

Federal Court



Cour fédérale

**Date: 20120529**

**Docket: T-1355-11**

**Citation: 2012 FC 654**

**Ottawa, Ontario, May 29, 2012**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**JUSTIN GERMA**

**Plaintiff**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**REASONS FOR ORDER AND ORDER**

[1] The Plaintiff in this proceeding, Justin Germa, seeks leave under Rule 334.3 of the *Federal Courts Rules*, SOR/98-106 (*Rules*) to discontinue this proceeding. The Defendant opposes the motion ostensibly because a discontinuance of the action may prejudice the interests of other proposed members of the class. The Plaintiff has requested that this motion be dealt with in writing. Having reviewed the materials filed by the parties, I have concluded that the motion can be dealt with under Rule 369 of the *Rules* and that there is no reason for an oral hearing.

## Background

[2] This action arises out of a prison lockdown at the Kent Institution in Agassiz, British Columbia between January 7, 2010 and January 18, 2010. During the lockdown, the rights of inmates were allegedly infringed by way of unlawful searches, cell extractions and the use of excessive force.

[3] On August 19, 2011, Mr. Germa commenced this proposed class proceeding on behalf of all inmates who were subject to the lockdown. The Chief Justice ordered this action into case management on November 29, 2011. The Plaintiff brought a motion to certify the action as a class proceeding and the Defendant responded with a motion to strike the action for disclosing no viable cause of action. Before those motions could be heard, the Plaintiff indicated a desire to discontinue this proceeding in favour of a class proceeding commenced on January 6, 2012 by another inmate, Jeffrey Ewert, in the Supreme Court of British Columbia claiming almost identical relief (the Ewert action). Counsel for the plaintiffs in both actions is the same.

[4] On January 17, 2012, a class proceeding was brought in the name of a third inmate, Trevor Bell. That proceeding was also brought in the Supreme Court of British Columbia by way of a Statement of Claim asserting claims that substantially overlap those in the other two proceedings. Mr. Bell is represented by a different counsel. There does not yet appear to be an agreement or resolution about which of the two Supreme Court of British Columbia actions should take priority.

[5] On March 21, 2012, the Minister moved to strike out the Ewert action on jurisdictional grounds and on the basis that it represented an abuse of process. Justice R. B. T. Goepel dismissed that motion on April 30, 2012. Justice Goepel held that the Supreme Court of British Columbia had jurisdiction and that, in the face of Mr. Germa's pending motion to discontinue this proceeding, it was not an abuse of process to allow the Ewert action to go forward. That Order was made without prejudice to the right of the Minister to bring the motion again in the event that Mr. Germa was not permitted to discontinue this proceeding.

#### Issue

[6] Should leave to discontinue this action be granted under Rule 334.3 of the *Rules*?

#### Analysis

[7] Mr. Germa's affidavit discloses that it is no longer practical for him to continue as the representative plaintiff in the class action because he has been transferred to the Springhill Institution in Nova Scotia. He deposes that he is content to have his claim advanced in the context of the Ewert action and he seeks to discontinue this proceeding.

[8] The Defendant opposes Mr. Germa's motion saying that it is premature to dispose of this proceeding because it might seek to appeal the decision of Justice Goepel. In other words, until the uncertainty of the Ewert action is resolved, this motion should either be dismissed or adjourned.

[9] The Defendant also argues that the interests of the “unnamed, putative class members” need to be considered on this motion and, in particular, the possibility that limitation defences may arise if the Ewert action is successfully appealed and ultimately dismissed.

[10] The Defendant’s argument in favour of protecting the juridical interests of members of the proposed class is somewhat unusual in the face of its efforts to strike out both the Ewert action and this action.

[11] There are no obvious limitations issues that would bar the claims advanced in the Ewert action. The fact that individual claims may now be statute barred does not appear to me to be of any consequence so long as the Ewert action is prosecuted. There may well be limitations issues in the Bell action, but presumably that will be a consideration when the Supreme Court of British Columbia is required to determine which of those actions should move forward. It is not for this Court to be concerned about procedural issues that may arise in the Supreme Court of British Columbia: see *Campbell v Canada (AG)*, 2009 FC 30 at para 28, [2009] 4 FCR 211.

[12] This proceeding is also in its very early stages and there is no material concern about thrown-away costs.

[13] The sole foundation for the Defendant’s motion to strike out the Ewert action was the existence of this action. The Defendant claimed that a collateral proceeding in the Federal Court deprived the Supreme Court of British Columbia of jurisdiction and gave rise to an abuse of process. As Justice Goepel understood, those arguments are rendered moot if this action is

discontinued. In fact, it is only by keeping this proceeding in place that the Defendant has a basis upon which to strike out the Ewert action. If the Defendant successfully accomplished that outcome, it would presumably reassert its motion to strike out this action as disclosing no cause of action — a strategy that, if successful, would leave the class without any recourse.

[14] In these circumstances, it does not seem advisable to force a reluctant party to continue with an action in which he has lost interest. Absent a concern about meaningful prejudice to the interests of the putative class members, the forum for prosecuting a class proceeding ought to be left in the hands of Mr. Germa and his counsel.

[15] This motion for leave to discontinue this action is, therefore, allowed without costs.

**ORDER**

**THIS COURT ORDERS that** leave to discontinue this action is granted without costs to either party.

"R.L. Barnes"  
\_\_\_\_\_  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1355-11  
**STYLE OF CAUSE:** GERMA v AGC

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369**

**REASONS FOR ORDER:** BARNES J.  
**DATED:** May 29, 2012

**APPEARANCES:**

Tonia Grace FOR THE PLAINTIFF  
Banafsheh Sokhansanj FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

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