Federal Court  Cour fédérale

Date: 20241219

Docket: T-1015-12

Citation: 2024 FC 2062

Ottawa, Ontario, December 19, 2024

PRESENT: The Honourable Mr. Justice Benoit M. Duchesne

BETWEEN:

SERGE EWONDE

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA and

MICHAEL THERIAULT

Defendants

ORDER AND JUDGMENT

[1] The Defendants have brought a motion for summary trial in writing pursuant to Rules 3, 216 and 369 of the *Federal Courts Rules*, SOR/98-106 [the *"Rules"*] for an Order dismissing the Plaintiff's claims and granting them judgment, with costs. They also seek an Order varying the style of cause to designate His Majesty the King ["HMTK"] as the sole Defendant and an order that the other named Defendant, Mr. Theriault, ceases to be a party to this proceeding.

[2] The Defendants' motions are granted for the reasons that follow. Mr. Theriault shall cease to be a party pursuant to Rule 104(a) of the *Rules* and the Defendant, HMTK, shall be granted judgment dismissing the Plaintiff's action, with costs.

I. **Background**

[3] The Plaintiff was an inmate in a federal Institution when he commenced this action by way of Statement of Claim issued on May 24, 2012.

[4] The Plaintiff claimed damages for negligence, for the negligent infliction of mental suffering, for misfeasance in public office, for intentional infliction of mental suffering, for harassment, for the loss of property, for the negligent deprivation of property, and for damages pursuant to section 24(1) of the *Charter* relating to breaches of his section 7, 8 and 12 *Charter* rights.

[5] The Plaintiff's claims are based on events allegedly occurring in connection with his transfer to the Atlantic Institution in Renous, New Brunswick, on January 19, 2010.

[6] The Plaintiff alleges that he possessed items of personal property that included various canteen items and a personalized watch laden with diamonds that was worth approximately $147,000 [the "Watch"]. The Watch and other canteen items was allegedly confiscated by the Defendant, Mr. Theriault, in his role as an Admissions and Discharge Officer ["A&D Officer"] upon the Plaintiff's arrival at the Atlantic Institution from another Institution. The Plaintiff

further alleges that the Watch was not included in his personal effects list upon arrival at the Atlantic Institution because of Mr. Theriault's actions.

[7] The Plaintiff thereafter sought to recover the Watch. He alleges that he was told that it had been lost. He also alleges having submitted a Crown claim which he pleads was either lost or not actioned by Correctional Services Canada ["CSC"].

[8] The Plaintiff alleges that the correctional officers who collected his personal property at the Atlantic Institution, including Mr. Theriault, owed a duty of care to the inmates of the Atlantic Institution to carry out their duties in a professional and effective manner with due regard to inmate welfare. He further alleges that the CSC staff were negligent in that they failed to:

a) exercise due diligence in the inventory and record keeping of his personal effects;

b) protect and secure his property contrary to the paragraph 4(e) (now paragraph 4(d)) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the "CCRA"]; and,

c) provide adequate complaint remedy admitting that they 'lost' his property and did not compensate him for the lost property.

[9] He also alleges that the Administration of the Atlantic Institution was negligent in that it failed to:

a) properly supervise correctional staff to ensure that an effective inmate property inventory listing was made pursuant to policy;

b) supervise and monitor A&D Officers in the care and custody of his property;

c) supervise and train A&D Officers in the procedure of handling inmates' property; and,

d) take all reasonable steps to ensure that A&D Officers were not stealing or converting inmates' property to their own use.

[10] The Plaintiff further alleges that the CSC staff's conduct violated his section 7, 8 and 12 *Charter* rights. The same conduct is alleged to have caused him extreme harm including psychological, physical, and emotional trauma both during the seizure of his property and subsequent to its loss. No particulars of any of these *Charter* claims were pleaded in the Statement of Claim.

[11] The Defendants defended the proceeding and deny the Plaintiff's claims

II. **Trial Scheduling and Adjournment**

[12] Following a pretrial conference held on October 14, 2021, Case Management Judge Tabib ordered that the factual and legal issues to be determined at trial were limited to:

a) whether the Defendants were negligent as alleged;

b) whether the Plaintiff suffered compensable damage;

c) if the Plaintiff suffered compensable damage, whether the damage was causally linked to any actions on the part of the Defendants;

d) if a), b) and c) are answered in the affirmative, the quantum of any damages suffered by the Plaintiff;

e) whether the Plaintiff's claim is barred by limitations; and,

f) whether the Plaintiff is entitled to aggravated and exemplary damages and, if so, the quantum.

[13] On December 31, 2021, the Court issued an Order that this action would proceed to trial by zoom videoconference for a duration of five (5) days, commencing on October 24, 2022. A joint request to adjourn the trial was received prior to its commencement and it was rescheduled to be heard for five days commencing on March 20, 2023.

[14] The action came on for trial as scheduled on March 20, 2023. The Plaintiff indicated to the Court at that time that he was suffering from a longstanding illness that required surgery and that he could not attend trial or testify at the trial. The parties agreed to have the trial proceed in writing with evidence in chief being led by way of affidavit. Madame Justice Walker, as she then was, adjourned the trial *sine die* without having heard any evidence.

[15] The Plaintiff took no steps to advance or prosecute his action thereafter.

[16] Following several case management orders, on May 6, 2024, the parties were ordered to provide the Court with their proposed timetable for the exchange of motion materials and for

potential dates for the hearing of a summary trial motion. The parties provided a timetable for the exchange of summary trial motion materials and were ordered to comply with their agreed upon timetable pending the determination of a motion hearing date.

[17] In June 2024, the Defendant requested that the summary trial motion proceed in writing only, without *viva voce* cross-examination as cross-examinations on affidavit could take place outside of Court prior to the motion being heard. The Plaintiff's position on this request was unknown. The Court directed the parties to confer and to communicate with the Court thereafter to determine the method by which the summary trial motion would proceed. The Defendant acknowledged receipt of the Court's direction whereas the Plaintiff did not, despite that the direction had been sent to the Plaintiff's solicitor of record at his address for service as set out in the Court file.

[18] The Defendant, having not heard from the Plaintiff or his solicitor of record, served and filed his motion record for this motion on October 18, 2024, along with a Solicitor's Certificate of Service attesting to his service of the motion record upon the Plaintiff's solicitor of record by way of email delivered to his email address as it appears in the Court file.

[19] On November 26, 2024, still having received no response from the Plaintiff or from his solicitor of record, and having no respondent's record tendered for filing despite the passage of time and the expiry of the time for filing the same, the Court issued a direction that it would dispose of the Defendant's motion for summary trial without further delay if the Plaintiff did not

seek an extension to time for the service and filing of a respondent's record by December 6, 2024.

[20] The Plaintiff has taken no steps to seek an extension of time to serve and file a respondent's record.

[21] The Defendant's motion is therefore proceeding as an uncontested motion for summary trial.

III. **The Applicable Law**

[22] Rule 369 of the *Rules* provides for a summary trial motion as follows:

Motion record for summary trial	**Dossier de requête en procès sommaire**
216 (1) The motion record for a summary trial shall contain all of the evidence on which a party seeks to rely, including	216 (1) Le dossier de requête en procès sommaire contient la totalité des éléments de preuve sur lesquels une partie compte se fonder, notamment :
(a) affidavits;	a) les affidavits;
(b) admissions under rule 256;	b) les aveux visés à la règle 256;
(c) affidavits or statements of an expert witness prepared in accordance with subsection 258(5); and	c) les affidavits et les déclarations des témoins experts établis conformément au paragraphe 258(5);
(d) any part of the evidence that would be admissible under rules 288 and 289.	d) les éléments de preuve admissibles en vertu des règles 288 et 289.
Further affidavits or statements	***Affidavits ou déclarations supplémentaires***

(2) No further affidavits or statements may be served, except

(a) in the case of the moving party, if their content is limited to evidence that would be admissible at trial as rebuttal evidence and they are served and filed at least 5 days before the day set out in the notice of motion for the hearing of the summary trial; or

(b) with leave of the Court.

Conduct of summary trial

(3) The Court may make any order required for the conduct of the summary trial, including an order requiring a deponent or an expert who has given a statement to attend for cross-examination before the Court.

Adverse inference

(4) The Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence.

Dismissal of motion

(5) The Court shall dismiss the motion if

(2) Des affidavits ou déclarations supplémentaires ne peuvent être signifiés que si, selon le cas :

a) s'agissant du requérant, ces affidavits ou déclarations seraient admissibles en contre-preuve à l'instruction et leurs signification et dépôt sont faits au moins cinq jours avant la date de l'audition de la requête indiquée dans l'avis de requête;

b) la Cour l'autorise.

Déroulement du procès sommaire

(3) La Cour peut rendre toute ordonnance nécessaire au déroulement du procès sommaire, notamment pour obliger le déclarant d'un affidavit ou le témoin expert ayant fait une déclaration à se présenter à un contre-interrogatoire devant la Cour.

Conclusions défavorables

(4) La Cour peut tirer des conclusions défavorables du fait qu'une partie ne procède pas au contre-interrogatoire du déclarant d'un affidavit ou ne dépose pas de preuve contradictoire.

Rejet de la requête

(5) La Cour rejette la requête si, selon le cas :

(a) the issues raised are not suitable for summary trial; or

a) les questions soulevées ne se prêtent pas à la tenue d'un procès sommaire;

(b) a summary trial would not assist in the efficient resolution of the action.

b) un procès sommaire n'est pas susceptible de contribuer efficacement au règlement de l'action.

Judgment generally or on issue

Jugement sur l'ensemble des questions ou sur une question en particulier

(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.

(6) Si la Cour est convaincue de la suffisance de la preuve pour trancher l'affaire, indépendamment des sommes en cause, de la complexité des questions en litige et de l'existence d'une preuve contradictoire, elle peut rendre un jugement sur l'ensemble des questions ou sur une question en particulier à moins qu'elle ne soit d'avis qu'il serait injuste de trancher les questions en litige dans le cadre de la requête.

Order disposing of action

Ordonnance pour statuer sur l'action

(7) On granting judgment, the Court may make any order necessary for the disposition of the action, including an order

(7) Au moment de rendre son jugement, la Cour peut rendre toute ordonnance nécessaire afin de statuer sur l'action, notamment :

(a) directing a trial to determine the amount to which the moving party is entitled or a reference under rule 153 to determine that amount;

a) ordonner une instruction portant sur la détermination de la somme à laquelle a droit le requérant ou le renvoi de cette détermination conformément à la règle 153;

(b) imposing terms respecting the enforcement of the judgment; and

b) imposer les conditions concernant l'exécution forcée du jugement;

(c) awarding costs.	c) adjuger les dépens.
Trial or specially managed proceeding	***Instruction ou instance à gestion spéciale***
(8) If the motion for summary trial is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary trial, to proceed to trial or order that the action be conducted as a specially managed proceeding.	(8) Si la requête en procès sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[23] A motion for summary trial may be heard on the basis of written submissions only and need not proceed by way of an oral hearing (*Oberlander v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 86 at para 10; *Adams v. Canada (Parole Board)*, 2022 FC 273 at para 19). The Court may exercise its discretion to order an oral hearing of the motion upon its consideration of such factors as the nature of the motion, the complexity of the issues, the nature of the evidence and the parties' arguments, and the potential that conducting an oral hearing will simply increase costs and delay the disposition of the motion (*Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel)*, 2017 FC 590, at paras 54 and 55 [*Premium Sports*]). The Court will also consider whether the responding party on the motion has objected to the motion proceeding in writing pursuant to Rule 369(2) of the *Rules*.

[24] The moving party has the burden of establishing that summary trial is an appropriate process to follow and will assist in the most efficient, just, and expeditious outcome of the proceeding considering its complexity, the importance of the issues and the issues involved in the dispute. The Court may consider a number of factors in determining whether the summary

trial process set out in the *Rules* is suitable for the resolution of the proceeding. Such factors include the cost of taking the proceeding to a trial in relation to the amount involved, whether the litigation is extensive, whether the summary trial will take considerable time, whether credibility is a crucial factor, whether the summary trial will involve a substantial risk of wasting time and effort, whether the summary trial will result in litigating the issues in slices, in addition to those identified in the determination of whether the motion should proceed in writing as identified immediately above (*Viiv Healthcare Company v. Gilead Sciences Canada, Inc.,* 2021 FCA 122 at paras 36 to 38; *Bosa v. Canada (Attorney General),* 2013 FC 793 at para 22 and the jurisprudence cited therein; *Noco Company, Inc. v. Guangzhou Unique Electronics Co., Ltd.,* 2023 FC 208 at paras 82 to 87).

[25] The Court must also be satisfied that there is sufficient evidence for adjudication regardless of the complexities of the issues and the existence of conflicting evidence.

[26] If the Court is satisfied that the issues are suitable for summary trial and that there is sufficient evidence to dispose of the proceeding, then the Court may grant judgment either generally or on an issue unless the Court is of the opinion that it would be unjust to determine the issues on the motion.

[27] As with all summary judgment or summary trial motions and pursuant to Rules 213 to 215, and 216(1) and (2), the parties are to put their best foot forward and adduce all the evidence they have on the issues to be determined. A judge hearing such a motion must judge the motion on the pleadings and the material actually before the court, and not on suppositions about what

might be pleaded or proved in the future (*Mud Engineering Inc. v. Secure Energy Services Inc.*, 2024 FCA 131 at para 41; *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para 19).

IV. **The Evidence On This Motion**

[28] The Plaintiff has not led any evidence or argument on this motion.

[29] The Defendant's evidence consists of three affidavits.

[30] The first is the affidavit of Michel Theriault, the named Defendant identified in the Statement of Claim as the person alleged to be involved in the disappearance of the Plaintiff's personal property and/or the failure to include the description of some of the Plaintiff's personal property on his personal property record.

[31] Mr. Theriault describes the process prescribed by the Commissioner's Directive (CD) 566-12: Personal Property of Offender [CD 566-12] and the Commissioner's Directive 568-5: Management of Seized Property [CD-568-5] when an inmate arrives at an Institution generally as follows.

[32] On admission into an Institution, inmates are informed orally and in writing of all policies relating to personal property, including institution-specific requirements such as the Personal Property Record ["PPR"]. Personal property items found in the inmate's cell or in the inmate's possession that are not listed on their PPR will be seized as unauthorized items.

[33] When CSC does not know who the owner of a seized item is, and where 30 days have passed since the seizure, or if possession of the item was unlawful or unauthorized, the seized items are forfeited to the Crown. However, where the owner of the seized item is known, the seizure control officer is to notify the inmate in writing as soon as practicable that the item has been seized. The seized item shall then be returned to its owner, where the owner requests in writing that the item be returned to them, within 30 days after being notified of the seizure.

[34] Mr. Theriault deposes that every inmate agrees, in writing, to accept responsibility for the safekeeping and reasonable use of their property while detained and that they are responsible for keeping their PPR current. This includes the responsibility of bringing any changes to their PPR to the attention of the A&D Officer as required under section 45 of CD 566-12.

[35] Pursuant to CD 566-12, the A&D Officer will retain the signed PPR and will give a copy of it to the inmate. All property, including newly purchased items, will be issued through the A&D Officer following a proper recording of the PPR. The result is that when an inmate requests a new item to be added to his PPR, the A&D Officer is responsible for confirming that the item was purchased either by the inmate or by someone in his community for him. Absent such confirmation, the A&D Officer cannot add it to the inmate's record as he or she has not shown that the property lawfully belongs to them.

[36] Inmates identify their personal belongings with the A&D Officer and the A&D Officer verifies that the monetary value for each item is in conformity with their PPR and CD 566-12. This allows the A&D Officer to keep track of which items belong to which inmate, and to

maintain a record of each inmate's personal belongings. It also protects inmates from muscling and bullying one another for these items while detained.

[37] Mr. Theriault deposes that, pursuant to sections 28 and 30 of CD 566-12, an inmate is permitted only a maximum combined value of $300 in jewelry at an Institution, and a total value of $90 in canteen items. The total value of canteen items includes food items, canned goods, hygienic products, etc., all of which are available for inmates to purchase for their own consumption or use through the canteen operated by inmates. The canteen items are purchased with funds from the inmate's own account. The monetary limits applicable to all inmates' items, including jewelry and canteen items, are in place to restrict their use as currency and/or barter between inmates.

[38] He also deposes that section 49 of CD 566-12 requires CSC staff to pay close attention during routine cell searches to the canteen and other personal items that are not listed on the inmate's PPR. If an inmate has items that were not purchased legitimately, or are in excess of the prescribed limits, these items will constitute unauthorized items and will be seized accordingly.

[39] Mr. Theriault deposes that he met with the Plaintiff on January 17, 2010, two days prior to his transfer. Mr. Theriault deposes that he told the Plaintiff that he would be asked to bring all of his personal effects to the A&D unit on the following day, January 18, 2010, in order for Mr. Theriault to review each item and verify it against his PPR. The purpose of this exercise was to pack the Plaintiff's effects so they would be ready to go with him in the transfer vehicle on the day of his transfer to the Atlantic Institution.

[40] Mr. Theriault confirms that the Plaintiff came to the A&D unit on January 18, 2010, and confirmed that he had brought all his belongings except for a television.

[41] On January 19, 2010, the morning of the Plaintiff's transfer, the Plaintiff arrived at the A&D unit with a pull cart of canteen items. The Plaintiff was told that he had too many canteen item, and that they would not all be inspected and packed up for him prior to his transfer. Mr. Theriault nevertheless told the Plaintiff that he would inspect the canteen items and do his best to send them by mail, via institutional driver, the next day if the items were in good order and in compliance with the Commissioner's Directives.

[42] Mr. Theriault then took the items, placed them in a cell in the A&D unit and photographed them. The items included potato chips, assorted candies and chocolates, assorted cereals, canned goods, coffee, cough drops, and marshmallows among various other packaged goods. Copies of the photographs are adduced as Exhibit D to Mr. Theriault's affidavit.

[43] Mr. Theriault determined that the Plaintiff's in-cell canteen items had a value of $ 265.90, which was far more than the $ 90 permitted by the Commissioner's Directives. The Security Intelligence Office ["SIO"] wrote an Incident Report to reflect this on January 20, 2010. The Incident Report explained that while packing the Plaintiff's cell effects for transfer, approximately $265 worth of canteen items was found, and that they were seized as they exceeded the maximum value of $90 worth of canteen items allowed in an inmate's cell. The Incident Report was adduced into evidence as an Exhibit to Mr. Theriault's affidavit.

[44] On or about February 17, 2010, correctional officers at the Atlantic Institution conducted a search of the Plaintiff's cell. A number of items not listed on his PPR were found and seized, including a gold-coloured Citizen Watch. The correctional officers who conducted the search followed CD 566-12 and determined that the Watch did not belong to the Plaintiff, as it was not listed on his PPR. A copy of the Offender Personal Property Cell Removal Sheet is adduced into evidence on this motion.

[45] Mr. Theriault deposes that the Plaintiff wrote to him on February 17, 2010, February 23, 2010, April 20, 2010, and May 3, 2010, by way of Inmate Request to ask him about the Citizen Watch and to request its return to him. Mr. Theriault responded to the Plaintiff in each instance that the Citizen Watch was not listed on his PPR and therefore, did not belong to him and was seized accordingly. Mr. Theriault explained to the Plaintiff that the Citizen Watch would be returned to him if he could prove lawful ownership of it, failing which the Citizen Watch would become Crown property in accordance with CD 566-12.

[46] The Court notes that the Plaintiff's Inmate Requests reflect his concern over the seizure of the gold-coloured Citizen Watch and a pair of diamond earrings. The Inmate Requests also reflect that the Plaintiff's concerns over the non-inclusion of the gold-coloured Citizen Watch on his PPR date as far back as January 2009 and that the Plaintiff had been informed since January 2009 that the Citizen Watch did not appear on his PPR because of the absence of proof of ownership.

[47] Mr. Theriault deposes that he was informed for the first time about the alleged cost of the Citizen Watch after the Plaintiff issued his pleading on May 24, 2012. He deposes that he looked online and discovered that the Citizen Watch is valued at approximately $ 1,000, and not at $ 147,000 as alleged by the Plaintiff in his pleading.

[48] The second affidavit is the affidavit of Nancy Manderville, another CSC staff member employed at the Atlantic Institution at the time of the Plaintiff's arrival there in January 2010. Ms. Manderville's affidavit sets out in some detail how she assisted Mr. Theriault with the control and recording of inmate property upon their admission and discharge from the Atlantic Institution in accordance with CD 566-12 and CD-568-5. Ms. Manderville's evidence is limited to the Plaintiff's canteen items on the date of this transfer and their value.

[49] The third affidavit is the affidavit of a legal assistant in the Defendant's solicitor of record's office. The various Orders issued by this Court are produced as exhibits on this motion through this affidavit.

V. **Arguments and Analysis**

[50] The Defendants argue that this motion may be heard in writing and that the issues before the Court are suitable for disposition by way of summary trial in writing. I agree.

[51] The issues framed in the Statement of Claim by the Plaintiff and ordered as matters for trial by Associate Judge Tabib are limited to the issues of a) negligence and damages arising therefrom, and, b) whether the Plaintiff's claims are statute-barred. These issues are not complex

and can be fairly and justly decided on a summary trial motion made in writing. Considering that the Plaintiff has failed to lead any evidence or to make any argument on this motion, and that the Court is entitled to determine this motion on the basis of the evidence before it without considering what might be proved later, it would be a waste of time and resources to direct that this matter proceed to trial as there are no credibility issues suggested by the evidence that should be determined through a trial, and the facts necessary to resolve the issues are clearly set out in the evidence [*Premium Sports* at para 55].

[52] I have reviewed the evidence filed by the Defendant in detail. I am satisfied that there is sufficient evidence before me to adjudicate the issues between the parties as framed by the pleadings and as ordered to proceed to trial by Associate Judge Tabib despite the Plaintiff's failure to present evidence.

[53] There are few relevant factual discrepancies between the evidence led by the Defendants, the material facts alleged by the Plaintiff in his pleading, and the Plaintiff's statements contained in his Inmate Requests that have been produced on this motion. There is no relevant evidentiary discrepancy pertaining to the material facts that give rise to the causes of action to be determined. The Plaintiff's Inmate Requests confirm relevant events, the dates of the events, when he had knowledge of what material facts, and the conduct of the parties.

[54] The only marginally relevant discrepancy between the evidence led on this motion and the allegations contained in the Statement of Claim is that the Watch the Plaintiff was concerned about is a gold-coloured Citizen Watch rather than a diamond laden watch worth $ 147,000. I

find that the Watch at issue in this proceeding is the gold-coloured Citizen Watch that was seized and described in the Offender Personal Property (Cell Removal Sheet) dated February 17, 2010, and was the object of the Plaintiff's Inmate Requests made February 17 and 24, 2010, and not a diamond laded watch worth $ 147,000.

[55] The Defendants argue that the Plaintiff's claims are statute-barred by the New Brunswick *Limitation of Actions Act*, SNB 2009 c L-8.5 [the "LAA"].

[56] The Defendants argue that seizure of the canteen items and the seizure of the Citizen Watch took place in the Atlantic Institution in New Brunswick. The seizure of the Plaintiff's canteen items occurred on January 19, 2010, and was discovered by the Plaintiff on the same date. The Citizen Watch was seized from the Plaintiff's cell on February 17, 2010, and was discovered by the Plaintiff on the same date. The Statement of Claim was issued on May 24, 2012, more than 2 years after the events. The Defendant argues that the Plaintiff knew of the seizure of both the canteen items and the Citizen Watch for more than two years before the Statement of Claim was issued, with the result that his proceeding was commenced beyond the 2-year timeframe provided for in the LAA and is accordingly statute-barred. The Defendant argues that the Plaintiff has not presented any evidence to justify a delay in the running of the applicable 2-year limitation period. As a result, his claims are statute-barred and should be dismissed.

[57] I agree with the Defendants.

[58] The LAA applies to this proceeding through section 32 of the *Crown Proceedings and Liability Act*, RSC 1985, c C-50. The limitation period applicable to the Plaintiff's claims as against the Crown and its servants is prescribed as being the applicable limitation period as set out in the provincial limitations legislation that applies to a cause of action that arose within the province. In this case, Plaintiff's causes of action arose in New Brunswick. New Brunswick's limitations legislation, namely the LAA, therefore applies.

[59] Subsection 5(1)(a) of the LAA provides that the general limitation period for an action is 2 years from the date the claim is discovered. Subsection 5(2) of the LAA provides that a claim is discovered on the day that the claimant first knew or ought reasonably to have known that the loss or damage had occurred.

[60] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para 3, the Supreme Court of Canada held that that a claim is discovered for the purposes of subsection 5(1)(a) of the LAA when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. A claim, as contemplated by section 5(1)(a) of the LAA, may be "discovered" despite that the plaintiff may not have knowledge of all the constituent elements of a claim.

[61] In this case the Plaintiff knew or reasonably ought to have known, on January 19, 2010, that he had suffered the loss of canteen items, and that the loss was caused in whole or in part by CSC Staff. This information was sufficient for him to draw the plausible inference on January 19, 2010, that CSC Staff had been negligent and that he had a claim to advance against them.

The Plaintiff did not commence his action until May 24, 2012, more than 2 years after he had actual or constructive knowledge of his claim. His claim with respect to the loss of his canteen items is therefore statute-barred by section 5 of the LAA as the proceeding was commenced after the expiry of the applicable limitation period.

[62] The Plaintiff made an Inmate's Request dated February 17, 2010. In that request, he noted that the Citizen Watch had been seized by CSC Staff on February 17, 2010. The record before me reflects that he had actual knowledge that he had suffered the loss of the Citizen Watch and that that loss had been caused in whole or in part by CSC Staff on February 17, 2010. The information he had on February 17, 2010, was sufficient for him to draw the plausible inference that CSC Staff had been negligent in their handling of the Citizen Watch and that he had a claim to advance against them. The Plaintiff did not commence his action until May 24, 2012, more than 2 years after he had actual or constructive knowledge of his claim with respect to the Watch. His claim with respect to the loss of the Watch is therefore statute-barred by section 5 of the LAA as the proceeding was commenced after the expiry of the applicable limitation period.

[63] As the Plaintiff's claims are statute-barred, his action must be dismissed and judgment granted to the Defendants accordingly.

[64] I shall nevertheless consider the Plaintiff's negligence claims as framed in his pleading in the event that I am incorrect in my determination of the limitation defence advanced by the Defendants.

[65] In order for a plaintiff to succeed on a claim in negligence, a plaintiff must allege and prove: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right (*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 (CanLII), [2020] 3 SCR 504 at para 18).

[66] As noted above, the Plaintiff has not led evidence on this motion. Applying the *Rules* and the prevailing jurisprudence, I must consider the Plaintiff's negligence claim in light of the evidence before me.

[67] The Defendants' evidence establishes on a balance of probabilities that the Defendants were not negligent in their dealings with the canteen items or the Citizen Watch but acted and conducted themselves in accordance with the standard set by the prevailing Commissioner's Directives. There is no allegation by the Plaintiff that the Commissioner's Directives have created a negligent standard. Quite to the opposite, the Plaintiff pleads that the "policy" applicable to property inventory listing is the standard to be met. Considered broadly and in light of the various Inmate Requests produced by the Defendants as exhibits to Mr. Theriault's affidavit, I understand that the Plaintiff's allegation of the applicable "policy" is the policy that applies to PPR and to his alleged property, that is, the Commissioner's Directives bearing nos. CD 566-12 and CD-568-5.

[68] Assuming, without finding, that the Defendants owed a duty of care to the Plaintiff in the circumstances, I find on the evidence before me that the Defendants did not breach the standard of care contemplated by Commissioner Directive nos. CD 566-12 and CD-568-5 because they conducted themselves in accordance with their described norms and standards. In finding that there was no breach of the applicable standard of care, I must find that the claims of negligence have not been made out and must be dismissed.

VI. **Conclusion**

[69] The Defendant's motion for summary trial is granted and the Plaintiff's proceeding is dismissed.

VII. **Costs**

[70] The Defendants request the opportunity to make costs submissions if their motion for summary trial is granted. The Defendants may serve and file costs submissions not exceeding 3 pages, double-spaced, exclusive of appendices and affidavits, if any, within 10 days of the date of this Order and Judgment failing which no costs shall be awarded.

ORDER and JUDGMENT in T-1015-12

1. The Defendant Michel Theriault's motion to be removed as a party in this proceeding is granted.

2. The named Defendant "Michel Theriault" is removed as a party to this proceeding and hereby ceases being party to this action pursuant to Rule 104(1)(a) of the *Rules*.

3. The style of cause in this proceeding is amended as follows from this date forward:

Docket no.: T-1015-12

SERGE EWONDE

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Defendant

4. The Defendant HMTK's motion for summary trial is granted.

5. The Plaintiff's claims are dismissed, with costs payable to be Defendant.

6. The Court reserves the determination of the quantum of costs payable by the Plaintiff to the Defendant.

"Benoit M. Duchesne"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1015-12
STYLE OF CAUSE:	SERGE EWONDE v HIS MAJESTY THE KING IN RIGHT OF CANADA and MICHAEL THERIAULT
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 19, 2024 (IN WRITING)
REASONS FOR ORDER:	B.M. DUCHESNE, J.
DATED:	DECEMBER 19, 2024

SOLICITORS OF RECORD:

Todd Sloan Todd Sloan Law Kanata, Ontario	FOR THE PLAINTIFF
Andrew Newman Department of Justice Civil Litigation Section Ottawa, Ontario	FOR THE DEFENDANTS