

Federal Court



Cour fédérale

**Date: 20240904**

**Docket: T-2337-22**

**Citation: 2024 FC 1378**

**Ottawa, Ontario, September 4, 2024**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**SASHA JOVANOVIICH**

**Plaintiff**

**and**

**HIS MAJESTY THE KING IN RIGHT OF CANADA**

**Defendant**

**ORDER AND REASONS**

I. Overview

[1] Sasha Jovanovich seeks to make two categories of amendments to his Statement of Claim in this action. The first would particularize existing allegations in the claim regarding events in November 2020 at Stony Mountain Institution, in which Mr. Jovanovich was assaulted by other inmates. The second would add new allegations that Mr. Jovanovich was injured after tripping on an exposed piece of metal at Bath Institution in June 2023. His Majesty the King in Right of

Canada [the Crown] consents to the amendments in the first category and opposes those in the second category.

[2] For the reasons below, I conclude it is not in the interests of justice to permit the second category of amendments. Permitting the expansion of this action, commenced 20 months ago in respect of events that occurred over three and a half years ago, to include allegations regarding an unrelated incident that occurred last year, would unreasonably delay the expeditious trial of the matter, prejudicing the Crown as defendant, and would not facilitate the Court's consideration of the substance of the dispute. While the new allegations, like the existing claim, assert that the Crown was negligent in failing to ensure Mr. Jovanovich's safety, the fact that both claims lie in negligence is not sufficient to require the matters to be determined together or to render it prejudicial to the applicant that they be addressed in separate proceedings. Nor am I persuaded by Mr. Jovanovich's argument that having to pursue the cases separately would require him to present expert evidence regarding damages twice. I am not satisfied that any overlap in such evidence outweighs the prejudice to the Crown or justifies any further delay in these proceedings.

[3] Mr. Jovanovich's motion is therefore allowed in part. He may make the proposed amendments to paragraphs 4 and 5 of the Statement of Claim within 15 days. Leave is not granted to make the proposed amendments to add paragraphs 7.1 to 7.5 to the Statement of Claim.

## II. Analysis

### A. *Legal principles*

[4] Rule 75(1) of the *Federal Courts Rules*, SOR/98-106, provides that the Court may allow a party to amend a document, including a pleading, “on such terms as will protect the rights of all parties.”

[5] As a threshold issue, any proposed amendment to a pleading must yield a sustainable pleading. The amendments must therefore, for example, disclose a reasonable and adequately particularized cause of action: *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 29–31; *McCain Foods Ltd v JR Simplot Company*, 2021 FCA 4 at para 20; *Federal Courts Rules*, Rule 221(1).

[6] If this threshold question is met, an amendment will generally be allowed at any stage of an action for the purpose of determining the “real questions in controversy,” provided that allowing the amendments (i) would not result in an injustice to other parties not capable of being compensated by an award of costs; and (ii) would serve the interests of justice: *Enercorp Sand Solutions Inc v Specialized Desanders Inc*, 2018 FCA 215 at para 19, quoting *Canderel Ltd v Canada*, 1993 CanLII 2990 (FCA) at p 10; *McCain* at para 20; *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at para 9.

[7] In assessing whether an amendment would serve the interests of justice, the Court may consider factors such as (i) the timeliness of the motion to amend; (ii) whether the proposed

amendments would delay trial; (iii) whether the amending party's prior position has led another party to follow a course of action in the litigation that it would be difficult to alter; and (iv) whether the amendments will facilitate the Court's consideration of the substance of the dispute on its merits: *Enercorp* at paras 20–21, quoting *Continental Bank Leasing Corp v Canada*, 1993 CanLII 17065 (TCC); *Federal Courts Rules*, Rule 3. These factors are considered together without any single factor being determinative.

[8] The onus lies on the amending party to show the amendments should be allowed: *Merck & Co, Inc v Apotex Inc*, 2003 FCA 488 at paras 29, 35–36.

B. *Status of the action*

[9] This action was commenced in November 2022. As it currently stands, the Statement of Claim alleges Mr. Jovanovich was injured after being assaulted on two consecutive days in November 2020 by other inmates at the Stony Mountain Institution. He alleges the Crown was negligent in failing to take steps to ensure his safety following the first assault. He claims the injuries he suffered have diminished his future work capacity, particularly his ability to return to his former employment as an electrical lineman after his release from custody.

[10] The Crown defended the action in December 2022. The Crown's Statement of Defence presents a materially different version of the events of November 2020, and denies any negligence on the part of any employees of Correctional Services Canada. The Crown served its affidavit of documents in June 2023. Mr. Jovanovich was to have served his affidavit of documents in July 2023, but did not do so, and has not to date served his affidavit of documents.

[11] On March 5, 2024, the Chief Justice ordered the matter to continue as a specially managed proceed, appointing me as Case Management Judge and requiring the parties to file a proposed timetable for completion of steps to advance the proceeding. Mr. Jovanovich's proposed timetable indicated his intention to apply for leave to amend his Statement of Claim. This ultimately led to the present motion, which was presented in writing.

C. *The proposed amendments*

[12] As noted at the outset, Mr. Jovanovich's amendments fall into two categories. The first category pertains to amendments to the existing allegations regarding the events of November 2020, and in particular to (i) amend paragraph 4(f) of the Statement of Claim to plead additional particulars with respect to the second assault; and (ii) make minor grammatical amendments to paragraphs 5(c) and (d). The Crown consents to these amendments and leave will be granted to make them.

[13] The second category of amendments seeks to add five paragraphs to the Statement of Claim, paragraphs 7.1 to 7.5, raising allegations regarding a different incident at Bath Institution, in which Mr. Jovanovich alleges that he tripped over an exposed piece of metal in the flooring, causing injury to his foot and ankle, and that he received inadequate care for that injury. He seeks to allege that the Crown's failure to provide safe facilities, and that its failure to provide appropriate medical care caused him to suffer injuries including loss of mobility, pain and suffering, and consequent loss of future earning capacity.

[14] I agree with the Crown that the amendments in the second category raise a new cause of action. Mr. Jovanovich asserts that since he claims negligence on the part of the Crown in respect of each incident, the amendments raise the same cause of action by the same plaintiff against the same defendant. However, a “cause of action” is not simply the legal basis for an assertion of liability. It includes the factual elements giving rise to the asserted legal grounds for liability: see, e.g., *Wiseau Studio, LLC v Harper*, 2023 FC 354 at paras 22–24, citing *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 54.

[15] As Justice Binnie noted in *Danyluk*, different causes of action may arise out of substantially the same set of facts, such as a claim for wrongful dismissal and a claim for statutory employment benefits, each arising out of termination of an employment agreement: *Danyluk* at para 54. This is reflected in Rule 201 of the *Federal Courts Rules*, which recognizes that a “new cause of action” may arise out of substantially the same facts as an existing cause of action. However, a new and independent claim premised on entirely different facts also raises a new cause of action, even if both actions sound in negligence.

[16] This is not to say that an amendment cannot raise a new cause of action: *Federal Courts Rules*, Rule 201; *McCain* at para 25; *Proprio Direct Inc v Vendirect Inc*, 2018 FC 1089 at paras 1–3. However, whether it does so, and the connection between the new cause of action and the existing cause(s) of action in the proceeding, are relevant factors for consideration in assessing whether the amendments should be granted.

[17] In the present case, the Crown does not argue that the new cause of action raised in the contested amendments fails the threshold issue of disclosing a reasonable cause of action.

Rather, the Crown argues that including these allegations in the current claim would cause it an injustice and be contrary to the interests of justice.

D. *Injustice and the interests of justice*

[18] Mr. Jovanovich has not satisfied me that the contested amendments in the second category would not cause injustice to the Crown and that they would be in the interests of justice.

[19] As the Crown points out, parties to litigation “have a legitimate expectation in the litigation coming to an end”: *Canderel* at p 11. Mr. Jovanovich’s claim in respect of the alleged Stony Mountain Institution assaults was started well over 18 months ago and Mr. Jovanovich has still not served his affidavit of documents. The Crown is entitled to an expeditious and efficient determination of this litigation. This is particularly so as this action was commenced almost two full years after the assault incidents in November 2020. As Mr. Jovanovich recognizes, allowing the contested amendments regarding the Bath Institution tripping incident will delay trial of his allegations regarding the Stony Mountain Institution assaults. This further delay, in the context of the delay to date, causes some injustice to the Crown and weighs against granting the amendments.

[20] The motion to amend was not brought on a particularly timely basis. The incident at Bath Institution is alleged to have occurred on June 30, 2023, about two weeks before Mr. Jovanovich was to have served his affidavit of documents in this action. Mr. Jovanovich apparently did send

a draft Amended Statement of Claim to the Crown in September 2023, not too long after the incident. However, there is no explanation given for why nothing then happened in the six months between September 2023 and March 2024, when the Chief Justice ordered this matter to continue as a specially managed proceeding and required the parties to file a proposed timetable. Again, this weighs against granting leave to make the amendments.

[21] The contested amendments do not involve a change to Mr. Jovanovich's position such that the Crown has followed a course of action that would be difficult to alter. However, I agree with the Crown that the proposed amendments will not facilitate the Court's consideration of the substance of the dispute on its merits.

[22] The "real questions in controversy" in Mr. Jovanovich's current claim are the facts pertaining to the alleged assaults at Stony Mountain Institution; what damages, if any, Mr. Jovanovich suffered as a result of the alleged assaults; and whether the Crown has any liability for any such harms. The contested amendments seek to raise entirely new and different questions in controversy, namely the facts pertaining to the alleged tripping incident at Bath Institution; what damages, if any, Mr. Jovanovich suffered as a result of the alleged tripping incident; and whether the Crown has any liability for any such harms.

[23] As the Crown points out, there is little if any overlap between these questions. In particular, the underlying facts pertaining to the two incidents themselves—and the Crown's witnesses in respect of those incidents—will be entirely different. There is no indication that any fact witness other than Mr. Jovanovich would be common to the two incidents. Adding the

allegations regarding the Bath Institution tripping incident at this stage of the litigation will not facilitate either the determination of the dispute regarding the Stony Mountain Institution assaults or the pre-trial process. If anything, it will complicate issues of discovery, witnesses, and trial location and schedule.

[24] Mr. Jovanovich claims there are two points of overlap: the Crown's duty to take reasonable care for his safety and for the safe operation of the institution; and certain evidence going to his diminished future earning capacity, and thus to his damages. However, as with the question of negligence generally, invocation of the Crown's duty to safely operate the institution does not create a material similarity between the cases. The questions of whether the Crown breached a duty of care by failing to protect Mr. Jovanovich from alleged assaults at Stony Mountain Institution, and whether the Crown breached a duty of care by failing to protect him from tripping hazards at Bath Institution, raise more factual and legal points of difference than of similarity.

[25] Similarly, on the issue of damages, the questions of what damages were caused by the alleged assaults, and whether the Crown is liable for some or all of those damages, are very different from those of what damages were caused by the alleged tripping incident, and whether the Crown is liable for some or all of those damages. I accept Mr. Jovanovich's submission that in each case, the physical requirements of an electrical line worker, his physical capacities at trial, and potential mitigation may be relevant. However, these commonalities are materially outweighed by the central issues of the impact of each of the particular incidents on Mr. Jovanovich's capacity to act as an electrical lineman.

[26] Nor do I accept Mr. Jovanovich's assertion that two separate trials against the same defendant would result in a waste of Court resources. There is little indication that a trial pertaining to the two incidents would be materially shorter than the combined time of two trials in respect of each incident. The factual testimony would be the same in each case, with potential inefficiencies caused by having to coordinate witnesses in respect of two different incidents, and any efficiencies in avoiding repetition of expert testimony would appear to be modest.

[27] In sum, the proposed amendments in the second category have not been put forward on a timely basis, raise a new cause of action arising from facts that are unrelated to those that have been outstanding in this action since it was commenced in 2022, would unnecessarily delay the proceedings in respect of the Stony Mountain Institution assaults and add unnecessary logistical complexity to the action and the trial, and would cause resulting prejudice to the Crown in doing so. Considering the various factors, I am simply not satisfied it is in the interests of justice to permit Mr. Jovanovich to add new allegations relating to a wholly different incident to those already at issue in this proceeding at this time and at this stage in the proceeding.

### III. Conclusion

[28] Mr. Jovanovich's motion to amend the Statement of Claim is therefore granted only in respect of the amendments pertaining to the Stony Mountain Institution incidents, namely those to paragraphs 4(f), 5(c), and 5(d), and is otherwise dismissed.

[29] The Crown seeks its costs of the motion. Mr. Jovanovich does not argue otherwise and I see no reason not to order costs to the Crown as the successful party.

[30] The within action should proceed on the existing allegations in an efficient and focused manner. To this end, the parties are to confer and propose a schedule for next steps in the proceeding within 20 days.

**ORDER IN T-2337-22**

**THIS COURT ORDERS that**

1. The plaintiff is granted leave to amend the Statement of Claim in accordance with paragraphs 4 and 5 of the proposed Amended Statement of Claim filed in the plaintiff's motion record, such amendments to be made within 15 days of the date of this order.
2. The plaintiff's motion is otherwise dismissed, with costs to the defendant.
3. Within 20 days of the date of this order, the parties are to confer and file a proposed timetable for the completion of the steps necessary to advance the proceeding in an expeditious manner.

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"Nicholas McHaffie"

Judge

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

**DOCKET:** T-2337-22

**STYLE OF CAUSE:** SASHA JOVANOVIĆ v HIS MAJESTY THE KING IN  
RIGHT OF CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369 OF THE *FEDERAL COURTS RULES***

**ORDER AND REASONS:** MCHAFFIE J.

**DATED:** SEPTEMBER 4, 2024

**WRITTEN REPRESENTATIONS BY:**

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FOR THE PLAINTIFF

Kim Laycock

FOR THE DEFENDANT

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