apologize to the parties for the length of time it has taken.

JUDGMENT in T-1909-18

THIS COURT'S JUDGMENT is that:

1. The Defendant's motion to strike the Statement of Claim is granted in part, and dismissed in part. Specifically:

    a. The motion to strike the claim for individual *Charter* damages is granted.

    b. The motion to strike the claim for a declaration that the process followed in dealing with a request by an extraditing state that Canada waive the rule of specialty violates section 7 of the *Charter* is dismissed.

2. The Defendant's motion for Summary Judgment is dismissed.

3. No costs are awarded on this motion.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	MONTRÉAL, QUÉBEC
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