Ontario Court Grants $20 Million Summary Judgment Against Government Of Canada For Unconstitutional Solitary Confinement Of Class Members

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On March 25, 2019, Justice Perell of the Ontario Superior Court of Justice issued his decision in Brazeau v. Attorney General (Canada), ordering the Government of Canada to pay $20 million in damages to inmates who were subject to solitary confinement pursuant to an "administrative segregation." Justice Perell also delineated additional compensatory and Charter violation claims that the class members could pursue. This is a landmark case demonstrating how class actions may proceed in lockstep with Charter challenges.

Background

The federal Corrections and Conditional Release Act, which came into force in 1992, permits the administrative segregation of inmates at federal correctional facilities. Administrative segregation is the practice of isolating an inmate from the general population as a means to provide security amongst the inhabitants of the penitentiary. Administrative segregation is a form of solitary confinement. The act also permits staff to place inmates in "disciplinary segregation" if they commit serious offences while incarcerated.

Recently, public interest litigants have brought successful Charter challenges against provisions of the act with respect to administrative segregation in both Ontario and British Columbia (see Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen and British Columbia Civil Liberties Association v Canada (Attorney General)).

In Brazeau, the class representative plaintiffs brought a class action against the Attorney General of Canada, seeking damages under the Canadian Charter of Rights and Freedoms, and punitive damages, on behalf of a class comprising inmates who were mentally ill and who spent time in administrative segregation in federal penitentiaries from 1992 to the present.

On consent, the court certified the action in 2016 with the following common issues:

1. Did the government breach the class members' rights under s. 7 of the Charter? If so, were its actions saved by s. 1 of the Charter?
2. Did the government breach the class members' rights under s. 9 of the Charter? If so, were its actions saved by s. 1 of the Charter?
3. Did the government breach the class members' rights under s. 12 of the Charter? If so, were its actions saved by s. 1 of the Charter?
4. If the government breached the class members' Charter rights and its actions were not saved by s. 1 of the Charter, are damages available to the class under s. 24 of the Charter?
5. If the answer to the previous question is "yes", can the court make an aggregate assessment of the damages suffered by all class members as a part of the common issues trial?

Justice Perell was asked to consider the above questions on a summary judgment motion. He held that a summary judgment motion was an appropriate procedure, given that "the issues are capable of being fairly and proportionately resolved by a motion procedure." He also limited the class to the approximately two thousand individuals whose claims were not statute-barred due to the expiry of applicable limitation periods.

On March 25, 2019, after five days of hearings and consideration of an evidentiary record that is over 31,000 pages, he issued his decision, holding the government liable for $20 million in damages, and delineating additional compensatory and Charter violation claims that the class members can pursue.

Summary of Decision

Section 7 Charter Claims

Section 7 of the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

On the evidence, Justice Perell found "that administrative segregation has the potentiality and the actuality of causing serious physical and serious psychological harm to any inmate," and that "the potentiality and actuality of serious physical and serious psychological harm is particularly acute for those already suffering from serious mental diseases and disabilities."

Justice Perell made two findings with respect to s. 7 of the Charter.

First, following the decisions in Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen and British Columbia Civil Liberties Association v Canada (Attorney General), Justice Perell found that the legislation violated s. 7 of the Charter by failing to provide for an adequate review process for placements in administrative segregation. This first finding of a Charter violation affected the entire class.

Second, Justice Perell found that the evidence supported a section 7 Charter violation with respect to individuals belonging to two subsets of the class: (a) those who were

involuntarily placed in administrative segregation for more than 30 days; and, (b) those who were voluntarily placed in administrative segregation for more than 60 days. Perell J. made this finding without prejudice to any individual class member's right to assert, at an individual issues trial, that his or her particular treatment was contrary to section 7 of the Charter, in the circumstances.

Justice Perell was not convinced that the aforementioned Charter breaches could be justified or "saved" under section 1 of the Charter. On the evidence, he found that "in practice and in experience there is also no meaningful difference between administrative segregation and disciplinary segregation under the [CCRA]." Therefore, the legislative regime was overbroad and grossly disproportionate, because it treated with the same blunt instrument (i.e. solitary confinement) inmates with mental illnesses and inmates who committed serious offences while incarcerated.

Section 9 Charter Claims

Under section 9 of the Charter, everyone has the right not to be arbitrarily detained or imprisoned. Justice Perell did not find a class-wide breach of section 9. Administrative segregation was not arbitrary, because it was authorized by the act, and was limited to a restricted category of inmates.

Section 12 Charter Claims

Section 12 of the Charter provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

On the evidence, Justice Perell found that there was cruel and unusual punishment for the mentally ill inmates placed involuntarily into administrative segregation for longer than 30 days, or placed voluntarily into administrative segregation for more than 60 days.

Interestingly, the Ontario Court of Appeal's decision in Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen was issued two days after Justice Perell's decision. In that case, the Court of Appeal held that administrative segregation longer than 15 consecutive days constituted cruel and unusual punishment. It is very likely that the Court of Appeal's decision will result in an adjustment to Justice Perell's findings.

Damages

The government argued that the court should not award the class members damages as a remedy under s. 24(1) of the Charter, because an individual remedy under s. 24(1) of the Charter will rarely be available where a court has already struck down legislation, absent conduct that was clearly wrong, in bad faith, or an abuse of power.

Justice Perell held that in this case damages to the whole class were justifiable, based upon the need for vindication and deterrence. He justified his damages award by the finding that:

[424] For decades, academic research, commissions, inquiries, inquests, court cases, domestic and international organizations, and the Correctional Investigator have

recommended that the Correctional Service change its policies and practices with respect to the treatment of seriously-ill inmates placed in administrative segregation. The vindication of the Class Members' Charter rights requires that the Federal Government be directed to do what it ought to have done for decades.

[425] None of these Charter damages are for compensatory purposes, which is a function that will be left to the individual issues trials. The funds are to remedy to the harm caused to society which has suffered from the Correctional Service's failure to comply with the Charter and also its failure to comply with the spirit of the Corrections and Conditional Release Act and its purpose of rehabilitating mentally ill inmates to return to society rather than worsening their capacity to do so by the harm caused by prolonged solitary confinement.

The government also argued that Charter damages could not be awarded as aggregate damages under the Class Proceedings Act, 1992.

On this issue, Justice Perell recognized that he could not determine, in the aggregate, the compensatory element of Charter damages, for the class or subclasses. However, Charter damages for vindication and deterrence, in his view, did not require individual assessment and he could award them on an aggregate basis, under the Class Proceedings Act, 1992. This is a significant finding. In essence, Justice Perell found the Charter breaches experienced by the inmates to constitute sufficient commonality permitting an award of aggregate damages.

Justice Perell quantified the Charter damages as $10,000 for each of the estimated 2,000 class members, totalling $20 million. He did not award punitive damages on top of Charter damages.

Issues Left for Individual Trials

Justice Perell found that the class members' quantification of their compensatory damages was a matter for individual issues trials. Each of 2,000 members of the class can pursue a claim for compensatory damages.

Furthermore, individuals belonging to the aforementioned subclasses (which will likely be refined in light of the Court of Appeal's decision in Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen) will have further claims for breach of ss. 7 and 12 of the Charter. The other class members who are not part of these subclasses are not prejudiced in their rights to bring claims alleging that they have suffered breaches of these rights as well.

Conclusion

The Brazeau decision is a landmark case, demonstrating how class actions may proceed in lockstep with Charter challenges. By confirming that courts can decide complex Charter breach issues on a summary judgment motion, and award aggregated damages in class proceedings alleging for Charter breaches, this decision creates a nexus between the policy objectives of class actions and public interest Charter litigation. Time will tell whether and how this decision will affect the way in which plaintiffs pursue public interest litigation in Ontario.

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