

Federal Court



Cour fédérale

Date: 20210603

Docket: T-88-21

Citation: 2021 FC 543

Ottawa, Ontario, June 3, 2021

PRESENT: The Honourable Mr. Justice Fothergill

PROPOSED CLASS PROCEEDING

BETWEEN:

MARTHA KAHNAPACE and JANE DOE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] The Defendant Attorney General of Canada [AGC] has brought a motion in writing in accordance with Rule 369 of the *Federal Courts Rules*, SOR /98-106 [Rules], for an order pursuant to Rule 8 extending the time for service and filing of the AGC's Statement of Defence.

The AGC proposes to file the Statement of Defence only following the final disposition of the Plaintiffs' motion for certification.

[2] For the reasons that follow, the motion is granted.

II. Background

[3] The Plaintiffs' Statement of Claim in this proposed class proceeding was filed on January 11, 2021. The Statement of Claim identifies the proposed classes as female Indigenous inmates, female inmates, Indigenous inmates, and all inmates in custody in medium security or maximum security federal correctional facilities whose security classification was determined in accordance with the Custody Rating Scale [CRS]. The CRS is a 12-item standardized test that is used to grade or score federal inmates in the custody of the Correctional Service of Canada [CSC] based on their public and institutional risk.

[4] Martha Kahnapace, one of the proposed representative Plaintiffs, is an Indigenous woman and a former federal inmate who was released from custody in 2013. The other proposed representative Plaintiff, in addition to or in lieu of Ms. Kahnapace, is identified as "Jane Doe", who is said to be a "past and present inmate of a federal correctional facility who was and is over-classified by the CRS".

[5] The Statement of Claim alleges that the CSC uses the CRS to assign inmates to minimum, medium, and maximum security facilities, knowing that it is biased against

Indigenous and female inmates. The Statement of Claim further alleges that the CRS over-classifies Indigenous and female inmates at higher security levels, and that the CSC's use of the CRS violates its governing statute and the proposed class members' rights under ss 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*.

[6] The Plaintiffs seek remedies including injunctive relief, general damages, special damages, exemplary and punitive damages, declaratory relief, and *Charter* damages.

III. Positions of the Parties

A. *AGC*

[7] The AGC says that extending the time to file the Statement of Defence until after the final disposition of the certification motion would advance the purpose of the Rules to "secure the just, most expeditious and least expensive determination" of the proceeding (Rule 3).

[8] The AGC maintains that a Statement of Defence would not assist the Court in determining the question of certification. The purpose of a certification hearing is to determine whether an action should advance as a class proceeding, not to test the claims on their merits.

[9] The AGC says that the Plaintiffs will suffer no prejudice from an extension of time to file the Statement of Defence. There are no anticipated disputes about the Court's jurisdiction over the causes of action or subject matter.

[10] The AGC asserts that a Statement of Defence has no bearing on the first criterion for certification, *i.e.*, whether the Statement of Claim discloses reasonable causes of action, which must be determined by reference to the Statement of Claim alone (citing *Always Travel Inc v Air Canada*, 2003 FCT 212 at para 6). The remaining criteria for certification are based on evidence, and a Statement of Defence does not contain evidence (citing *Poundmaker Cree Nation v Canada*, 2017 FC 447 [*Poundmaker*] at para 34).

[11] If the proposed class proceeding is certified, then the AGC says a streamlined Statement of Defence that is fully responsive to the causes of action and common issues may be prepared and filed without undue delay.

B. *Martha Kahnpace and Jane Doe*

[12] The Plaintiffs say that a Statement of Defence is essential to the Court's determination of the certification motion. Without a Statement of Defence, the Court cannot know whether the AGC will rely on s 1 of the *Charter* to justify the alleged breaches of ss 7 and 15. The Court cannot know whether the AGC intends to argue that compensation is not available under s 24(1) of the *Charter*, or that there are countervailing factors that would render compensation inappropriate or unjust.

[13] The Plaintiffs maintain that they will be prejudiced if the AGC is permitted to postpone the filing of a Statement of Defence until after certification. If no Statement of Defence is filed, the Court cannot weigh the common issues of fact and law arising under ss 1 and 24(1) of the *Charter* in the balance of common and individual issues. This may unfairly tip the balance against the Plaintiffs.

IV. Analysis

[14] The Rules do not contemplate the filing of a statement of defence subsequent to the determination of the motion for certification of a proposed class proceeding. Rule 204 states that a defendant shall defend an action by serving and filing a statement of defence within 30 days after service of the statement of claim, if the defendant is served in Canada. Pursuant to Rule 8, on motion, the Court may extend or abridge a period provided by the Rules or fixed by an order.

[15] In *Poundmaker*, Justice Cecily Strickland provided the following helpful framework for determining motions to extend the time for filing a statement of defence until after a certification motion has been decided (at para 30, citations omitted):

- i) whether a defendant must file a defence prior to certification is purely a matter of judicial discretion;
- ii) whether that discretion should be exercised is fact specific in each case and should be approached in a flexible and liberal manner seeking a balance between efficiency and fairness;
- iii) while deferred filing may reflect a general practice or convention, it is not automatic or to be granted as a matter

of course [...] and the burden of persuading the Court lies with the moving party;

- iv) in that regard, the motion must be grounded on sound reasons which will generally include an evidentiary basis, however, the Court may also rely upon the content of [the] statement of claim in appropriate circumstances;
- v) factors to be considered in considering such a motion can include:
 - a. whether the statement of defence would serve any useful purpose at this stage in the proceeding. That is, is the statement of defence essential to a determination of the issues to be addressed at the certification motion or likely to be of assistance to the Court;
 - b. whether the relief sought will advance the most just, efficient and least costly resolution of the litigation;
 - c. whether the nature of the proceedings and the rights asserted are relevant contextual factors;
 - d. the complexity of the matter;
 - e. the amount of time and effort involved to prepare the statement of defence;
 - f. whether the statement of defence may have to be entirely reformulated in response to the outcome of the certification hearing; and
 - g. whether there is any obvious prejudice to the plaintiff.

[16] Most of the considerations identified in *Poundmaker* militate in favour of granting the AGC's motion to extend the time in which to serve and file the Statement of Defence until after the certification motion is determined. Whether the Statement of Claim discloses a reasonable cause of action must be determined by reference to the pleading itself. The remaining criteria for certification will be assessed with reference to the evidence and argument, not the pleadings.

[17] It is not unusual for a plaintiff's theory of the case to evolve as the action works its way to certification, and even at or after the certification motion itself (*Dugal v Manulife Financial Corp*, 2011 ONSC 6761 at para 13). A Statement of Defence that is filed prior to the Plaintiffs' motion for certification may therefore have to be substantially reformulated after the final disposition of the certification motion.

[18] The AGC notes that Ms. Kahnpace is not a member of any of the four classes described in the Statement of Claim. Should "Jane Doe" be designated as a representative plaintiff, in addition to or in lieu of Ms. Kahnpace, material facts specific to her circumstances will have to be pleaded. The AGC will then be required to amend any Statement of Defence to respond to the new allegations.

[19] In the event that the proposed class proceeding is not certified, and the claims are instead pursued as individual actions, any Statement of Defence filed before certification will have unnecessarily responded to class-wide allegations. Preparing a Statement of Defence in advance of certification will require the AGC to expend substantial resources, which may be duplicated or wasted if the Plaintiffs' claims are substantially reformulated after certification, or not certified at all.

[20] According to the AGC, the factual question of whether the CRS over-classifies certain categories of inmates has potentially far-reaching consequences for the administration of correctional facilities. Preparing the Statement of Defence will require extensive consultations, and the synthesis of a wide range of empirical and statistical data regarding the CRS' validity

and its effects on inmate populations across Canada. The legal issues related to the CSC's governing statute and whether use of the CRS violates ss 7 and 15 of the *Charter* are, in the words of the AGC, "by no means issues of ordinary complexity".

[21] The primary objection of the Plaintiffs to the AGC's proposal to defer the filing of a Statement of Defence concerns possible defences based upon ss 1 and 24(1) of the *Charter*. According to the Plaintiffs, if the proposed proceeding is certified as a class action without a Statement of Defence, and the AGC then files a Statement of Defence that relies on ss 1 and 24(1), this will necessitate a further motion to certify common issues of fact and law arising from those defences. I disagree.

[22] In *Poundmaker*, Justice Strickland rejected the plaintiff's assertion that a limitation defence, if relied on, should be pleaded so that it could be identified as a potential common issue. Justice Strickland noted that the question of common issues "is based on evidence, and a statement of defence does not contain evidence" (*Poundmaker* at paras 13 & 34).

[23] Similarly, in *Tippett v Canada*, 2019 FC 869 and *Liang v Canada*, 2020 FC 1073, this Court certified class actions in which *Charter* damages were sought without requiring statements of defence to be filed. Among the common issues certified in both proceedings was whether the alleged breaches of the *Charter* were justified pursuant to s 1 and, if not, whether damages pursuant to s 24(1) were a just and appropriate remedy.

[24] I am therefore satisfied that, at this stage of the proceedings, deferring the filing of the Statement of Defence until after the final disposition of the certification motion will cause no prejudice to the Plaintiffs and will help to secure the just, most expeditious and least expensive determination of the proposed class action. As in *Poundmaker*, this conclusion may be revisited with leave of the Court if, as the matter proceeds, it becomes apparent that there would be utility in requiring the filing of a Statement of Defence.

V. Conclusion

[25] The motion of the AGC for an order pursuant to Rule 8 extending the time for service and filing of the Statement of Defence until after the final disposition of the Plaintiffs' motion for certification should be granted. Consistent with Rule 334.39(1), no costs should be awarded.

ORDER

THIS COURT ORDERS that:

1. The time for service and filing of the Defendant's Statement of Defence in this proposed class proceeding is, unless otherwise ordered by the Court, extended to 30 days after the final determination of the certification motion, should that motion be successful.

2. No costs are awarded.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-88-21

STYLE OF CAUSE: MARTHA KAHNAPACE and JANE DOE v THE
ATTORNEY GENERAL OF CANADA

APPLICANTS' MOTION RECORD DATED APRIL 28, 2021.

ORDER AND REASONS: FOTHERGILL J.

DATED: JUNE 3, 2021

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