Date: 20050114

Docket: T-2414-03

Citation: 2005 FC 39

Ottawa, Ontario, January 14, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER

BETWEEN:

HÉLÈNE GALARNEAU

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

and

CORRECTIONAL SERVICE OF CANADA (CSC)

Defendants

REASONS FOR ORDER AND ORDER

[1] The plaintiff Ms. Garlarneau is appealing the decision of Prothonotary Morneau, dated May 18, 2004, allowing the motion to strike out the statement of claim and dismiss the action pursuant to paragraphs 208(*d*) and 221(1)(*a*) of the *Federal Court Rules, 1998*, SOR/98-106.

[2] The parties agree that Prothonotary Morneau=s order is addressed to an issue that is vital to the outcome of the case and that the Court must therefore consider the appeal as an application *de novo* and exercise its own discretion by rehearing the matter from the beginning (*Canada v. Aqua Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.) and *Merck & Co., Inc. v. Apotex Inc.*, [2003] F.C.J. No. 1925 (C.A.) (QL), at paragraphs 19 and 20).

[3] In their motion, the defendants ask that the action be dismissed, arguing that the Court does not have jurisdiction *ratione materiae* to hear a dispute that bears essentially on the steps taken by the Correctional Service of Canada (CSC) as an employer to maintain the occupational health and safety of its employees, including Ms. Galarneau. The subject matter, they say, is one for which the collective agreement and the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA) provide an exclusive dispute settlement procedure that applies over and above any other administrative remedies provided for in other federal legislation such as the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Part II), the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 and the *Non-smokers= Health Act*, R.S.C. 1985 (4th Supp.), c. 15, and which allow Ms. Galarneau and her colleagues to put an end to this situation and obtain compensation for the resulting damages.[1]

[4] The Federal Court has ruled on similar questions on many occasions. However, as the Prothonotary states, this is the first time that the Court has been asked to strike out, under rule

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[1] See in Appendix A the table submitted by the defendants, which illustrates some of the available administrative remedies and clause 20.02(*a*) of the collective agreement reproduced in paragraph 11 below.

221(1)(*a*), a statement of claim containing an application for certification as a class action under rules 299.12 *et seq*.[2]

[5] The Court also notes that Ms. Galarneau has raised in this appeal a new argument that substantially alters the factual context of the case. She is now disputing that the collective agreement gave her the right to file a grievance. The defendants have not raised any objection in this regard and have not argued that they will be adversely affected if the Court were to consider this argument without their having had an opportunity to adduce evidence of certain relevant facts. Since this is a motion based on the Court=s alleged lack of jurisdiction, the parties were entitled to file evidence in support of their motion (*MIL Davie Inc. v. Hibernia Management and Development Company Ltd.*, [1998] F.C.J. No. 614, at paragraph 8) and the defendants had filed a copy of the applicable collective agreement.

[6] The interpretation of a collective agreement is a question of law *(Voice Construction & General Workers= Union, Local 92 v. Voice Construction Ltd.*, [2004] 1 S.C.R. 609) and there is no indication that relevant evidence is lacking to determine this question. The Court must therefore consider this argument on appeal (*Athey v. Leonati*, [1996] 3 S.C.R. 458, at

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[2] Since the hearing, the Court has struck out a statement of claim containing an application for certification as a class action in *Desrosiers v. Canada (A.G.)*, [2004] F.C.J. 1940, but most of the submissions made by Ms. Galarneau do not appear to have been raised in that case.

paragraph 51, and *671905 Alberta Inc. v. Q=Max Solutions Inc. (C.A.)*, [2003] F.C.J. No. 873, at paragraph 35).

A. CONTEXT

[7] Ms. Galarneau is a correctional officer employed by the CSC who seeks, in her statement of claim, to represent all the persons working or having worked in a penitentiary in Quebec at some time as a correctional officer I or II and who, in these workplaces, were or are now being exposed to smoke resulting from tobacco use.

[8] As Prothonotary Morneau states in his decision, the plaintiff criticizes the CSC for failing to comply with its obligations under the *Non-smokers= Health Act* because correctional officers are illegally exposed to second-hand smoke in the course of their employment.

[9] She argues that this situation constitutes a breach of the CSC=s duty to ensure the health and safety of its employees under the *Canada Labour Code* and violates her right to security guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 (the Charter). The employer=s conduct amounts to a civil fault giving rise to damages as well as exemplary damages and a permanent injunction.

[10] The collective agreement binding Ms. Galarneau and all correctional officers I and II employed by the CSC provides in clause 18.01 that:

> The Employer shall make reasonable provisions for the occupational safety and health of employees. The Employer will welcome suggestions on the subject from the Bargaining Agent, and the parties undertake to consult with a view to adopting and expeditiously carrying out reasonable procedures and techniques designed or intended to prevent or reduce the risk of employment injury.
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> [Emphasis added.]

[11] The collective agreement also provides, in clause 20.02, subject to section 91 of the PSSRA and pursuant to the provisions of that section, that

> . . . an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 20.05 except that:
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> (*a*) where there is another administrative procedure provided by or under any Act of Parliament to deal with the employee=s specific complaint, such procedure must be followed,
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> and
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> (b) where the grievance relates to the interpretation or application of this Agreement or an Arbitral Award, the employee is not entitled to present the grievance unless he or she has the approval of and is represented by the bargaining agent.

[12] Clause 20.23 contains the same provisions as section 92 of the PSSRA and lists the grievances that may be sent to adjudication.

[13] Subsections 91(1) and 92(1) of the PSSRA provide:

91. (1) Where any employee feels aggrieved

(*a*) by the interpretation or application, in respect of the employee, of

(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or

(ii) a provision of a collective agreement or an arbitral award, or

(*b*) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (*a*)(i) or (ii),

in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.

91. (1) Sous réserve du paragraphe (2) et si aucun autre recours administratif de réparation ne lui est ouvert sous le régime d=une loi fédérale, le fonctionnaire a le droit de présenter un grief à tous les paliers de la procédure prévue à cette fin par la présente loi, lorsqu=il s=estime lésé :

a) par l=interprétation ou l=application à son égard :

(i) soit d=une disposition législative, d=un règlement C administratif ou autre C, d=une instruction ou d=un autre acte pris par l=employeur concernant les conditions d=emploi,

(ii) soit d=une disposition d=une convention collective ou d=une décision arbitrale;

b) par suite de tout fait autre que ceux mentionnés aux sous-alinéas *a*)(i) ou (ii) et portant atteinte à ses conditions d=emploi.

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(*b*) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or
(ii) termination of employment or demotion pursuant to paragraph 11(2)(*f*) or (*g*) of the *Financial Administration Act*, or

(*c*) in the case of an employee not described in paragraph (*b*), disciplinary action resulting in termination of employment, suspension or a

92. (1) Après l=avoir porté jusqu=au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l=arbitrage tout grief portant sur :

a) l=interprétation ou l=application, à son endroit, d=une disposition d=une convention collective ou d=une décision arbitrale;

b) dans le cas d=un fonctionnaire d=un ministère ou secteur de l=administration publique fédérale spécifié à la partie I de l=annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)*f*) ou *g*) de la *Loi sur la gestion des finances publiques*;

c) dans les autres cas, une mesure disciplinaire entraînant le licenciement, la suspension ou une sanction pécuniaire.

> financial penalty,
> and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

[14] At the hearing, the plaintiff essentially repeated the same arguments she had made before the prothonotary, except with respect to the following points.

[15] First, and this is important, she is now disputing that clause 18.01 of the collective agreement allows an employee to file a grievance under clause 20.02 of the collective agreement or subparagraph 91(1)(*a*)(ii) of the PSSRA.

[16] And while the plaintiff is still not disputing that the administrative remedies in other federal legislation identified by the defendants apply to her,[3] she now adds certain elements to support her position that the remedies under the PSSRA and the *Canada Labour Code* do not allow her to obtain genuine relief. She argues that notwithstanding the existence of all these administrative remedies, she would effectively be deprived of an ultimate remedy.

[17] She also argues that the filing of a grievance under section 91 is optional and that her union can also refuse its consent. In this regard the plaintiff filed, with the consent of the

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[3] In fact, the plaintiff conceded that it is probable that she will have to commence other administrative proceedings such as an application to the CSST in order to claim any damages included in this action.

defendants, a letter dated November 10, 2000, from a representative of the union to another CSC employee who wanted to send a grievance linked to the effect of secondary smoke to adjudication under section 92 in order to obtain punitive damages. In this letter, Clark McMunagle states that this grievance cannot be adjudicated and that in any event the adjudicator does not have the power to award such damages.

[18] Before examining the issues, it should be noted that in her supplementary submissions of December 20, 2004, the plaintiff states that the Court should consider exhibit R-1, described in her statement of claim and in her motion for certification. She says that this exhibit was served on the defendants. However, it is obvious that this evidence was not considered by the prothonotary since it was not in the Court record before this document was sent as an attachment to the letter of December 20, 2004. In the circumstances, the Court sitting on an appeal from the prothonotary=s decision cannot consider this evidence (*James River Corp. of Virginia v. Hallmark Cards Inc. et al.* (1997), 72 C.P.R. (3d) 157, at page 169).

B. ISSUES

[19] The Court must determine whether the defendants= motion is premature, and whether it should, as suggested by the plaintiff, be referred to and decided by the judge who will hear the motion for certification as a class action under rules 299.12(3) and 299.17.

[20] If the motion is not premature, it will have to be decided whether it is plain and obvious that the Court does not have jurisdiction. Naturally, to do so, it will be necessary to define the essence of the case before the Court.

C. ANALYSIS

[21] Before examining the issues, it would be appropriate to refer to the applicable test on a motion to strike under rule 221(1)(*a*). The parties did not make any submissions on this topic. This is probably because the issue was not worth arguing. Indeed, the cases are consistent that an applicant must establish Athat it is plain and obvious@ that the Court is without jurisdiction (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). This test applies even when the issue raised in the motion is one of lack of jurisdiction (*Hodgson v. Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042 (F.C.A.), leave to appeal denied by the Supreme Court of Canada).

D. PREMATURE NATURE OF THE MOTION

[22] The plaintiff argues that it is premature to consider the defendants= motion because a number of the relevant factors may change depending on how the judge rules on the certification of the action as a class action. Before that decision is made, we cannot know who will be a member of the group and whether they are or were bound by the collective agreement and the PSSRA, or what exactly will be the collective questions.

[23] The uncertainty stemming from the fact that the collective questions or the group that is represented are not yet definitively defined may be relevant in determining whether it is plain and obvious that the Court lacks jurisdiction. However, this argument is not relevant in deciding whether a motion to strike under rule 221(1) may be filed in opposition to the present action before the motion for certification.

[24] In this regard, the Court agrees with the comments of Prothonotary Morneau in paragraphs 22 to 40 of his decision and does not intend to repeat them. Nevertheless, it should be mentioned that since the prothonotary=s order, the Quebec Court of Appeal has handed down a major decision on the issue in *Société Asbestos Ltée v. Lacroix*, [2004] J.Q. No. 9410 (C.A.) (QL), confirming on all points the interpretation of the Quebec courts and the conclusion of Prothonotary Morneau.

[25] In that case, the respondent Charles Lacroix had filed a motion for authorization to institute a class action against Asbestos Corporation Ltd. and the latter raised a declinatory exception in opposition to the respondent=s motion asking that the proceeding be dismissed because the case essentially involved a question of interpretation of the collective agreement for which the respondent could use the grievance and arbitration procedure that was also provided in that collective agreement.

[26] The Quebec Court of Appeal therefore had to determine whether this motion filed prior to the hearing on the motion for authorization was premature. After analyzing the various trends in the cases, including the authorities cited by the plaintiff, it held that jurisdiction *ratione materiae* is a question of public order and that it is in the interest of the sound administration of justice if lack of jurisdiction *ratione materiae* can be raised at the first opportunity.

[27] At the hearing, in her reply, Ms. Galarneau conceded that as a general rule it is no longer possible to raise this argument in a Quebec court, but she submits that the Quebec Court of Appeal recognized that in certain exceptional cases where the judge hearing the motion would be unable to rule because of, for example, the complexity of the evidence needed to settle the issue, he or she could refer the whole matter to the judge sitting on the motion for authorization.

[28] In my opinion, it is obvious that these comments by the Quebec Court of Appeal cannot apply when the Court is hearing a motion under rule 221(1)(*a*)[4] since if the Court is unable to rule or has some difficulty in doing so for that reason, it can not find that the moving party has proved that it is plain and obvious that the action discloses no valid cause of action and it will simply have to dismiss the motion.

[29] Like Prothonotary Morneau, the Court determines, therefore, that it is not premature to decide this motion by the defendants.

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[4] These comments might, however, apply in the context of a motion under rule 213 or rule 220.

E. JURISDICTION

[30] There are two ways to characterize the essence of the dispute between the parties:

(i) it is a dispute between the federal Crown and its employees bearing on the interpretation and application of a provision in the collective agreement (clause 18.01); or, more generally

(ii) it is a dispute concerning labour relations in the public service, more particularly the working conditions pertaining to the health and safety of correctional officers.[5]

[31] As I said earlier, the plaintiff states that she cannot avail herself of the grievance procedure in her collective agreement because clause 18.01 does not give her any individual right and she cannot complain of its application in regard to her (subparagraph 91(1)(*a*)(ii)).

[32] She bases her interpretation on two decisions of the Public Service Staff Relations Board in *Alb and Deminchuk v. Treasury Board (Solicitor General Canada)*, [1987] P.S.S.R.B. No. 343 (QL) and *Labelle v. Treasury Board (Canada Labour Relations Board, Supply and Services*

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[5] The plaintiff initially challenged this characterization but she acknowledged at the hearing that even the *Non-smokers= Health Act* deals with the CSC=s obligations when acting as an employer. Furthermore, a health and safety officer within the meaning of subsection 122(1) of the *Canada Labour Code* is an inspector under that act who may monitor the employer=s application of the legislation.

Canada, Statistics Canada, Consumer and Corporate Affairs Canada and Agriculture Canada), [1990] P.S.S.R.B. No. 54 (QL).

[33] In its cases, the Board held that it did not have jurisdiction to hear the grievances of employees who said they were aggrieved by a breach of the duty to ensure their health and safety under provisions in their collective agreement similar to clause 18.01. According to the Board, these provisions only create rights between the parties to the collective agreement, i.e, the employer and the union. That is why, in *Labelle*, *supra*, the Board held that it only had jurisdiction to hear the grievance of principle filed by the union under section 99 of the PSSRA.

[34] It is not easy to understand the Board=s reasoning, since its decisions are succinct on this point. Basically, the Board in *Labelle* adopts the finding in *Alb*, *supra*, and it seems that in *Alb*, the Board narrowly construed the first sentence in this provision, dealing with the employer=s duty, because the second sentence refers to suggestions by the bargaining agent.

[35] However, the language of clause 18.01 and of the provisions examined in these cases is very similar to that in section 124 of the *Canada Labour Code*, imposing a general obligation on employers in respect of each of their employees, and reading as follows:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.	124. L=employeur veille à la protection de ses employés en matière de santé et de sécurité au travail.

[36] The defendants submit that these decisions have not been followed and that the Ontario Court of Appeal has now settled this issue in *Gaignard v. Canada (Attorney General)*, [2003] O.J. No. 3998 (C.A.) (QL). In that case, the Court was reviewing the same provision of the collective agreement between CSC and the union representing the correctional officers. It was also a dispute involving the occupational health and safety conditions of these officers. The Ontario Court of Appeal states, at paragraphs 23 to 26:

> [23] . . . The facts centre on an alleged covert operation to stop contraband entering Kingston Penitentiary which employed methods that the appellants say poisoned their work environment and caused them physical and emotional harm. These allegations clearly engage the employer=s obligation in Article 18 of the collective agreement to make reasonable provisions for the occupational safety and health of the employees.
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> [24] The same reasoning makes it equally clear that the ambit of Article 18 extends to the facts which the appellants say underpin this dispute. The employer=s obligation under the collective agreement to maintain a safe workplace is directly implicated by the covert operation and its consequences for the appellants as described in the statement of claim.
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> [25] If this dispute were arbitrated and a breach of the collective agreement were established, the remedy at arbitration would undoubtedly include compensation to injured employees who grieved. That would remedy the wrong in very much the same way as would an award of damages in a court action. There would be no deprivation of ultimate remedy.
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> [26] Finally, looked at holistically, it seems to me that this is precisely the kind of dispute that the parties intended to be finally resolved by arbitration when they agreed to Article 18. . . .

[37] The plaintiff=s argument does not appear to have been presented to the Ontario Court of Appeal in *Gaignard*, *supra*. And the Court must bear in mind the deference that the courts grant to the Board, which has been described many times as the expert on such matters.

[38] So although it is quite probable that the interpretation adopted by the Ontario Court of Appeal will be followed, particularly in light of the language of section 124 of the *Canada Labour Code* and the large and liberal interpretation that is generally given to collective agreements, the Court cannot conclude that the plaintiff=s position has no chance of success.

[39] The Court will therefore examine whether its jurisdiction is excluded regardless of the interpretation that is given to clause 18.01, as the defendants submit.

[40] If the litigation proceeds on the basis of the collective agreement, Ms. Galarneau and her colleagues will not only be entitled to file a grievance under clause 20.02 of the collective agreement and subparagraph 91(1)(*a*)(ii) of the PSSRA, but they will be able to refer this grievance to adjudication under paragraph 92(1)(*a*). These remedies are in addition to those provided in the other federal statutes dealing specifically with these issues.

[41] In that case, there is no doubt that this Court lacks jurisdiction to hear the action, even if it is an action that has been brought in order to obtain certification as a class action.

[42] Indeed, the case law on this issue is abundant and unanimous. The decision of the Ontario Court of Appeal in *Gaignard, supra,* is an excellent example. Since the Court agrees with the analysis of Prothonotary Morneau at paragraphs 41 to 63 of his decision, it is not necessary to review that case law here.

[43] Not only is it a subject matter expressly covered in the collective agreement, but in addition the statutory scheme clearly bars recourse to the courts of ordinary law in such cases, where the parties may present their disagreement to an independent third party.

[44] The plaintiff argued strenuously that the Court should not apply this principle to a class action and thereby deprive the employees who are Aparties@ to a collective agreement of the right to launch a class action suit. She relies on the decision of the Supreme Court of Canada in *Western Canadian Shopping Centers v. Dutton*, [2001] 2 S.C.R. 534. The Court has carefully considered this question for it is true that there are many advantages to a class action in practical terms, but the fact remains that the Court=s rules concerning class actions do not create any substantive law. The rules cannot alter the scheme provided by the legislature. As the Quebec Court of Appeal stated in *Carrier v. Québec*, [2000] J.Q. No. 3048, at paragraph 55, a Court cannot, through its rules of practice, grant itself jurisdiction that it does not have. Yet that is precisely what the plaintiff=s argument suggests.

[45] Moreover, as the Ontario Court of Appeal notes in *Gaignard*, *supra*, the remedies provided by the legislature need not be identical to those that would otherwise be available in the courts. And there is no doubt that in this case that the plaintiff and her colleagues are not being deprived of an ultimate remedy.

[46] The Court further notes that even the collective aspect is not excluded from the statutory scheme, when we consider that the definition of grievance in subsection 2(1) of the PSSRA includes a complaint Apresented . . . by an employee on his own behalf or on behalf of the employee and one or more other employees@. Finally, the PSSRA also provides, as I said, for the filing of a grievance of principle by the union in subsection 99(1).

[47] Lastly, in *Johnson-Paquette v. Canada*, [2000] F.C.J. No. 441 (C.A.) (QL), the Federal Court of Appeal explicitly rejected the argument based on the optional language of section 91. With respect to the possibility that the union could refuse to file a grievance, two comments are in order. First, it is obvious that the letter of November 10, 2000, was written prior to the decision of the Ontario Court of Appeal in *Gaignard*, *supra*, and there is no evidence that the union refused or would now refuse to file a grievance on behalf of Ms. Galarneau and her colleagues. Second, as was indicated in the Supreme Court of Canada decision in *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, Ms. Galarneau may force the union to comply with its duty of fair representation.

[48] This being the case, is the reply equally obvious if Ms. Galarneau is not entitled to file a grievance under clause 18.01 of the collective agreement?

[49] In that case, apart from the remedies provided in other federal statutes, the parties agree that the defendant could use the grievance procedure in subparagraph 91(1)(*a*)(i) or paragraph

91(1)(*b*) of the PSSRA. However, this grievance could not be referred to adjudication, and Ms. Galarneau argues that this difference is significant. The defendants dispute that position.

[50] The Court agrees with the defendants that the Federal Court of Appeal, in *Vaughan v. Canada (C.A.)*, [2003] 3 F.C. 645, upheld the view that, in enacting the PSSRA, Parliament clearly signified its intention to exclude the use of the ordinary courts in resolving labour relations disputes between the federal Crown and its employees, even when the grievance procedure in subsection 91(1) is the only available recourse under the PSSRA.

[51] In doing so, the Federal Court of Appeal reaffirmed the position it had adopted, *inter alia*, in *Johnson-Paquette, supra*, after reviewing the contrary decisions of various provincial courts of appeal, such as, for example, *Guénette v. Canada (Attorney General)* (2002), 60 O.R. (3d) 601, and *Pleau v. Canada (Attorney General)*, [1999] N.S.J. No. 448 (C.A.) (QL).

[52] The decisions of the Federal Court of Appeal are binding on this Court and it is obvious that the action has no chance of success unless it is clear that these decisions do not apply to this case.[6] That is why, incidentally, the action had been struck out by the prothonotary and the

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[6] The appeal of the decision in *Vaughan, supra*, was heard in May 2004, but the Supreme Court of Canada requested a rehearing in October 2004 (*Vaughan v. Canada*, [2003] F.C.A. No. 165 (QL)). The parties did not request a stay of the proceeding pending the decision of the Supreme Court of Canada in this case.

appeal judge in *Vaughan v. Canada* (2001), 213 F.T.R. 144, and *Vaughan v. Canada* (2000), 182 F.T.R. 199, and that the action was dismissed on a motion for summary judgment in *McKenzie-Crowe v. Canada*, [2003] F.C.J. No. 702, paragraph 66.

[53] Let us say, in the first place, that for the reasons expressed in paragraphs 42 to 44 above, the Court does not accept the plaintiff=s argument that this case is distinguished from the *Vaughan* case, *supra*, because it is a class action and cannot be dealt with as a [TRANSLATION] Abundle of individual proceedings@.

[54] The plaintiff then submits that in paragraph 17 of *Vaughan, supra*, Mr. Justice Sexton acknowledges that, by way of exception, the Court may hear disputes covered by the PSSRA when they involve a Charter issue.

[55] As the defendants noted, Sexton J.A., in this paragraph, cited the exception noted by the Supreme Court of Canada at paragraph 19 of its decision in *Ocean Port Hotel Ltd. v. British Columbia*, [2001] 2 S.C.R. 781. He was referring to a constitutional challenge to section 91 of the PSSRA and not a dispute in which the plaintiff alleges a breach of the Charter by the employer. The plaintiff here is not challenging the constitutional validity of section 91 in her statement of claim.

[56] Ms. Galarneau also says that the grievance officer does not have the power to award punitive damages and that the judgment in *Vaughan* is not binding on the Court in regard to her claim under section 24 of the Charter.

[57] The defendants submit that although it does not address this point specifically in its decision, the Federal Court of Appeal in *Johnson-Paquette*, *supra*, already settled this question by upholding the decision of Madam Justice Tremblay-Lamer in *Johnson-Paquette v. Canada*, [1998] F.C.J. No. 1741, in which she stated clearly at paragraphs 23 to 25 that the grievance officer and the adjudicator acting under the PSSRA had jurisdiction to award punitive damages under subsection 24(1) of the Charter. The Court ruled to the same effect in *Bédirian v. Canada (Attorney General)*, 2004 FC 566, [2004] F.C.J. No. 683 (QL) and in *Desrosiers v. Canada (Attorney General)*, 2004 FC 1601, [2004] F.C.J. No. 1940 (QL).

[58] As Mr. Justice Harrington states in *Desrosiers*, the Court must apply the decision of the Supreme Court in *Nova Scotia (Workers= Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

[59] At the request of the Court, the plaintiff submitted her comments regarding this decision. She states that the Court is not bound by this decision because in *Martin*, *supra*, the Court was reviewing a decision of an administrative appeal tribunal that was clearly independent, which is not the case with a grievance adjudicator acting under section 91 of the PSSRA. As for

Desrosiers, *supra*, the plaintiff states that the Court ruled on the motion to dismiss without considering that it was not an individual proceeding but rather a class action.

[60] Clearly, the facts in *Martin*, *supra*, differ from those in this proceeding. However, the Court is not persuaded that these differences, and in particular the lack of independence of the grievance adjudicator, preclude the application of the rules laid down in *Martin*.

[61] The Supreme Court of Canada clearly stated that it intended to establish a single set of rules concerning the jurisdiction of administrative agencies. In its decision, the Court refers not only to administrative tribunals but also to administrative agencies of the state. It says:

> [28] . . . Courts may not apply invalid laws, and the same obligation applies to every level and branch of government, including the administrative organs of the state. Obviously, it cannot be the case that every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply. If, however, she is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. This is because the consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.
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> [29] From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. . . .
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> [30] . . . In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court. . . .

[62] There is no doubt that section 91 authorizes grievance officers to interpret and apply various federal statutes and therefore to decide questions of law. The Supreme Court of Canada indicates that in such cases there is no need to go beyond the language of the statute and that it can be presumed that Parliament has granted the administrative body the authority to rule on constitutional issues. In this regard, it is appropriate to note that the powers set out in section 91 are similar if not identical to those given to the adjudicator in section 92.

[63] Finally, the issue of the grievance officer=s lack of independence was analyzed in depth by the Federal Court of Appeal in *Vaughan*, and it held that it could not be concluded from this factor that Parliament intended to allow recourse to ordinary courts in order to settle the issues described in section 91.

[64] In the circumstances, the Court is satisfied that the application of the decisions of the Federal Court of Appeal regarding the effect of section 91 on the Court=s jurisdiction cannot be disregarded. In fact, the plaintiff was unable to cite a single decision since *Johnson-Paquette*, *supra*, holding that a grievance officer did not have authority to award exemplary damages.

[65] At the hearing, the plaintiff raised a large number of further arguments without developing them. She says, for example, that is not clear that she will be able to call expert witnesses or that she will be entitled to a hearing before the appeals officer under the *Canada Labour Code*. She argues as well that no one has the power to issue an injunction to stop the

situation from continuing and that the compensation provided in the *Government Employees Compensation Act* applies only to employees who have had an accident or contracted an illness while she is also seeking damages for employees who have suffered other types of inconvenience.

[66] Clearly, presenting a long list of grievances will not suffice to get a Court to find that the plaintiff has some chance of ruling out the application of the Federal Court of Appeal decisions.

[67] The decisions of the grievance officer and the other decision-makers under the other applicable federal statutes are subject to judicial review. If there were in fact a breach of the rules of natural justice, the decisions would be set aside. As Evans J.A. states in *Vaughan*, *supra*, such arguments do not preclude the application of the statutory scheme enacted for resolving disputes in connection with employment conditions in the federal public service.

[68] As is apparent in subsection 91(1), when an administrative procedure for redress is not provided in other federal statutes, Ms. Galarneau=s claim may be grieved under section 91.

[69] As to the permanent injunction, it is obvious that even if the decision-makers under the *Canada Labour Code* do not have authority to issue such an injunction, they do have the power to require that the employer put an end to the situation. If the employer delays doing so, it would

then be necessary to contemplate a proceeding in the ordinary courts. There is no indication that the employer has refused to implement a decision of one of these decision-makers.

[70] Having considered each and every one of the arguments raised by the plaintiff, the Court finds that these occupational health and safety issues between the federal Crown and the correctional officers employed by it are clearly the subject matter of a complete code and that a significant panoply of administrative remedies has been provided by Parliament. The existing statutory scheme excludes the Court=s jurisdiction over claims by these employees and by Ms. Galarneau in particular.

[71] But before concluding on this appeal, the Court must consider Ms. Galarneau=s argument that she wishes to represent not only some employees of the CSC but also some 400 retirees who were previously exposed to secondary smoke in the course of their employment with the CSC and whose rights under the PSSRA and other federal legislation such as the *Canada Labour Code* are not as clear.

[72] Under rule 299.12, an action prefaced by the heading AProposed Class Action@ may be commenced only by a member of the group. Ms. Galarneau is not a retiree, so her action could not be commenced for this group of persons only.

[73] The Court need not rule, therefore, on the question of its jurisdiction over a claim that would be validly commenced by a retiree since there is no such claim before it.

[74] In their memorandum, the parties had both requested costs but they have since confirmed that they were withdrawing this request.

ORDER

The appeal is dismissed.

AJohanne Gauthier@

Judge

Certified true translation
K. Harvey

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2414-03

STYLE: Hélène Galarneau v. Attorney General of Canada and Correctional Service of Canada (CSC)

PLACE OF HEARING:
Montréal, Quebec

DATE OF HEARING:
October 6, 2004

REASONS FOR ORDER AND ORDER: The Honourable Madam Justice Johanne Gauthier

DATED:
January 14, 2005

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