Federal Court  Cour fédérale

Date: 20170131

Dockets: T-455-16
T-456-16

Citation: 2017 FC 121

Ottawa, Ontario, January 31, 2017

PRESENT: The Honourable Mr. Justice Barnes

PROPOSED CLASS PROCEEDINGS
AND PROPOSED SIMPLIFIED ACTION

Docket: T-455-16

BETWEEN:

CHRISTOPHER JOHN WHALING

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

Docket: T-456-16

AND BETWEEN:

WILLIAM WEI LIN LIANG

Plaintiff

and

ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

[1] The Defendant, the Attorney General of Canada, brings two motions to strike the Statements of Claim filed in the two proceedings styled above. These reasons are intended to apply to both motions and will accordingly be filed in T-456-16 and T-455-16.

[2] The Plaintiffs in these two proceedings, Christopher John Whaling and William Wei Lin Liang, brought their respective claims in the form of proposed class actions. Each Statement of Claim asserts a cause of action alleging a breach of section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*] and seeking damages pursuant to section 24(1) of the *Charter*. The proposed classes of claimants are those federal inmates whose rights to accelerated parole review were removed by the retrospective application of the *Abolition of Early Parole Act*, SC 2011, c 11. It is common ground that the attempt by Parliament to apply this legislative change retrospectively was ultimately held to be unconstitutional because, in Mr. Whaling's case, it violated the section 11(h) *Charter* rights of three already sentenced inmates not to be punished again for the same offence. In other words, the retrospective application of the law represented a prohibited form of double jeopardy: see *Canada (Attorney General) v Whaling*, 2014 SCC 20, [2014] 1 SCR 392 [*Whaling*]. In the case of Mr. Liang, the *Charter* violation was found to arise under section 11(i) which extends to a guilty person the benefit of lesser punishment in the face of a legislative change occurring between the dates of the commission of the offence and sentencing: see *Liang v Canada (Attorney General)*, 2014 BCCA 190, 355 BCAC 238 [*Liang*].

[3] Notwithstanding the prior determination of these *Charter* breaches, the Defendant moves to strike these actions under Rule 221(1)(*a*) of the *Federal Courts Rules,* SOR/98-106, on the basis that the Statements of Claim disclose no reasonable cause of action. In particular, the Defendant says that the asserted claims cannot succeed in the face of Parliamentary (or legislative) immunity for the consequences flowing from the passage of unconstitutional legislation. The present pleadings, it is argued, are insufficient to overcome this significant legal obstacle. The Defendant also asserts that these actions are statute barred and should be struck based on estoppel and abuse of process principles.

[4] The Plaintiffs have responded to these challenges by filing amended Statements of Claim offering further support for their proposed causes of action. They say their new allegations are sufficient to survive a motion to strike. The key passage in the proposed amended Statements of Claim said to support the proceedings moving ahead is paragraph 9 and, in particular, the added underlined allegations:

> 9. As set out by the Record of Proceedings in Parliament, this repeal was intended to be prospective affecting only those subsequently convicted or sentenced but shortly before the Federal election because of the case Earl Jones in Quebec, a large white collar criminal fraudster and the extensive media notoriety his case engendered, the legislation introduced provided by virtue of s.10(1) that the repeal be applied retrospectively or retroactively in order to ensure that this particular individual and inevitably others already eligible for APR would have it taken away retroactively, in furtherance of the Conservative Party of Canada's "*Tough on Crime*" election campaign agenda. <u>The Defendant acted recklessly, in a grossly negligent manner, in bad faith and/or in abuse of its power by proposing, pursuing and passing a bill in to law which it knew or ought to have known was unconstitutional and would infringe the rights of those to whom it applied, and did so motivated by political self-interest.</u>

[5] The Plaintiffs' theory of liability emerged with some additional clarity during oral argument in response to arguments put forward by counsel for the Defendant and questions from the Court. To the Defendant's argument that the proposed pleadings, as written, fail to distinguish between the conduct of the executive and legislative branches of government, the Plaintiffs assert that both should be treated, in this context at least, as a single entity. This is so, they say, because the executive branch knowingly and wrongfully proposed an unconstitutional legislative provision to Parliament and forced its will by whipping the vote in both Houses. The argument is that the Court should, at this early stage, entertain a cause of action based on practical political realities and ignore the *de jure* separation of responsibilities. For that point, the Plaintiffs rely on the general references in *Mackin v New Brunswick,* 2002 SCC 13, [2002] 1 SCR 405 [*Mackin*] to "governmental action", "the government of New Brunswick" and "the government and its representatives" without any seeming regard for the separation of law-making functions in the context of a claim to *Charter* damages arising from the passage of unconstitutional legislation.

[6] The Plaintiffs also rely on other passages in *Mackin*, above, suggesting a low threshold for government liability for damages for the passage of unconstitutional legislation, such as where conduct is "clearly wrong" or "negligent."

I. General Principles

[7] The general principles that apply to a motion to strike in a case like this are not in dispute.

[8] In *Blackshear v Canada*, 2013 FC 590, [2013] FCJ No 613 (QL), Prothonotary Roger Lafrenière discussed the approach to be taken to motions to strike for disclosing no reasonable cause of action:

> [3] On a motion to strike a pleading on the grounds that it does not disclose a reasonable cause of action, those allegations that are capable of being proved must be taken as true: *Hunt v Carey Canada Inc* [1990] 2 SCR 959. This rule does not apply, however, to allegations based on assumptions and speculation: *Operation Dismantle Inc v The Queen* (1985), 18 DLR (4th) 481 (SCC) at 486-487 and 490-491. The Statement of Claim should also be read generously with allowance for inadequacies due to drafting deficiencies. However, the Court need not accept at face value bare allegations, factual allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as factual allegations.

[9] In *Henry v British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 SCR 214 [*Henry*], the Court dealt with a challenge to a pleading that advanced a claim to *Charter* damages arising from allegations of prosecutorial misconduct. As in this case, the Crown moved to strike the claim on the basis of its assertion of immunity. The underlying question involved the scope of the immunity. The Court described the need for adequate pleadings in such a context in the following passage:

> [43] When a heightened *per se* liability threshold has been imposed, this will have consequences at the pleadings stage. To survive a motion to strike, a claimant must plead sufficient facts to disclose a reasonable cause of action: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. If the alleged *Charter* violation occurs in a context where courts have imposed a heightened *per se* liability threshold, the claimant must particularize facts that, if proven, would be sufficient to establish that the state conduct met the required threshold of gravity. The failure to do so will be fatal to the claim. With these principles in mind, I turn to the applicable threshold for wrongful non-disclosure by prosecutors.

[10] The requirement for pleading sufficient material facts to support a viable theory of liability was also discussed in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, [2015] FCJ No 1245 (QL). There the Court was faced with a Crown motion to strike a Statement of Claim seeking to recover, in part, *Charter* damages arising from the passage of ostensibly unconstitutional legislation. The Court upheld the underlying decision striking the pleading in its entirety on the following basis:

> [16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that 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."
>
> [17] The latter part of this requirement – sufficient material facts – is the foundation of a proper pleading. If a court allowed 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. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.
>
> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.
>
> [19] What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The 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.

[20] The requirement of material facts is embodied in the rules of practice of the Federal Courts and others: see *Federal Courts Rules*, Rule 174; Alta. Reg. 124/2010, s. 13.6; B.C. Reg. 168/2009, s. 3-1(2); N.S. Civ. Pro. Rules, s. 14.04; R.R.O. 1990, Reg. 194, s. 25.06. While the contours of what constitutes material facts are assessed by a motions judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory. 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: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

…

[26] A properly pleaded tort claim identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort. As the judge pointed out, while the appellants assert various torts including misfeasance in public office, they do not link particular conduct to the elements of the tort. For example, the tort of misfeasance in public office requires a pleading of a particular state of mind by a public official – deliberate, specific conduct which the official knows to be inconsistent with their legal obligations: *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184. The statement of claim in this case does not meet that standard.

[27] The bald assertion of a conclusion is not a pleading of material fact. The judge properly struck many of the paragraphs underlying the tort claims on the basis that without more, these were conclusory statements. He also found that the allegations of bad faith and abuse of power comprised a set of statements or conclusions and did not meet the standard of pleading described in *Merchant Law* at paras. 34-35.

[28] The judge assessed the allegations of tortious conduct in the implementation and enforcement of the *Regulations* against these principles and concluded that the appropriateness of the enforcement measures could only be assessed in the light of the facts and context of a particular action or series of actions. What was pleaded, however, was a general practice, with no specific instances, leaving it unclear as to whether the conduct was "something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are

> referring to what individual officials have chosen to do" (Reasons for Decision at para. 106).
>
> G. Damages
>
> [29] Relying on *Mackin* and *Ward*, the judge correctly dismissed the claim for relief under sections 24(1) of the *Constitution Act*, 1982: *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, 2010 SCC 27; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. As a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" – one of the elements typically required in order to found a damages claim under section 24(1) of the Charter – but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim.

Also see *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at paras 34 and 40, 321 DLR (4th) 301.

II. Application of Legal Principles to this Case

[11] I turn now to the application of the above legal principles to the pleadings in this case.

[12] The Plaintiffs' allegations of recklessness, bad faith and abuse of power appear to be unobjectionable and arguably address the issue of Parliamentary immunity discussed in *Mackin*, above, at para 78. These allegations are, however, insufficient on their own to defeat a motion to strike. It is well established in the jurisprudence that such conclusory pronouncements must be supported by the assertion of material facts. That is where the pleadings come up short.

[13] The Plaintiffs maintain that the requisite material facts are found in the reference to the "proposing, pursuing and passing a bill in to law which [the Defendant] knew or ought to have known was unconstitutional and would infringe the rights of those to whom it applied, and did so motivated by political self-interest."

[14] The question that remains is whether the above statement is one of material fact or simply another unsupported conclusion. In my view, it is the latter and, in any event, it is insufficient to inform the Defendant of the case to be met. Broken down, the amended plea is simply a factually unsupported allegation that the Defendant passed into law a statutory amendment that it knew or ought to have known was unconstitutional. The added assertion of a political motivation adds nothing of legal significance because all legislative initiatives are the creatures of political motives in some form. What is entirely absent from the pleading is any assertion of material fact that would tend to establish the liability threshold necessary to obtain *Charter* damages for the passage of unconstitutional legislation.

[15] I accept the Plaintiffs' point that no bright-line test for grounding liability in cases like this emerges from the decision in *Mackin*, above. What does emerge from the majority judgment are some general impressions coupled with considerable uncertainty about where the boundaries of the limited immunity for legislative action begin and end. At various places in the judgment the Court indicates that legislative immunity for *Charter* damages may not be available for the exercise of governmental action that is "clearly wrong," "in bad faith," "an abuse of power," "negligent," brought with an "unreasonable attitude" or for "ulterior motives," or "with knowledge of … unconstitutionality," or that fails to "respect the 'established and indisputable'

laws that define the constitutional rights of individuals." Whether the test is subjective, objective or something in between is left unanswered.

[16] What is also lacking from the judgment in *Mackin*, above, is any discussion of the principles of justiciability that typically guide any judicial intrusion into the business of Parliament. In *Friends of the Earth v Canada*, 2008 FC 1183, [2009] 3 FCR 201, I observed that the courts are often ill-equipped to second-guess the public policy considerations or motivations that inform the legislative process:

> [24] The parties do not disagree about the principles of justiciability but only in their application in these proceedings. They agree, for instance, that even a largely political question can be judicially reviewed if it "possesses a sufficient legal component to warrant a decision by a court": see *Reference Re Canada Assistance Plain (B.C.)*, [1991] 2 S.C.R. 525 at para. 27, 83 D.L.R. (4th) 297. The disagreement here is whether the questions raised by these applications contain a sufficient legal component to permit judicial review. The problem, of course, is that "few share any precise sense of where the boundary between political and legal questions should be drawn": see Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at p. 133.
>
> [25] One of the guiding principles of justiciability is that all of the branches of government must be sensitive to the separation of function within Canada's constitutional matrix so as not to inappropriately intrude into the spheres reserved to the other branches: see *Doucett-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paras. 33 to 36 and *C.U.P.E. v. Canada (Minister of Health)*, 2004 FC 1334 at para. 39, 244 D.L.R. (4th) 175. Generally a court will not involve itself in the review of the actions or decisions of the executive or legislative branches where the subject matter of the dispute is either inappropriate for judicial involvement or where the court lacks the capacity to properly resolved [sic] it. These concerns are well expressed in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, above, at pp. 4 and 5:
>
> > Appropriateness not only includes both normative and positive elements, but also reflects an

> appreciation for both the capacities and legitimacy of judicial decision-making. Tom Cromwell (now Mr. Justice Cromwell of the Nova Scotia of Appeal) summarized this approach to justiciability in the following terms:
>
> > The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.
>
> While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. We cannot state all the reasons why a matter may be non-justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with confidence is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."
>
> [Footnotes omitted.] [Emphasis in original.]

[17] On the basis of the above concerns one is left to wonder how a court is to discern the institutional motivations or knowledge of Parliament when it passes legislation and whether a court should ever attempt such an exercise. Would some awareness that a Bill is constitutionally vulnerable be enough to ground a claim to *Charter* damages or must there be evidence of institutional negligence, willful blindness or bad faith? In the context of a search for

Parliamentary intent these are questions that are not readily amenable to or appropriate for judicial determination and, in my view, are not justiciable. Indeed, it is apparent from the judgment in *Whaling*, above, that the Court had real difficulty in ascertaining a Parliamentary purpose from the Hansard comments of individual members of Parliament: see paras 66-68.

[18] It may be that a *prima facie* claim to section 24(1) *Charter* damages ought to be available in the face of an *ex post facto* judicial determination of unconstitutionality. This would leave the availability of *Charter* damages in cases like this to a judicial assessment of the functional considerations discussed in the following passage from *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*]:

> [4] ….The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[19] This is the approach to section 24(1) that was adopted by the minority in *Henry*, above, where the *Charter* breach arose from prosecutorial non-disclosure and where proof of intent was said to be unnecessary.

[20] Another possible approach would maintain a *per se* liability threshold but based on the objective standard of what Parliament ought to have known about the constitutionality of its legislation. This was essentially the approach adopted by the majority in *Henry*, above, where

either actual or imputed prosecutorial knowledge of the facts constituting a *Charter* breach were said to be sufficient to support a claim to section 24(1) damages.

[21] There is arguably no overriding rationale for denying compensation to a person whose liberty interests have been infringed by the passage of manifestly unconstitutional legislation. While *Ward*, above, identified a legitimate concern about a "chill" on the "exercise of policy-making discretion," the prospect of such a recovery might also serve to reinforce the constitutional obligations of the executive and legislative branches and thereby check any tendency to overreach. In fact, in *Mackin*, above, the Court acknowledged the need to find "a balance between the protection of constitutional rights and the need for effective government": see para 79.

[22] These same competing interests were very recently considered in *Ernst v Alberta*, 2017 SCC 1, [2017] SCJ No 1 (QL) [*Ernst*]. There, too, the matter came before the Court on a Crown motion to strike a claim for *Charter* damages based on a statutory immunity provision. Writing for the majority, Justice Thomas Cromwell observed at paragraph 27 that the remedy of *Charter* damages is "limited to situations in which it is 'appropriate and just' because it serves one or more of the compensatory, vindicatory and deterrent purposes which support that choice of remedy." One of the fundamental concerns of the majority was the need to preserve effective governance – a point that was countered by Chief Justice Beverley McLachlin who, in dissent, noted, at paragraph 169, the salutary value of *Charter* damages as a means of enhancing good governance.

[23] The division in thinking at the Supreme Court on the availability of *Charter* damages in the face of common law and statutory immunities protecting state actors appears to be quite profound. In a recent web-based article by Jeff Beedell, Matthew Estabrooks and John J Wilson of Gowling WLG,[1] the split evidenced by the opinions expressed in *Ernst*, above, was described in the following way:

> It is unlikely that the question of whether and to what extent *Charter* damages are available under the *Ward* analysis as a remedy available for the actions of administrative tribunals has been finally settled by a divided Court. While the reasons of Justice Cromwell and Justice Abella, read together, reflect a majority decision that *Charter* damages are (likely) not an appropriate and just remedy in these circumstances, the three sets of reasons delivered in *Ernst* form a kind of continuum between the opposing values of "good governance" (meaning the independence and impartiality of adjudicators/regulators) and the need to ensure that *Charter* breaches are meaningfully redressed. It remains to be seen where along that continuum the Court will next go.

[24] In the face of the above-noted jurisprudence, one can reasonably ask whether the functions of vindication and deterrence are adequately recognized by a bare declaration of invalidity, particularly when the harm occasioned by the passage of unconstitutional legislation results in the loss of one's physical freedom – that being "the most severe deprivation of liberty known to our law": see *Liang*, above, at para 44, citing *R v Wigglesworth*, [1987] 2 SCR 541 at 562, 45 DLR (4th) 235.

---

[1] Jeff Beedell, Matthew Estabrooks & John J Wilson, *Supreme Court's First Decision of 2017: Striking Section 24(1)* Charter *Damages Claim Against a Regulator*, online: Gowling WLG <http://gowlingwlg.com/en/canada/insights-resources/supreme-court's-first-decision-of-2017-striking-section-24(1)-charter-damages-claim-against-a-regulator>.

[25] All of this is not to say that any theory of liability need be entertained. For example, the theory expounded by the Plaintiffs in oral argument for a blending of the executive and legislative functions has, in this case at least, no prospect for success. That is so because the legislation that is the subject of this action was proposed and passed into law by a minority government with the support of members of the opposition.[2] In short, the vote was not whipped or coerced by the executive branch acting abusively or in bad faith. And even then there remains a clear dichotomy "between the executive and Parliament" that the courts are obliged to accept: see *Canada v Courtoreille*, 2016 FCA 311 at para 54, [2016] FCJ No 1389 (QL). Finally, there is nothing in the proposed Statements of Claim that articulates the Plaintiffs' newly advanced theory of liability.

[26] As discussed above, the Statements of Claim as presently constituted fail to meet the legal requirements set out in *Henry*, above, and, on that basis, they are struck out in their entirety.

[27] What remains for determination is whether the Court should permit the Plaintiffs to amend their pleadings and to propose a fresh theory of liability that might be viable. The test for granting leave to amend is whether the defect in the pleading is potentially curable: see *Simon v Canada*, 2011 FCA 6 at para 8, [2011] FCJ No 32 (QL).

[28] Notwithstanding the fatal flaws in the present Statements of Claim, I am mindful of the admonition in *Henry*, above, that the boundaries for accessing *Charter* damages, particularly in

---

[2] This is a legislative fact of which the Court can take judicial notice: see *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, 2000 SCC 2 at para 5, [2000] 1 SCR 44. See also *R v Find*, 2001 SCC 32 at para 48, [2001] 1 SCR 863.

cases like this one, are in the early stages of judicial development and should not be unduly stifled:

> [35] *Charter* damages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to "develop incrementally": *Ward*, at para. 21. When defining the circumstances in which a *Charter* damages award would be appropriate and just, courts must therefore be careful not to stifle the emergence and development of this important remedy.

Also see *Ward*, above, at paragraph 18, cautioning against unduly constraining the broad discretion afforded by section 24(1), and *Canada v Hislop*, 2007 SCC 10, [2007] 1 SCR 429, at paragraph 103, referring to the need to allow for the evolution of the relevant jurisprudence.

[29] Given the uncertain boundaries that surround legislative immunity as discussed in *Mackin*, above, and *Henry*, above, I am not, at this point, able to say with confidence that no arguably viable claim to *Charter* damages could ever be pleaded in the circumstances of this case. For that reason, the Statements of Claim are struck but with leave to refile.

[30] I would add that the Defendant's limitations defence is not a barrier to this case going forward. The proposed class actions involve federal inmates incarcerated in prisons across Canada. The fact that both representative Plaintiffs were, at the material times, serving their custodial sentences in British Columbia does not dictate that British Columbia limitation periods apply to their claims or that other provincial limitation periods would apply to the claims of the proposed members of the class.

[31] It seems quite obvious to me that the causes of action the Plaintiffs seek to advance are not ones that arise in the province where any particular class member was held at the time of the passage of the impugned legislation or thereafter. Rather, these are causes of action that arose "otherwise than in a province" as contemplated by section 39(2) of the *Federal Courts Act*, RSC, 1985, c F-7. They are, therefore, subject to a six-year limitation period.

[32] The rationale for uniformity of treatment in situations like this was well articulated in *Markevich v Canada*, 2003 SCC 9, [2003] 1 SCR 94, in the following passage:

> 38 Section 32 applies provincial limitation laws to proceedings in respect of a cause of action arising in a province, and a six-year limitation period to those which arise otherwise than in a province. The motions judge, at para. 59, would have found that the cause of action arose otherwise than in a province. The Court of Appeal applied the provincial limitation provision and so, implicitly at least, found that the cause of action arose in a province. In this appeal, the matter is of no particular consequence, because in either case the limitation period runs for six years from the date upon which the cause of action arose. Nonetheless, I conclude that the appellant's cause of action arose otherwise than in a province, and hence that the six-year limitation period provided by s. 32 applies.
>
> 39 Tax debts created under the *ITA* arise pursuant to federal legislation and create rights and duties between the federal Crown and residents of Canada or those who have earned income within Canada. The debt may arise from income earned in a combination of provinces or in a foreign jurisdiction. The debt is owed to the federal Crown, which is not located in any particular province and does not assume a provincial locale in its assessment of taxes. Consequently, on a plain reading of s. 32, the cause of action in this case arose "otherwise than in a province".
>
> 40 A purposive reading of s. 32 supports this finding. If the cause of action were found to arise in a province, the limitation period applicable to the federal Crown's collection of tax debts could vary considerably depending upon the province in which the income was earned and its limitation periods. In addition to the administrative difficulties that potentially arise from having to determine the specific portions of tax debts that arise in different

> provinces, the differential application of limitation periods to Canadian taxpayers could impair the equitable collection of taxes. Disparities amongst provincial limitation periods could foreseeably lead to more stringent tax collection in some provinces and more lenient collection in others. The Court can only presume that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country with regard to proceedings of the kind at issue in this appeal.
>
> [Emphasis added.]

[33] For the above reasons and particularly because the proposed class actions are brought in response to Parliamentary action, pursuant to unconstitutional federal legislation and for the loss of a right guaranteed by federal legislation, the claims can only be purposively seen to arise "otherwise than in a province". That being so, even if the earliest possible date is chosen for the causes of action to arise, being the date the impugned legislation came into force, the Plaintiffs and other members of the proposed classes are not statute barred.

[34] I also reject the Defendant's contention, at least at this early stage, that the actions should be struck on the basis of estoppel or abuse of process principles. This argument is based on the point that a party is required to put all of its case forward when it brings a claim for relief and cannot litigate a cause of action on a piecemeal basis. Here it is argued that the two representative Plaintiffs should have coupled their respective claims to *Charter* damages with their earlier challenges to the constitutionality of the subject legislation and should not be permitted to seek damages in these subsequent actions.

[35] Although I accept that the technical requirements for establishing cause of action estoppel are present – at least insofar as the representative Plaintiffs are concerned – I do not agree that the defence should be applied to these cases.

[36] The Court always has a residual discretion in the application of estoppel or abuse of process defences – a discretion that must be exercised with a view to ensuring that the requirements of justice are met and that the Court's processes are not abused: see *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 33, [2001] 2 SCR 460.

[37] If these actions are reconstituted with proper pleadings and ultimately certified as class proceedings, it would be inappropriate to bar them on the basis of these defences. First and foremost, the members of the proposed classes should not be prejudiced by the litigation conduct of the representative Plaintiffs. In that sense, there is an absence of privity among the interested parties and it would be unfair to the proposed class members at this stage of the actions to bar their access to relief from the Court.

[38] I am also mindful of the practical difficulties faced by the representative Plaintiffs in bringing their initial constitutional challenges. These included limitations on legal aid funding, the need for an early determination of the constitutionality issue and the corresponding risk of delay from including the damages claim in the first instance. These are all matters that dictate that the persons affected by the unconstitutional removal of access to earlier parole ought not be deprived of the opportunity to seek monetary relief on the basis of estoppel or abuse of process.

[39] For the foregoing reasons, the Defendant's motions to strike are allowed subject to the Plaintiffs' rights to amend their pleadings and refile. Having regard to the divided success of these motions and to the nature of the proceedings on behalf of the proposed classes, no costs are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the Defendant's motions to strike are granted and the Statements of Claim in these actions are struck in their entirety with leave to amend and refile.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-455-16
STYLE OF CAUSE:	CHRISTOPHER JOHN WHALING v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-456-16
STYLE OF CAUSE:	WILLIAM WEI LIN LIANG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 23, 2016
JUDGMENT AND REASONS :	BARNES J.
DATED:	JANUARY 31, 2017

APPEARANCES:

John W. Conroy, QC Tonia Grace	FOR THE PLAINTIFFS CHRISTOPHER JOHN WHALING WILLIAM WEI LIN LIANG
Cheryl D. Mitchell Sarah-Dawn Norris	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Conroy & Company Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS CHRISTOPHER JOHN WHALING WILLIAM WEI LIN LIANG
Grace Snowdon & Terepocki LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE PLAINTIFFS CHRISTOPHER JOHN WHALING WILLIAM WEI LIN LIANG

William F. Pentney
Deputy Attorney General of Canada
Vancouver, British Columbia

FOR THE DEFENDANT