Federal Court Cour fédérale

Date: 20190227

Docket: T-1445-13

Citation: 2019 FC 238

[CERTIFIED ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, February 27, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

RICHARD TIMM

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

<u>JUDGMENT AND REASONS</u>

[1] Mr. Timm, an inmate in a federal institution, is seeking damages from the federal Crown. He alleges that two Crown employees caused him various forms of injury by criticizing him for pursuing certain remedies and by discouraging another inmate from associating with him for that reason. I dismiss Mr. Timm's action. Indeed, with one exception, I find that the Crown employees' conduct did not constitute a fault. Moreover, I find that Mr. Timm failed to prove the alleged injury and the causal link between that injury and the faults that may have been

committed. Lastly, Mr. Timm failed to demonstrate interference with his fundamental rights. Therefore, he cannot claim punitive damages.

[2] In making these findings, I am not denying that it is important for every person, including incarcerated persons, to be able to pursue the various types of statutory remedies without retaliation or interference by Crown officials. I find that there is evidence of such a conduct on one specific occasion. However, Mr. Timm has not shown that the improper conduct caused him any injury.

I. Factual background

[3] The plaintiff, Richard Timm, is an inmate serving a life sentence. In 1995, he was convicted of first degree murder and other offences. Since that time, he has maintained that he did not commit the crime for which he was convicted. The Minister of Justice dismissed his application for mercy. That decision was upheld by this Court and by the Federal Court of Appeal (*Timm v Canada (Attorney General)*, 2012 FC 505; 2012 FCA 282).

[4] Over a number of years, Mr. Timm has filed numerous complaints and grievances regarding various aspects of his conditions of detention. He has also commenced a number of proceedings in the Federal Court.

[5] In 2012, when the incidents giving rise to this action took place, Mr. Timm was incarcerated in La Macaza Institution, a medium-security facility. On September 14, 2012, his parole officer [PO], Valery Beaulieu-Guilbault, told him that she found it difficult to establish a

relationship of trust with him, given the numerous complaints he was filing against the institution's staff members. On January 11, 2013, Ms. Beaulieu-Guilbault had a meeting with Dave Roy, another inmate under her supervision, and noticed that his temporary absence request had clearly been prepared by another inmate, most likely Mr. Timm. Ms. Beaulieu-Guilbault told Mr. Roy that his request had been prepared by another inmate whom she described as [TRANSLATION] "very litigious". She advised him to be careful about the company he kept, because that inmate [TRANSLATION] "[would] only hinder him". Shortly after, Yves Maillé, Mr. Roy's Aboriginal liaison officer, advised Mr. Roy not to associate with Mr. Timm.

[6] In response to these events, Mr. Timm filed a grievance disputing the way in which he had been treated by Ms. Beaulieu-Guilbault and Mr. Maillé. In the grievance, he requested that the Correctional Service of Canada [CSC] acknowledge that Ms. Beaulieu-Guilbault and Mr. Maillé had breached a number of provisions in Commissioner's Directives [CDs] 060 and 081. At the time, the grievance process under CD 081 consisted of three levels. At the first level, the acting warden of La Macaza Institution, Yves Guimont, denied the grievance. At the second level, CSC's regional deputy commissioner for Quebec, Réjean Tremblay, also rejected the grievance. At the third level, however, CSC's senior deputy commissioner, Anne Kelly, allowed Mr. Timm's grievance. The specific rationale for allowing the grievance will be examined in detail below.

[7] Shortly after receiving the third-level decision, Mr. Timm brought this action based on extracontractual liability against the federal Crown. He maintains that the actions of Ms. Beaulieu-Guilbault and Mr. Maillé have caused him injury. In his statement, he also

complains about the actions of Mr. Guimont, Mr. Tremblay and Ms. Kelly. At the hearing, however, counsel for Mr. Timm stated that Mr. Timm was not basing his claim on the faults that these three individuals allegedly committed. Therefore, these reasons will relate to the actions of Ms. Beaulieu-Guilbault and Mr. Maillé. Mr. Timm is claiming $400,000 in compensatory damages for [TRANSLATION] "moral damages and damage to reputation", and $800,000 in punitive damages. He is also seeking declarations by the Court that various statutory or regulatory provisions have been breached.

II. Legal framework

[8] Mr. Timm bases his action on the provisions of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [the CLPA]. Under section 3 of the CLPA, the Crown is civilly liable for faults committed by "servant[s] of the Crown", that is, its employees. This means that, with respect to extracontractual liability, the Crown is subject to the private law of the province in which the events occurred. Since the events in this case occurred entirely in Quebec, the basic principles are set out in article 1457 of the *Civil Code of Québec*, SQ 1991, c 64:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457**. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.

material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.	Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

[9] It should be emphasized that, under the CLPA, the federal Crown cannot be held directly liable for its own actions; it is liable only in respect of the fault of its employees (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at paragraphs 36–38; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at paragraph 92, [2015] 2 SCR 621 [*Hinse*]). One cannot merely allege that a fault was committed by the "government" as an institution unless the fault was also that of a specific employee.

[10] In Quebec, the reference to private law in section 3 of the CLPA includes not only the Civil Code but also certain provisions of the *Charter of human rights and freedoms*, CQLR, c C-12 [the Quebec Charter] (*Hinse* at paragraphs 156–163). Consequently, when events giving rise to liability also constitute interference with a right guaranteed by the Quebec Charter, it is possible to claim punitive damages (sometimes called exemplary damages) under section 49, paragraph 2, of the Quebec Charter. According to *de Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64 [*de Montigny*], the purpose of punitive damages is not to compensate for the injury, but rather to punish a person who interferes with a right, to deter similar interference and to publicly denounce the impugned conduct. The amount of such damages must be determined taking into account the factors listed in article 1621 of the Civil

Code, namely the gravity of the fault, the debtor's patrimonial situation, the amount of compensatory damages and whether the debtor is insured.

[11] Procedurally, it is important to note that the scope of the debate before me is framed by the allegations contained in the pleadings—the statement of claim or statement of defence—filed by the parties. There is a reason for the requirement, found in rule 174 of the *Federal Courts Rules*, SOR/98-106, that pleadings contain "a concise statement of the material facts on which the party relies". This enables the opposing party to conduct its own verification of the facts and to bring evidence and make legal submissions to refute the other party's allegations. This prevents surprises and ensures that the trial is conducted fairly and properly. Pleadings are used to determine the scope of pre-trial proceedings, such as examinations for discovery, as well as what can be proven at trial. Of course, pleadings must be interpreted generously, but not in such a way as to allow an endless investigation into the dealings between the parties.

[12] In his pleadings, Mr. Timm identified precise and time-specific events that, he alleges, constitute a fault against him. This judgment deals with those allegations. At trial, Mr. Timm referred to various other sources of dissatisfaction with his conditions of detention. However, these events are not alleged in the pleadings. This proceeding is therefore not the appropriate time to consider every detail of Mr. Timm's time at La Macaza Institution.

III. Fault

[13] The concept of fault is the cornerstone of extracontractual liability in civil law. Article 1457 of the Code defines fault as a failure to abide by "the rules of conduct incumbent on

[every person], according to the circumstances, usage or law". Thus, the first step in the analysis is to define the appropriate standard of conduct. Second, the evidence must be analyzed to determine whether that standard has been violated.

[14] The standard of conduct may be based on circumstances or usage. In some types of situations that are frequently brought before the courts, such as damage to reputation, case law helps to define the appropriate standard of conduct. In other cases, it is up to the judge to determine *a posteriori* what a reasonable person would have done in the circumstances.

[15] The standard of conduct may also be based on legislation or regulations made under a statute. As will be seen below, however, not all statutes or regulations give rise to civil liability when they are breached.

A. *Standard of conduct*

[16] In his pleadings, Mr. Timm alleges various types of fault. Many of his criticisms of CSC employees stem from the alleged violation of certain internal CSC rules. I must therefore identify the conditions under which the violation of a statutory norm gives rise to civil liability. Moreover, Mr. Timm bases his claims on the decision at the third level of the review of his grievance. I must therefore clarify the authority of such a decision with respect to this case. Once I have examined these preliminary issues, I will be able to describe the various standards of conduct at issue in this case.

(1) Relationship between violation of legislation and civil fault

[17] Despite the reference to "law" in the first paragraph of article 1457 of the Civil Code, there is general agreement that not every breach of a statute or regulation constitutes civil fault. For example, in *Morin v Blais*, [1977] 1 SCR 570, the Supreme Court stated that the violation of a regulatory standard could constitute a fault if that standard also expressed an elementary standard of care. More recently, the Supreme Court stated in *St. Lawrence Cement Inc. v Barrette*, 2008 SCC 64 at paragraphs 34 and 36, [2008] 3 SCR 392:

> In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault . . . . For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. . . .
>
> . . .
>
> As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct—the content of which may be reflected in the relevant legislative standards—having regard to the law, usage and circumstances.

(2) Relevance of grievance decisions

[18] The events giving rise to an extracontractual liability action may have been considered in other decision-making processes. If so, it is necessary to determine the authority of decisions rendered in such processes over a civil trial.

[19] The decisions rendered in such processes are not binding on a judge who rules on an extracontractual liability action. This is because the conditions for the recognition of

res judicata, provided for in article 2848 of the Civil Code, are not fulfilled (*La Foncière, compagnie d'assurance de France v Perras*, [1943] SCR 165). For a matter to be considered to be *res judicata*, the parties, cause and object must be identical. For example, in a professional discipline decision, the cause is a breach of a code of discipline and the object is a regulatory penalty, which is very different from an extracontractual liability action arising from civil fault and seeking reparation for injury.

[20] Nevertheless, it is recognized that a criminal or disciplinary decision may have de facto authority over a civil trial (*Ali c Compagnie d'assurance Guardian du Canada*, [1999] RRA 427 (CA); *Audet c Transamerica Life Canada*, 2012 QCCA 1746 at paragraphs 44–46). This means that a criminal or disciplinary decision is a relevant fact that may be put into evidence in a civil trial. The decision may be a convincing indication that the facts that it finds did in fact occur, even if the legal conclusions it draws may not be applicable to the issue of whether there was civil fault.

[21] In this case, the grievance process under the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA], does not aim at awarding damages for injury. It is not based on the concept of civil fault. In fact, it appears that the main purpose of this process is to enforce the internal rules of the penitentiary system (see *May v Ferndale Institution*, 2005 SCC 82 at paragraph 63, [2005] 3 SCR 809). Grievance decisions therefore do not have the force of *res judicata* in this case; they have only de facto authority.

[22] Having made these clarifications, I can now turn to the main standards of conduct that may be relevant. I will divide them into two main categories, namely standards governing the conduct of a public body with respect to the exercise of legal or other remedies, and standards prohibiting harassment and discrimination.

(3) Prohibition against interfering with the pursuit of a legal remedy and prohibition against retaliation

[23] The right to an effective remedy is an essential component of the rule of law. It is pointless to recognize the rights of individuals if they cannot exercise those rights. There is a growing awareness of the practical difficulties that Canadians face when seeking to have their legal disputes determined by the courts and of the significant resources they must devote to this end (see, for example, *Hryniak v Mauldin*, 2014 SCC 7 at paragraphs 23–33, [2014] 1 SCR 87). Nevertheless, the issue here is more specific, namely imposing hurdles or constraints on the pursuit of a remedy, in particular through retaliation.

[24] One of the best-known decisions on this issue is *Golder v the United Kingdom*, a decision made by the European Court of Human Rights on February 21, 1975. Mr. Golder, an inmate, sought to bring a civil suit against a prison guard who had allegedly made a false statement about him. However, the British prison authorities denied Mr. Golder permission to contact a lawyer. On the basis of Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Court held that everyone has a right of access to the courts and that the British prison authorities had violated this right by denying Mr. Golder the right to consult a lawyer, thereby significantly interfering with his pursuit of a remedy.

[25] The Supreme Court of Canada applied the same principle in *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214. The Court confirmed an injunction to prevent picketing outside British Columbia's courthouses. Citing *Golder*, Chief Justice Dickson linked the prohibition against interfering with the pursuit of legal remedies to the principle of the rule of law, stating the following at page 230:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

[26] The Supreme Court reiterated these principles in a more recent decision, *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paragraphs 32 and 38–40, [2014] 3 SCR 31.

[27] A concrete example of interference with the pursuit of a legal remedy that has been found to be contrary to the rule of law is provided by *Compagnie de construction et de développement cris ltée v Société de développement de la Baie James*, [2001] RJQ 1726 (CA). In that case, a municipality had included in the terms and conditions of its calls for tenders a clause that excluded from the bidding process any company that had filed a lawsuit against the municipality. The Court of Appeal found that such a clause was contrary to public order and the rule of law, since it imposed a disadvantage on persons who had exercised their right to pursue a legal remedy.

[28] To ensure the right to effectively pursue a remedy, it is also necessary to prohibit retaliation. Although this is undoubtedly a general principle, there are several statutory provisions that specifically prohibit retaliation against persons exercising certain rights or

remedies (see, for example, section 14.1 of the *Canadian Human Rights Act*, RSC 1985, c H-6; section 147 of the *Canada Labour Code*, RSC 1985, c L-2; section 19 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46; section 425.1 of the *Criminal Code*, RSC 1985, c C-46; and section 10 of the *Canadian Victims Bill of Rights*, SC 2015, c 13). In this case, the relevant provision is section 91 of the CCRA, which reads as follows:

91. Every offender shall have complete access to the offender grievance procedure without negative consequences.	**91.** Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs.

[29] How this process works is described in detail in CD 081—Offender Complaints and Grievances. (This directive has since been amended; I am quoting the provisions in force when the events took place.) Section 10(a) of this directive reiterates that retaliation (“negative consequences”) is prohibited.

[30] In addition, section 54 of CD 081 states that the grievance process is confidential and that:

An offender’s use of the complaint and grievance process may not be mentioned in records outside the complaint and grievance process without the authorization of the Institutional Head.	Le fait qu’un délinquant a eu recours au processus de règlement des plaintes et griefs ne peut être mentionné dans d’autres dossiers que ceux qui concernent ce processus sans l’autorisation du directeur de l’établissement.

[31] Although most of the cases cited above dealt with applications to overturn government decisions, interfering with the pursuit of a remedy may also, depending on the circumstances, constitute a civil fault for which reparation may be sought if the fault has caused injury. Indeed,

in the case of retaliation, several of the statutes above specifically provide for reparation to the victim.

(4) Prohibition against harassment and discrimination

[32] In his pleadings, Mr. Timm strongly emphasizes breaches of certain provisions of CSC's internal rules. More specifically, he refers to the prohibition against discrimination and harassment in the Commissioner's Directive No. 60 [CD 060]—Code of Discipline. For example, section 12 of the Code states that an employee has committed an infraction if he or she "maltreats, humiliates, harasses, discriminates and/or is abusive, by word or action, to an offender". Mr. Timm also refers to the following definitions in the appendix to the Code:

Discrimination: when the grievor believes that CSC staff actions, language or decisions were made in a discriminatory manner based on gender, race ethnicity, language, sexual orientation, religion, age, marital status, or a physical or mental disability. The category includes staff behaviour that constitutes a violation of the offender's human rights or the *Canadian Charter of Rights and Freedoms*.	Discrimination : des actes, des paroles ou des décisions du personnel du SCC qui incitent le délinquant à s'estimer victime de discrimination fondée sur le sexe, la race, l'ethnie, la langue, l'orientation sexuelle, la religion, l'âge, l'état civil ou une déficience mentale ou physique. Sont inclus les comportements du personnel qui enfreignent les droits de la personne ou de la *Charte canadienne des droits et libertés*.
Harassment: any improper conduct by one or more employees, offenders, visitors or volunteers, that is directed at and offensive to another person, and that the individual knew or ought reasonably to have known to cause offence	Harcèlement : tout comportement inapproprié de la part d'un ou de plusieurs employés, délinquants, visiteurs ou bénévoles à l'égard d'une autre personne, et dont l'auteur ou les auteurs savaient ou auraient

or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.	raisonnablement dû savoir qu'il serait offensant ou préjudiciable. Le harcèlement comprend tout acte, propos ou exhibition répréhensible qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la *Loi canadienne sur les droits de la personne*.

[33] Harassment and discrimination may also constitute a civil fault giving rise to an obligation to make reparation for the injury caused (regarding harassment, see *Syndicat des employées et employés de métiers d'Hydro-Québec, section locale 1500 (SCFP-FTQ) c Fontaine*, 2006 QCCA 1642, [2007] RJQ 5; regarding discrimination, see *de Montigny* at paragraph 44). In this case, however, I must rely on the definitions of these concepts that have been adopted by the civil courts and not on the definitions in the internal CSC rules.

[34] With regard to harassment, I refer to the following definition proposed by Judge Christian Brunelle of the Court of Québec in *Bélanger c Hydro-Québec*, 2016 QCCQ 15565, at paragraphs 64 and 65:

> [TRANSLATION]
>
> In general, harassment occurs when there are unwanted, vexatious acts whose effects are ongoing, either because the acts are being repeated or because there are serious harmful effects on the person being harassed.
>
> To describe a situation as harassment, one must assess [TRANSLATION] "all the circumstances of the case before the Court". Indeed, there are differences—of nature and degree—between harassing acts and acts that are simply [TRANSLATION]

> “annoying” or [TRANSLATION] “bothersome”. [References omitted.]

[35] With regard to discrimination, the conduct complained of must involve a distinction related to one of the grounds set out in section 10 of the Quebec Charter, for example colour, age or sex. In the absence of such a distinction, there can be no discrimination (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paragraph 52, [2015] 2 SCR 789).

B. *Evidence of fault*

[36] In his statement, Mr. Timm complains about two separate events, namely the discussion between him and Ms. Beaulieu-Guilbault on September 14, 2012, in which she criticized him for filing complaints against the staff, and the discussions on January 11, 2013, in which Ms. Beaulieu-Guilbault and Mr. Maillé advised Mr. Roy to stop associating with Mr. Timm. The circumstances of the first event are not subject to significant debate; however, the parties disagree on the second event. I must therefore analyze the evidence in detail to determine what in fact took place.

[37] Having established the facts, I will then be able to characterize them legally and determine whether a fault has been committed. I will state my findings at the outset: Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault with respect to the second event only, by trying to discourage Mr. Roy from pursuing certain remedies; however, Ms. Beaulieu-Guilbault’s conduct in the first event was not a fault, and there was no harassment and no discrimination.

(1) Facts

[38] It is not disputed that, on September 14, 2012, Ms. Beaulieu-Guilbault had a meeting with Mr. Timm and made the comments recorded in the Offender Management System [OMS]:

> [TRANSLATION]
>
> . . . we spoke at length about his resistant attitude towards authority and CSC. We talked about the complaints he has been filing and the consequences of that for him. . . . I told him that I am finding it difficult to reach him and that it is hard to trust him because of the many complaints he has been making against the staff.

[39] However, the accounts of the events on January 11, 2013, are divergent. It is therefore necessary to examine the evidence in detail on this matter.

(a) *Mr. Roy's affidavit*

[40] Mr. Timm did not personally witness the actions he alleges. These acts were revealed to him by another inmate, Mr. Roy, who agreed to sign an affidavit relating these facts.

[41] This affidavit was initially prepared in support of Mr. Timm's grievance. However, the defendant objects to its admission into evidence in these proceedings, because Mr. Roy did not testify at trial.

[42] Under rule 285 of the *Federal Courts Rules*, I may order that a specific fact be proven by affidavit. I am of the opinion that this discretionary power should be exercised and I order that Mr. Roy's affidavit be admitted into evidence. This affidavit was brought to the attention of the

defendant in 2013, as part of the grievance process. There is no indication that the defendant has challenged the content of this affidavit or attempted to prove otherwise. Decisions at all three levels of the grievance process were based, at least implicitly, on the premise that the events described by Mr. Roy had actually taken place. In addition, because Mr. Roy has since been released, Mr. Timm has not been able to locate him.

[43] In the affidavit, Mr. Roy states that he asked Mr. Timm for help in preparing a request for an escorted temporary absence [ETA]. He submitted this written request to his PO, Ms. Beaulieu-Guilbault. The following is his account of what then happened:

> [TRANSLATION]
>
> The following week, PO Valery Beaulieu Guilbault called me to her office to tell me that she had read my ETA request and was convinced that it had been written not by me but rather by Richard Timm, because she recognized his writing style.
>
> . . .
>
> PO Valery Beaulieu Guilbault then said not to associate with Richard Timm, because he was bad company, since he was a litigious person who had filed complaints against employees and since associating with him would only hinder my progress.
>
> On the same afternoon, Aboriginal liaison officer [ALO] Yves Maillé had a meeting with me to tell me that, further to a call from PO Valery Beaulieu Guilbault, he had to tell me to stop associating with Richard Timm, because he was bad company and was not well liked by the staff, since he had filed complaints against certain employees, and because it could hinder my reintegration in society.

[44] At first glance, these statements constitute evidence that, when Ms. Beaulieu-Guilbault discovered that Mr. Timm had helped Mr. Roy with a request, she and Mr. Maillé immediately intervened to discourage Mr. Roy from associating with Mr. Timm and asking for more help.

(b) *Ms. Beaulieu-Guilbault's testimony*

[45] Ms. Beaulieu-Guilbault testified at trial. I found her to be generally honest and professional. However, she occasionally sought to interpret the facts to her advantage.

[46] Ms. Beaulieu-Guilbault confirmed the accuracy of the note she entered in Mr. Roy's record in the OMS on January 11, 2013:

> [TRANSLATION]
>
> In addition, I noticed that the request was written not by him but by another very litigious inmate. I immediately told him that he should be careful about the company he kept and that this inmate would only hinder him. He said that he was able to form his own opinion about the other inmates and that he would not let another inmate hinder his progress. However, I urged him to be careful.

[47] She stated that, during this discussion with Mr. Roy, she did not mention Mr. Timm's name. However, she admitted that, at that time, she was certain it was Mr. Timm who had written Mr. Roy's ETA request, because only Mr. Timm had access to a computer and only Mr. Timm submitted typed documents. Even if I give her the benefit of the doubt in this regard, for her warning to make sense, she had to make it clear to Mr. Roy that she was referring to Mr. Timm, even if she did not say his name. Moreover, she wrote that associating with "this inmate" would hinder him. It is difficult to understand how this message could be conveyed without it being clear to Mr. Roy that she was talking about Mr. Timm. In fact, according to Mr. Roy's affidavit, that is how he understood the conversation. In this regard, it does not matter that Ms. Beaulieu-Guilbault testified that there were other litigious inmates at La Macaza.

[48] I must also say that I was not convinced by her attempt to downplay the derogatory nature of the word [TRANSLATION] "litigious." Even though, as she points out, the dictionary defines a litigious person as one who always uses the law to assert their point of view, it is obvious that she does not see this in a positive light, especially since she uses the adverb [TRANSLATION] "very" before the adjective [TRANSLATION] "litigious" and concludes that the litigious person in question is bad company.

[49] Ms. Beaulieu-Guilbault also acknowledged that she definitely told Mr. Maillé about this incident, probably at a meeting of Mr. Roy's case management team [CMT], although she could not say exactly when. She further stated that the workers did not keep secrets and that it was normal for one worker to talk to another about an inmate's interactions. She did not recall taking the initiative to contact Mr. Maillé on January 11, 2013, but she did not deny it.

[50] Finally, Ms. Beaulieu-Guilbault stated that the entire staff of La Macaza Institution knew that Mr. Timm made frequent use of the complaints and grievance process.

(c) *Mr. Maillé's testimony*

[51] At trial, Mr. Maillé said that he remembered Mr. Roy, because Mr. Roy was involved in the activities for Indigenous inmates that he organized or facilitated. In those days, he could be interacting with Mr. Roy between 15 and 30 minutes a day.

[52] When asked about the matter, Mr. Maillé said he did not remember receiving a call from Ms. Beaulieu-Guilbault regarding the relationship between Mr. Roy and Mr. Timm. He also does

not remember advising Mr. Roy not to associate with Mr. Timm. This memory lapse seems implausible to me. One must not forget that these events were the subject of a grievance in the weeks that followed and of this action a few months later. It is unlikely that Mr. Maillé did not discuss this matter with the institution's management and then with the Crown attorneys. In other words, Mr. Maillé surely had several opportunities to refresh his memory shortly after the events took place.

(d) *The grievance decision*

[53] Mr. Timm filed a grievance regarding the facts underlying this action. This grievance was decided at all three levels. A review of these decisions shows that the facts alleged by Mr. Timm, including the discussions between Ms. Beaulieu-Guilbault, Mr. Maillé and Mr. Roy, are not in question. To that extent, I am prepared to give some de facto authority to these decisions.

[54] The decision at the first level, signed by the warden of the institution, contains the following paragraph:

> [TRANSLATION]
>
> We are of the opinion that the two employees [Ms. Beaulieu-Guilbault and Mr. Maillé], more particularly the PO (because the grievance focuses more on her), did not harass you, based on the definition in CD 081 mentioned above. However, the casework records attached to the grievance may raise some questions. Nevertheless, we conclude that Ms. Beaulieu-Guilbault acted openly with the intention of helping you, and the other inmate involved, in your respective paths.

[55] If the warden concludes that Ms. Beaulieu-Guilbault acted to assist Mr. Timm and Mr. Roy, it is because he necessarily admits that she made comments to discourage Mr. Roy from associating with Mr. Timm and obtaining his help in writing requests.

[56] The decision at the second level, signed by CSC's regional deputy commissioner, contains the following paragraphs:

> [TRANSLATION]
>
> On 2013-02-13, the inmate you mentioned completed an affidavit, sworn in by a commissioner for oaths. It states that the ALO [Mr. Maillé] intervened and suggested that he no longer associate with you since this would only hinder his personal progress under paragraph 6a of CD 710-1.
>
> The ALO has to communicate with the PO and the CMT to provide input on the intervention strategy in relation to your correctional plan, in accordance with paragraphs 6c and 6e of CD 710-1.

[57] In these passages, however, the regional deputy commissioner assumes that there were in fact conversations between Ms. Beaulieu-Guilbault and Mr. Maillé. He seeks to justify their actions rather than deny that they took place. Far from contradicting the content of Mr. Roy's affidavit, this decision makes sense only if one concludes that Mr. Roy was telling the truth.

[58] The decision at the third level does not contain any additional information on this matter.

(e) *Conclusion on facts*

[59] From all of this evidence, I conclude that the events did indeed unfold as Mr. Roy describes in his affidavit.

[60] At the hearing, the Crown attorney tried to argue that Mr. Timm's testimony regarding Mr. Roy's visit on January 11, 2013, was implausible, because the time at which Ms. Beaulieu-Guilbault entered her note on the conversation in the OMS is the time that Mr. Maillé would have finished his shift. Mr. Roy would therefore not have had time to visit Mr. Timm between the meetings with Ms. Beaulieu-Guilbault and Mr. Maillé. This argument assumes that the OMS entry was made at the exact time of the conversation and that Mr. Maillé remembers exactly what time he left work that day. I believe that this is speculation and that it does not support the inference that the Crown attorney urges me to draw, namely that the events described by Mr. Roy in his affidavit did not take place.

(2) Legal characterization of facts

(a) *Retaliation and interference with pursuit of remedy*

[61] The first event must be placed in context: it is a regular meeting between an inmate and his parole officer. It is normal in such a meeting to have a frank conversation on the various elements of the correctional plan and the factors that are hindering the inmate's progress. Ms. Beaulieu-Guilbault was entitled to point out the lack of a relationship of trust between Mr. Timm and his CMT and to identify Mr. Timm's [TRANSLATION] "many complaints" as one of the barriers to establishing such a relationship, along with Mr. Timm's [TRANSLATION] "resistant attitude". In doing so, Ms. Beaulieu-Guilbault was not retaliating: she was not attempting to impose negative consequences on Mr. Timm for pursuing a remedy. She was also not attempting to hinder the pursuit of remedies in the future.

[62] I would add that the fact that Ms. Beaulieu-Guilbault referred to Mr. Timm's complaints in the OMS does not, in my opinion, constitute a civil fault. Although this entry violates CD 081, violating a regulatory standard does not necessarily constitute a civil fault. In this case, this violation was neither a form of retaliation nor an attempt to interfere with the pursuit of a remedy.

[63] However, in acting as they did in the second event, Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault. They wanted to isolate Mr. Timm for having helped Mr. Roy write a request. This is retaliation for collaborating with another inmate in the pursuit of a remedy and, more generally, for having pursued multiple remedies in the past. In addition, the obvious goal was to discourage Mr. Roy and possibly other inmates from making more requests in the future with the help of Mr. Timm. In this sense, Ms. Beaulieu-Guilbault and Mr. Maillé sought to interfere with the exercise of the rights or remedies of these other inmates. The fact that their actions failed does not excuse their conduct, but remains relevant to the existence of injury, as discussed below.

(b) *Harassment and discrimination*

[64] To begin with, the evidence does not reveal any act of discrimination by Ms. Beaulieu-Guilbault or Mr. Maillé. Indeed, they did not act on any prohibited ground of discrimination set out in section 10 of the Quebec Charter. Pursuing a remedy or filing a grievance, even repeatedly, is unrelated to these prohibited grounds of discrimination.

[65] For that reason alone, I am also of the opinion that the acts that Mr. Timm describes as harassment do not constitute a civil fault. Even if their purpose was to discourage the pursuit of remedies, the actions taken by Ms. Beaulieu-Guilbault and Mr. Maillé, according to the admissible evidence, did not constitute repeated or especially serious vexatious acts.

[66] As I mentioned above, the first event must be considered in the context of the relationship between officers and inmates in a penitentiary. Ms. Beaulieu-Guilbault was simply trying to paint a realistic picture of Mr. Timm's situation to allow him to make progress towards achieving the objectives of his correctional plan. To make an analogy with workplaces, it is well established that the exercise of an employer's management rights, however unpleasant, does not constitute harassment (Bernard Cliche et al., *Le harcèlement et les lésions psychologiques*, 2nd ed., Cowansville, Que., Yvon Blais, 2012 at pages 197–198).

[67] Moreover, regarding the second event, the evidence shows that Ms. Beaulieu-Guilbault and Mr. Maillé were not so much seeking to offend or humiliate Mr. Timm, whom they did not see that day, as to discourage other inmates from seeking Mr. Timm's assistance in preparing a request or pursuing a remedy. Judge Brunelle's remarks in *Bélanger*, at paragraph 68, may apply to Mr. Timm's situation: [TRANSLATION] "However 'irritating' or 'annoying' it may be, this practice does not seem serious enough to constitute harassment amounting to civil fault."

[68] Mr. Timm also refers to the third-level decision on his grievance. He submits that it upholds his grievance in its entirety and that the deputy commissioner has therefore acknowledged that he was a victim of harassment.

[69] In this regard, it is useful to recall that the grievance decision can only have de facto authority. The concept of harassment in CD 060 is not necessarily defined in the same way as harassment that constitutes civil fault. As well, the grievance process is not intended to compensate the grievor. The decision therefore does not have the authority of *res judicata*.

[70] Moreover, from a factual standpoint, this decision does not conclude that harassment occurred. To fully understand this, one particular feature of the grievance process must be emphasized, namely the two-step process for handling harassment complaints. In the first step, the first-level authority must determine whether the facts alleged by the complainant, if they are assumed to be true, constitute harassment. Only if this initial question can be answered affirmatively should the decision-maker move to the second step and proceed to an inquiry to establish the facts.

[71] In this case, however, the warden concluded that the acts alleged by Mr. Timm, although they had occurred, did not constitute harassment. He therefore felt no need to proceed to the second step of the harassment process. At the second level, the regional deputy commissioner took the same approach:

> [TRANSLATION]
>
> Upon reading your allegations, I am able to conclude that the situations mentioned do not meet the definition of harassment . . . .

[72] At the third level, the senior deputy commissioner took a different approach. She states the following:

> [TRANSLATION]

> Despite the results of the first-level investigation, the conduct of your PO and ALO, were it proven [emphasis added], would meet the definition of harassment. However, the warden's investigation determined that the PO and ALO had not engaged in any conduct that was harmful to you. Indeed, at a meeting with the PO, it was determined that she had acted with the intention of helping you.
>
> [Emphasis in the original]

[73] Consequently, she deemed it necessary to proceed to the second step of the process. However, she noted that an examination of the facts that actually occurred did not support a finding of harassment. In other words, the senior deputy commissioner took a different path to reach the same result, the denial of the grievance with respect to harassment. Therefore, the grievance was allowed not because of harassment, but for another reason.

[74] In my opinion, the grievance was upheld at the third level only because the senior deputy commissioner found that the first-level process had not allowed Mr. Timm to present his arguments with respect to the entries in the OMS regarding complaints he had filed against staff members. The warden had noted that these entries might raise [TRANSLATION] "some questions", but had asked Mr. Timm to present a new grievance on the issue. At the third level, the deputy commissioner found that the grievance had [TRANSLATION] "not been dealt with in accordance with the provisions of CD 081 and GL 081-1".

[75] My understanding is that the only reason the grievance was upheld at the third level is that, at the two previous levels, Mr. Timm's allegations regarding the references to his complaints in the OMS had not been taken into consideration. This also explains why the only corrective measures imposed by the senior deputy commissioner are a reminder to staff members

that they may not refer to the use of the complaint and grievance process in an inmate's record and the amendment of Mr. Timm's record to remove the references in question.

[76] I agree that the decision at the third level is not written in a way that makes it easy to understand. Nevertheless, the Supreme Court encourages us to read administrative decisions from a broad perspective and not to focus on flaws or deficiencies in drafting: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708. Mr. Timm claims that, since his grievance was not upheld [TRANSLATION] "in part", it was necessarily upheld [TRANSLATION] "in full". I disagree. A reading of the decision as a whole clearly shows that the allegations of harassment were not upheld and that the senior deputy commissioner agreed with Mr. Timm only on the issue of the casework record entries. There is therefore nothing in this decision to support an allegation of civil fault.

IV. Injury and causal link

[77] A finding of fault is not sufficient to establish extracontractual liability. The fault must also have caused injury. In his pleadings and at trial, Mr. Timm referred to various types of injury. I will assess whether Mr. Timm has proven this injury and whether he has shown that it was caused by the fault of Ms. Beaulieu-Guilbault and Mr. Maillé.

A. *Interference with pursuit of remedy*

[78] I should begin by noting that, although the fault I found may be described as discouraging the use of grievance procedures or other remedies, there is no evidence that this fault has had any consequence whatsoever.

[79] Indeed, Mr. Roy told Ms. Beaulieu-Guilbault that he would form his own opinion about his relationship with Mr. Timm. There is no evidence that Ms. Beaulieu-Guilbault's intervention discouraged Mr. Roy or anyone else from pursuing a remedy, with or without Mr. Timm's assistance. In any event, such injury would have been suffered by Mr. Roy (or another inmate), and Mr. Timm would not have the required standing to claim damages to compensate for that injury.

[80] During his testimony, Mr. Timm did not in any way claim to have been prevented from pursuing any remedy whatsoever. In fact, the evidence shows that he subsequently commenced a variety of recourses.

B. *Damage to reputation*

[81] In *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9, [2011] 1 SCR 214, Justice Marie Deschamps of the Supreme Court of Canada describes, at paragraphs 27 and 28, what constitutes damage to reputation in the context of an extracontractual liability action:

> A person is defamed where the image reflected back to the person by one or more other people is inferior not only to the person's

> self-image but above all to the image the person projected to "others" in the normal course of social interaction. . . .
>
> Therefore, the fact that a person alleging defamation feels humiliated, sad or frustrated is not a sufficient basis for an action in defamation. In such an action, injury is examined at a second level focussed not on the actual victim but on the perceptions of other people. Injury exists where "an ordinary person . . . believe[s] that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim.

[82] Mr. Timm argues that, in a prison context, the remarks made by Ms. Beaulieu-Guilbault and Mr. Maillé were extremely damaging, since, out of fear of authority, other prisoners would be strongly encouraged to avoid him and could even resort to physical violence towards him.

[83] These assertions are not supported by the evidence. Mr. Roy, the main recipient of the impugned remarks, did not stop associating with Mr. Timm. On the contrary, he even helped to prepare Mr. Timm's grievance by filing an affidavit.

[84] During his testimony, Mr. Timm alleged that, as a result of the events, some inmates avoided him. He did not say who the inmates were and did not give any further details. He also alleged that some staff members made comments, but did not provide further details. A finding of injury cannot be made on the basis of such vague statements.

[85] Mr. Timm states that at least three other inmates were present when Mr. Maillé told Mr. Roy to stop associating with him. The three inmates allegedly heard Mr. Maillé's remarks and went to see Mr. Timm to tell him what had happened. It was only at trial that Mr. Timm gave the names of these three inmates. He stated that he did not want to do so at discovery, for

fear of hindering the progress of these inmates or, worse, for fear of retaliation. In any event, Mr. Timm's testimony in this regard is hearsay that is inadmissible in evidence. The other three inmates did not testify or provide an affidavit. In his affidavit, Mr. Roy does not mention the presence of the other three inmates. In any event, Mr. Timm did not claim that the three inmates stopped associating with him.

[86] Finally, there is no evidence that a fellow inmate used violence against Mr. Timm as a result of the events or for any other reason.

[87] Mr. Timm also testified about his reputation at La Macaza Institution. He claims that his nickname was [TRANSLATION] "the Citizen" and that he was known for not being associated with organized crime or contraband within the institution. Nothing in the evidence suggests that that perception has changed as a result of the interventions of Ms. Beaulieu-Guilbault and Mr. Maillé.

C. *Negative effect on certain decisions*

[88] At trial, Mr. Timm reported a number of events that occurred after the discussions on September 14, 2012, and January 11, 2013, that are central to his action. Although these subsequent events were not alleged in his statement, he asserted that they were consequences of the faults committed by Ms. Beaulieu-Guilbault and Mr. Maillé. This approach does not allow for a fair debate on these issues. Indeed, it deprives the Crown of the opportunity to investigate and bring evidence to refute Mr. Timm's allegations. In addition, the situations referred to by Mr. Timm would constitute separate faults and not injury caused by the conduct alleged in the statement of claim. This makes the attempt to broaden the debate to include facts that were not

alleged in the pleadings even more problematic. Nevertheless, I shall say a few words about the main situations referred to by Mr. Timm.

[89] First, Mr. Timm states that the faults committed against him resulted in the denial of his ETA request and his request for a security classification decrease. More generally, Mr. Timm claims that he is still in prison because of the [TRANSLATION] “poor management of his case”.

[90] Although, at the meeting on September 14, 2012, Ms. Beaulieu-Guilbault told Mr. Timm that she would not support an ETA request, he nevertheless submitted one, and it was denied a few weeks later. The denial predates the events of January 11, 2013, which are the only events I consider to be faults. These events cannot be the cause of the ETA denial.

[91] It also appears that, in fall 2012, Mr. Timm requested that his security classification be decreased. His March 2013 correctional plan shows that the request was denied on November 14, 2012. Again, this decision predates the events of January 11, 2013.

[92] The correctional plan and the assessment for the ETA decision include detailed reasons. Mr. Timm’s lack of commitment, lack of progress and resistant attitude are the main reasons given in support of the denials. There is no evidence to suggest that these grounds are unreasonable or flawed or that prison authorities acted on the basis of irrelevant factors. In any event, were that the case, these decisions would constitute separate faults, which are not alleged in the declaration, rather than injury.

D. *Move to a different wing*

[93] In January 2014, Mr. Timm was moved from Wing C of the La Macaza Institution, where he had been living for 11 years, to Wing A of the same institution. At discovery and at trial, he stated that he had been told at the time by staff members of the institution that this decision was a consequence of his having brought this action in September 2013.

[94] Such allegations are troubling. As mentioned above, it is unacceptable to retaliate against a prisoner who pursues remedies available under the law.

[95] However, I can grant a remedy only if Mr. Timm can prove the reasons for the move to a different wing. He has not done so. His statement constitutes hearsay. He has not called the people who were involved in this decision to testify. On cross-examination, he also acknowledged that, in August 2013, he had requested to be physically separated from Ms. Beaulieu-Guilbault, since he believed that the third-level decision recognized that she had been harassing him. In addition, Exhibit 17 in the record contains a grievance apparently filed by Mr. Timm following the move to a different wing. The evidence does not show what action was taken on the grievance. In short, the situation may not be as clear-cut as Mr. Timm suggests. I am unable to draw a presumption of fact, as his counsel is asking me to do, since it is not serious, precise and concordant, as required by article 2849 of the Civil Code. Only fulsome evidence would allow me to make a finding.

E. *Unwarranted searches and sleep deprivation*

[96] During his testimony at trial, Mr. Timm also alleged that, after his move to Wing A, guards conducted unwarranted searches of his cell and deprived him of sleep. As for the latter, he stated that a guard would knock on his door to wake him up each hour during the night. Since his cell door was locked at night, he did not know the identity of the guards who had carried out these acts.

[97] Again, such allegations are troubling. However, there are a number of reasons preventing me from granting any reparation in this regard.

[98] First, Mr. Timm admitted on cross-examination that these events took place mainly over two months in 2016, shortly before he moved from La Macaza Institution to another institution. Moreover, while I acknowledge that it is inherently difficult to obtain evidence on this issue, I have no information about the motives of the guards who allegedly deprived Mr. Timm of sleep. It is therefore difficult for me to conclude that the sleep deprivation resulted from the events in January 2013 or, at the very least, from the commencement of this action in September 2013.

[99] Secondly, these events are not mentioned in Mr. Timm's statement of claim, since it was written in 2013. Mr. Timm never amended his statement of claim to mention these events. Procedurally, one cannot simply raise entirely new injuries at trial. As mentioned above, doing so deprives the opposing party of any realistic opportunity to investigate and bring counterevidence.

[100] Third, Mr. Timm admitted on cross-examination that he had filed a grievance in relation to these events and that the grievance had been denied. Therefore, it is possible that not all the relevant facts have been put in evidence before me.

V. Punitive damages

[101] In *Hinse*, the Supreme Court of Canada affirmed that the Quebec Charter is part of the *jus commune* ("*droit commun*", or general law) of extracontractual liability in Quebec, which applies to the federal Crown through section 3 of the CLPA. It would therefore be possible to claim punitive damages, under section 49, paragraph 2, of the Quebec Charter, in cases of intentional interference with a right that it guarantees. Since the Supreme Court considered that Mr. Hinse's claim was unfounded, it did not consider it necessary to specify the conditions under which the federal Crown could be ordered to pay punitive damages.

[102] Mr. Timm maintains that the conduct of Ms. Beaulieu-Guilbault and Mr. Maillé interfered with his right to dignity, honour and reputation (s. 4), his right to equality (s. 10), his right to protection from harassment (s. 10.1) and his right to liberty (s. 24).

[103] It is true that, in *de Montigny*, the Supreme Court stated that punitive damages could be awarded even in the absence of compensatory damages. However, there must still have been interference with a guaranteed right.

[104] Given the findings I have already reached, I must conclude that Mr. Timm has not proven any interference with a right guaranteed by the Quebec Charter. I have ruled that Mr. Timm has

not proven any damage to his reputation, which disposes of section 4. Mr. Timm has also failed to demonstrate that he was a victim of discrimination under section 10. As for harassment, section 10.1 prohibits only harassment arising from a ground set out in section 10, for example sex. Therefore, it is not possible for Mr. Timm to demonstrate that section 10.1 was breached. In any case, I have found that he was not harassed. Lastly, section 24 provides that "no one may be deprived of his liberty . . . except on grounds provided by law". Mr. Timm is incarcerated because he has been convicted of an offence under the *Criminal Code*. He has not asked me, either in his statement or at trial, to question the legality of his conviction. Therefore, section 24 was not breached. Mr. Timm has not raised any rights other than the ones I have just discussed.

[105] In the absence of interference with a guaranteed right, I cannot award punitive damages.

VI. Declarations

[106] Although he did not emphasize this issue at trial, in his statement, Mr. Timm also requests that a series of declarations be issued finding violations of various standards by Ms. Beaulieu-Guilbault, Mr. Maillé and the persons who ruled on his grievance.

[107] Declaratory relief may be provided where the parties have an interest in the determination of a genuine issue (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paragraph 46, [2010] 1 SCR 44 [*Khadr*]). As the Supreme Court stated in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11, [2016] 1 SCR 99, "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties".

[108] In Mr. Timm's case, there is no longer any "live controversy"

[109] between the parties over the facts of this case. The case is a thing of the past. Unlike in *Khadr*, it cannot be said that the facts before the Court, namely the events of September 14, 2012, and January 11, 2013, continue to have legal or practical implications.

[110] In other words, this decision constitutes a complete solution to the matter before the Court. A declaration would add nothing.

VII. Costs

[111] Although the usual practice is to award costs in favour of the successful party, rule 400 of the *Federal Courts Rules* provides that the Court retains full discretion in this regard. Exercising this discretion, I am of the opinion that Mr. Timm should not be ordered to pay the costs.

[112] I find that Ms. Beaulieu-Guilbault and Mr. Maillé did commit a fault. This fault is not sufficient to give rise to liability on the part of the federal Crown, since it did not cause any injury to Mr. Timm. However, it explains why Mr. Timm brought this action. In addition, the wording of the third-level decision on Mr. Timm's grievance was rather confusing. Given all the circumstances, I consider it unfair to make Mr. Timm bear the financial consequences of the failure of his action.

JUDGMENT in T-1445-13

THIS COURT ORDERS that the action is dismissed without costs.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Pierre Tabah Andrée-Anne Dion-Côté	FOR THE PLAINTIFF
Véronique Forest	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Labelle, Côté, Tabah et associés Avocats Saint-Jérôme, Quebec	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT