



No. S-127611
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

DANIEL CHRISTOPHER SCOTT, MARK DOUGLAS CAMPBELL,
GAVIN MICHAEL DAVID FLETT, KEVIN ALBERT MATTHEW
BERRY, BRADLEY DARREN QUAST, AARON MICHAEL
BEDARD

PLAINTIFFS

AND

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

APPLICATION RESPONSE

Application Response of: The Plaintiffs (the "Application Respondents")

THIS IS A RESPONSE TO the notice of application of the Defendant filed May 31, 2013

PART 1: ORDERS CONSENTED TO

Not applicable.

PART 2: ORDERS OPPOSED

The Application Respondents oppose the granting of the order set out in Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

Not applicable.

PART 4: FACTUAL BASIS

1. The Plaintiffs refer to the facts as set out in detail in the Notice of Civil Claim.

PART 5: LEGAL BASIS

1. The Plaintiffs submit that it is not plain and obvious that the claim will not succeed and therefore the Defendant's application ought to be dismissed.

Test for Striking a Notice of Civil Claim

2. The onus on an applicant seeking to strike a claim is high. The legal test under Rule 9-5(1)(a) requires them to show that it is "plain and obvious" that the statement of claim discloses no reasonable cause of action.

Hunt v. T. & N. plc, [1990] 2 S.C.R. 959 at para. 33

3. If there is a hint of some merit to the claim, the applicant will not have discharged the burden.

Mohl v. the University of British Columbia, 2006 BCCA 70
at para. 41

4. The issue is whether there is a question fit to be tried, regardless of the complexity or novelty. The issue must be decided on the basis of the pleadings as they stand or might be amended.

Kripps v. Touche Ross & Co (1992), 69 B.C.L.R. (2d) 62 at
68 (C.A.)

5. Important and novel causes of action should be resolved at trial and not on the basis of pleadings. The Supreme Court of Canada noted in *R. v. Imperial Tobacco Canada Ltd.* that the motion to strike is a tool that must be used with care, given that the law is not static and unchanging. On a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

R. v. Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3
S.C.R. 45 at para. 21;

*Bow Valley Resource Services v. Kansa General
Insurance Co* (1991), 56 B.C.L.R. (2d) 337

6. Equal care must also be taken in a motion to strike out constitutional claims. Courts have held that, except in the rarest of cases, the rule for striking pleadings is not an appropriate vehicle for making a determination as to the constitutionality of provisions, as that determination requires a factual foundation.

Pacific Press v. British Columbia (Attorney General)
(1998), 61 B.C.L.R. (3d) 377 (C.A.) at para. 5; and

Chapman v. Canada, 2001 BCSC 420 at paras. 38 to 43

7. Similarly, Courts have been cautious on applications to strike in the context of alleged fiduciary duties. The content of any fiduciary duty that might be owed is a matter that requires factual investigation.

Timberwest Forest Ltd. v. British Columbia, 1999 CanLII
5060 (BC SC) at para. 55

8. Finally, in considering an application to strike, Courts have held that even where there is a binding precedent that is determinative of the issues on an application, the Court could let the action proceed if there is some indication that the precedent is open for reconsideration.

Dudley v. Canada (Attorney General), 2013 BCSC 1005 at
paras. 38-43

9. The Plaintiffs submit that the Defendant has not met the onus set by the Rules and case authorities for an application to strike.

Honour of the Crown

10. The Honour of the Crown doctrine has been an evolving part of the Canadian common law for centuries and continues to evolve with its most recent incarnation as a defining feature of Aboriginal case law.
11. The historical and continued application of the Honour of the Crown doctrine demonstrates that Canadian courts apply the doctrine when considering notions of law, justice and equity in a number of circumstances. The prevailing assumption under the doctrine is that the Crown will enter into dealings, make grants and carry out its duties with honourable intentions.
12. The Crown's duty to act honourably arose when it covenanted with Canadian Forces members to risk their lives and bodies in service of the nation. The Plaintiffs and Class members are entitled to assume that the Crown intends to fulfill its promises and will engage in a process of honourable consultation, at a minimum a duty to discuss important decisions with those affected by the promise, and honourable efforts to reconcile and accommodate the promise with other rights and interests.
13. The important question of law concerning whether the Honour of the Crown doctrine may be extended to benefit these Plaintiffs is appropriately left for determination by the Trial Judge on the merits. Given the evolving nature of this legal doctrine, it is not plain and obvious that it does not apply to the Government of Canada's relationship with Canadian Forces members and veterans.

Breach of Fiduciary Duty

14. Where, as is the case with those who serve and have served, including the Plaintiffs and proposed Class members, the Crown has assumed discretionary control over specific interests, the Honour of the Crown gives rise to a fiduciary duty in relation to specific interests flowing from their service to the country.
15. An injured soldier, left to the whim of the Crown's veterans' disability pension scheme, is the very picture of vulnerability. Only the Crown has the ability to protect a soldier's interests. In the face of these unique facts, there is a very strong argument that the special relationship between the Crown and those who serve her gives rise to a fiduciary duty.
16. The law of fiduciary duty is not settled in Canada and the development of new fiduciary relationships is ongoing.

Guerin v. The Queen, [1984] 2 S.C.R. 335

17. Specifically, the courts have repeatedly refused to strike claims for breach of fiduciary duty against the Crown made by members of the Canadian Forces because "the relationship of soldier to the Crown may be a unique relationship in the manner of *Guerin*".

Duplessis v. Canada (2000), 197 FTR 87 at para. 30
Stopford v. Canada, 2001 FCT 887 [*Stopford*]
Cross v. Sullivan, 2003 CanLii 44082

18. In the context of a "unique relationship" where the Crown may unilaterally exercise its discretion in such a way as to affect the legal and practical interests of members of the Canadian Forces, the courts must balance the Crown's fiduciary duties with its legislative authority.
19. The case at bar presents an important opportunity to finally determine whether the relationship of a soldier to the Crown may be a unique relationship in the manner of *Guerin* giving rise to a fiduciary duty.

Public Law Duty

20. The Crown owes a public law duty to the Plaintiffs to exercise its legislative function in a manner consistent with the Social Covenant between members of the Canadian Forces and the Crown, to recognize its obligations to provide proper compensation to those members of the Canadian Forces who have died or have been disabled as a result of their military service to this country.
21. The Social Covenant raises fiduciary duties as between the parties. The Courts have left open the possibility that fiduciary duties can exist in the public law context. This is a matter appropriately left for determination on the merits.
22. In addition, the Plaintiffs are not seeking a public law judgment but rather are seeking declaratory relief that public law duties are owed to them and the Class members.

Charter of Rights- Section 15(1)

23. In order to succeed on a claim under section 15(1) of the *Charter*, the Plaintiffs must establish that the law in question creates a distinction based on an enumerated or analogous ground and the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

Quebec (Attorney General) v A, 2013 SCC 5 at para. 324
[*Quebec*].

24. Whether a section 15 claim is made out will be determined on the basis of a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous ground.

Quebec, at para 331.

25. Taking the pleadings as they stand or may be amended, the Plaintiffs submit that the New Veterans Charter :

- (a) creates a distinction based on the analogous ground of Canadian Forces Member;
 - (b) creates a disadvantage for members of the Class by perpetuating prejudice or stereotyping; and
 - (c) is therefore inconsistent with section 15(1) of the *Charter*.
26. The Plaintiffs submit that it is not "plain and obvious" that the facts pled in the Amended Notice of Civil Claim do not support a claim that the New Veterans Charter violates the Plaintiffs' section 15 *Charter* rights.
27. At this stage of proceedings, the inescapable conclusion for this Court is that it is not plain and obvious that the Plaintiffs' claims will fail. There is a serious question of law here that is more appropriately left for determination by the Trial Judge on the merits.

Section 7 of the Charter

28. Taking the pleadings as they stand or may be amended, the Plaintiffs submit that:
- (a) The New Veterans Charter deprives them of their security of the person by failing to provide adequate compensation for their injuries sustained in the service of Canada, despite assurances that they would be so compensated;
 - (b) The New Veterans Charter deprives them of their security of the person as a result of the serious state imposed psychological distress which results from the application of the New Veterans Charter; and
 - (c) The above deprivations do not accord with the principles of fundamental justice, namely the principle of the Honour of the Crown and the government's obligations to fulfill its promises, and the Crown's fiduciary duties, as well as the principle that laws should not be arbitrary.
29. The Supreme Court of Canada has left open the possibility that there could be unique facts where an economic interest could found a claim for a *Charter* breach.
30. The facts and circumstances surrounding military service are unique from any role in civilian society in that the Plaintiffs and Class members were required by law to risk their lives and bodies to death and bodily injury in service to the Government and citizens of Canada. It is by virtue of this service that they are in financial need, and in light of this, and the government's obligation to fulfill its promises, the Plaintiffs submit that this action presents the unique set of facts required to found a novel claim under section 7.
31. The Plaintiffs submit that the questions of whether:
- (a) in the face of a prior obligation or promise to provide support and compensation to members of the armed forces injured in the service of their country, can a failure to provide adequate disability benefits amount to a deprivation of the Plaintiffs' security of the person; and
 - (b) whether the honour of the Crown amounts to a principle of fundamental justice

are fit questions to be tried despite that they are novel. As a result, it is not "plain and obvious" that the facts pled in the Amended Notice of Civil Claim do not support a claim that the New Veterans Charter violates the Plaintiffs' section 7 *Charter* rights.

32. These are issues which ought to be determined on the evidence and not summarily. The Supreme Court of Canada has said that the task of the courts on section 7 issues, is to evaluate those issues in the light, not just of common sense or theory, but of the evidence.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35,
[2005] 1 SCR 791 at para. 150

Principles of Fundamental Justice

33. The Honour of the Crown embodies notions of law, justice and equity. The doctrine that the Crown will carry out its duties with honourable intentions is a basic norm regarding how the state should deal with its citizens.
34. The Plaintiffs submit that the Honour of the Crown reflects the shared assumptions on which our system is grounded and therefore is a principle of fundamental justice.
35. In light of this recognized obligation of the people and Government of Canada towards veterans and those who serve in the armed forces, the New Veterans Charter is clearly not in relation to, and is inconsistent with Canada's interests in meeting its obligations and therefore is not in accordance with fundamental justice.
36. In addition, the New Veterans Charter violates the principle that laws shall not be arbitrary.

Section 24 of the Charter

37. The Plaintiffs submit that the wording of section 24 is generous enough to permit a stand-alone remedy for unconstitutional effects, as it confers on the Court a discretion to grant "such remedy as the court considers appropriate in the circumstances" to anyone whose rights and freedoms have been infringed. The cases have not conclusively closed the door on the situations where a section 24 remedy may be available in conjunction with section 52, and it is not plain and obvious that the Plaintiffs' claim will fail.
38. In addition or in the alternative, there is nothing in the law to preclude a party from pleading the remedies in the alternative.

Property Rights

39. Property rights are recognized at Canadian law in numerous ways including the *United Nations Universal Declaration of Human Rights*, which serves as a reflection of the normative values of Canadians, and in the 1960 *Canadian Bill of Rights*, S.C. 1960, c. 44, which affirms the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law. As federal legislation, *the Bill of Rights* applies to areas within federal jurisdiction, including those that are the focus of this litigation.
40. The enactment of the New Veterans Charter and the discontinuation of the superior benefits under the *Pension Act*, was not done in accordance with due process. Rather, the change was unilaterally imposed during a time of war despite the Social Covenant

which the Canadian Forces members and veterans understood to be in place and notwithstanding the obligations of the Crown towards those members.

Crown Liability and Proceedings Act

41. The purpose of section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, is to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof.

Sarvanis v. Canada, 2002 SCC 28, [2002] 1 S.C.R. 921

42. Section 9 of the *Crown Liability and Proceedings Act* has no application to the case at bar. The misconduct alleged by the Plaintiffs relates to the enactment of the New Veterans Charter on the basis that it is unconstitutional and in violation of fiduciary duties owed to the Plaintiffs.
43. There is no prospect of double recovery in this case, as the breaches alleged by the Plaintiffs raise separate claims and injuries not contemplated by any pension award which has been or may be payable to the Plaintiffs.

Statutory Instruments Act

44. The Defendant's suggestion that no Parliamentary Committee need actually do anything with Statutory Instruments purportedly referred to the Committees is contrary to the legislative intent.
45. The Plaintiffs maintain their submission that the Table of Disabilities has not been properly enacted.

Canadian Human Rights Act

46. The Plaintiffs are not making a claim under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and reference to the Act does not appear anywhere in the Relief Sought. Rather the references to the Act are made as part of the legislative matrix that makes up the factual foundation for the claim.
47. As a result, the references to the Act ought not to be struck.


PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein.

The Application Respondents estimate that the application will take three days.

- [X] The Application Respondent has filed in this proceeding a document that contains the Application Respondents' address for service.

Date: 12/Jul/2013


Signature of Lawyer for the Application Respondents

Donald J. Sorochan, Q.C.

