

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

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF APPLICATION**

Names of applicants: The Attorney General of Canada (the “Defendants”)

To: The Plaintiffs

TAKE NOTICE that an application will be made by the applicants to the Judicial Management Judge, the Honourable Mr. Justice Weatherill at the courthouse at 800 Smithe Street Vancouver, BC V6Z 2E1 on July 22, 2013 at 10:00 a.m. for the order set out in Part 1 below.

**Part 1: ORDERS SOUGHT**

1. That the Plaintiffs’ claim be struck, with costs to the Defendant.

**Part 2: FACTUAL BASIS**

1. This is a proposed Class Proceeding action brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The Plaintiffs seek an order appointing them as representative plaintiffs under the *Act*. The proposed General Class consists of Canadian Forces members and veterans who have claims for services, assistance, and compensation under the provisions of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2011, c. 12 (“the legislation”). Six subclasses are also proposed.<sup>1</sup>
2. The Plaintiffs allege the existence of a “social covenant” between Canada and the members of Canadian Forces which guarantees military members “adequate recognition and benefit”<sup>2</sup> and is governed by principles including “suitable care and compensation be

<sup>1</sup> Amended Notice of Civil Claim (“Claim”), at paras 5-6.

<sup>2</sup> Claim at para 218, 220, 222.

provided to members, veterans and those injured in the service of Canada through programs and services required to meet the complex needs of individual members”.<sup>3</sup>

3. The legislation provides for services and benefits to eligible members of the Forces and their families, such as vocational assistance, earnings loss benefits, supplementary retirement benefits, income support benefits, permanent impairment allowances, and disability benefits, among others.
4. The Plaintiffs have each made claims under the legislation for compensation arising from service-related injury, loss, or damage,<sup>4</sup> and in respect of which they have each received compensation.<sup>5</sup>
5. The Plaintiffs allege that the amounts they received under their claims are inadequate and substandard. They allege that the provisions of the legislation treat some disabled veterans less generously than the formerly applicable provisions of the *Pension Act*, (“the former legislation”)<sup>6</sup> and that the provisions of the legislation do not accord with the heads of damages or amount of damages which Superior Courts or provincial Workers Compensation legislation might award for “analogous personal injuries”.<sup>7</sup>
6. The Plaintiffs also allege that the New Veterans Charter is arbitrary.<sup>8</sup> The allegations that the New Veterans Charter is “arbitrary” focus on the limits set for disability benefits.
7. The assessment of disability benefits, and caps on those benefits, are established by a Table of Disabilities and instructions which are made pursuant to subsections 51(1) of the legislation and 35(2) of the *Pension Act*; are statutory instruments and regulations under the *Statutory Instruments Act*; and are exempt from the application of sections 3, 5 and 11 of that *Act* by virtue of section 35(2.01) of the *Pension Act*.<sup>10</sup>
8. Finally, the Plaintiffs allege procedural deficiencies in the legislation, chiefly that the legislation was passed without widespread, broad, and extensive consultations<sup>11</sup> and that the Table of Disabilities and instructions were not referred for review and scrutiny pursuant to section 19 of the *Statutory Instruments Act*.<sup>12</sup>
9. The Plaintiffs allege that as a result of the foregoing, they have sustained damages including unlawful deprivation of property and an adverse impact on their physical and

---

<sup>3</sup> Claim at para225.

<sup>4</sup> Claim at paras 19, 36, 48, 59,117, 132-135, 155, 178, 190,201.

<sup>5</sup> Claim at paras 37, 39, 60-61, 65-66, 78, 118-119, 121, 123, 132-135, 141-142, 145-146, 179, 182, 184, 202.

<sup>6</sup> Claim, paras. 335-336.

<sup>7</sup> Claim at paras 331-334, 349.

<sup>8</sup> Claim at paras 348, 349, 354, 370, 389.

<sup>9</sup> Claim at para355.

<sup>10</sup> Claim, para 358.

<sup>11</sup> Claim at para321.

<sup>12</sup> Claim at paras 359-360

psychological integrity, individual human dignity, and personal autonomy and independence.<sup>13</sup>

### Part 3: LEGAL BASIS

10. The Plaintiffs' claim as follows:

- a) **Fiduciary Duty:** the Defendant breached a “common law fiduciary duty” to the Plaintiffs and the putative Class Members through the establishment of support and compensation schemes for the benefit of the Class and their families under the New Veterans Charter and which the Plaintiffs allege to be “arbitrary, sub-standard, and inadequate.”<sup>14</sup> The Plaintiffs assert that the concept of “Honour of the Crown” applies to relations between the federal government and the proposed class, and that it “gives rise to a fiduciary duty in relation to specific interests flowing from their service to the country, to give effect to the alleged “social covenant” in priority to all other considerations, and to a duty of consultation.”<sup>15</sup>
- b) **Constitutional Claims:** the Defendant, through the establishment of support and benefit schemes under the New Veterans Charter, deprived the Plaintiffs and putative Class Members of their rights to life, liberty, and security of the person and violated their equity rights, contrary to sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and in a manner that is inconsistent with the principles of fundamental justice.<sup>16</sup> The Plaintiffs also invoke the Bill of Rights and the Universal Declaration of Human Rights.

#### *Test for Striking a Notice of Civil Claim*

11. Rule 9-5(1)(a) of the Rules of Court provides that at any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that it discloses no reasonable claim.
12. The test for striking a claim is whether it is plain and obvious, assuming the facts pleaded are true, that the claim discloses no reasonable cause of action or that the action is certain to fail.<sup>17</sup>
13. Charter claims and proposed class proceedings are as susceptible to being struck as other kinds of claims and actions.<sup>18</sup>
19. On an application to strike, conclusions of law, unlike material facts, are not assumed to be true and may be pleaded only if the material facts supporting them are pleaded.<sup>19</sup>

---

<sup>13</sup> Claim at para 354.

<sup>14</sup> Claim, paras 388-389.

<sup>15</sup> Claim at para 386.

<sup>16</sup> Claim at paras 390-391.

<sup>17</sup> *British Columbia (Director of Civil Forfeiture) v Flynn*, 2013 BCCA 91 at para 10.

<sup>18</sup> *Canadian Bar Association* (2008), 290 DLR (4<sup>th</sup>) 617 (BCCA) at para 51; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para 40.

### ***Public Law Duty***

20. Canadian law does not recognize a cause of action based on breach of a public law duty.<sup>20</sup>
21. At no point do the Plaintiffs plead that Canada owes them a private law duty. Absent a private law duty of care, there can be no tort-based cause of action against Canada.
22. The Plaintiffs have not pleaded any action, conduct or exercise of discretion that deviates from the legislation. The harm they complain of is based on the proposition that Canada has proceeded in accordance with the legislation.
23. The law is clear that the exercise of a legislative function does not give rise to any private law duty of care, not can validly enacted legislation be challenged on such a ground.<sup>21</sup> The Plaintiffs claims for breach of public law duty should be struck pursuant to Rule 9-5 for disclosing no cause of action.

### ***Honour of the Crown***

24. There is no jurisprudence which supports the use of the Honour of the Crown concept outside of the aboriginal context. There is also no jurisprudence that supports the use of the Honour of the Crown concept to invalidate validly-enacted legislation.
25. Moreover, assuming that the concept of the Honour of the Crown could apply in the present situation, (which is denied), the Plaintiffs have failed to plead any material facts which could give rise to a fiduciary duty on the part of the Crown.
26. To establish a fiduciary duty in the government context, one must first identify a government commitment that supports the existence of an undertaking by government to act with undivided loyalty towards one person or group<sup>22</sup> and the interest at issue must be a specific private law interest to which the person or class of persons has a pre-existing distinct and complete legal entitlement.<sup>23</sup>
27. The Plaintiffs have not identified any legislation that supports the existence of a fiduciary duty, have not pleaded a specific pre-existing private law interest that could be subject to a fiduciary duty; and have not identified any government commitment that supports the existence of an undertaking by government to act with undivided loyalty towards one person or group.

---

<sup>19</sup> *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 (CanLII) at para 30; Supreme Court Civil Rule 3-7(9).

<sup>20</sup> See *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR 205; *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, 1997 CanLII 316 (SCC), [1997] 2 SCR 890 at para 49; *Kamloops (City of) v Nielsen*, 1984 CanLII 21 (SCC), [1984] 5 WWR 1 at page 35.

<sup>21</sup> *Welbridge Holdings Ltd. v. Winnipeg*, [1971] S.C.R. 957.

<sup>22</sup> *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36, [2011] 2 SCR 261 at paras 31, 58, 59.

<sup>23</sup> *Ibid* at para 51.

28. What the Plaintiffs complain of is not the assumption of discretionary control over specific interests but rather Parliament's decision to enact legislation within its legislative competence that provides a particular regime of benefits and entitlements to those individuals affected by disabilities incurred during their service in the Armed Forces.
29. Parliament, in passing legislation, can never be said to be subject to a fiduciary duty to act only in the interest of a specific group, and without regard to the interests of the broad Canadian public. Fiduciary duties do not arise in respect of the government's exercise of its legislative functions.<sup>24</sup> Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty.<sup>25</sup>
30. The Plaintiffs claims for breach of fiduciary duty arising from the Honour of the Crown should be struck pursuant to Rule 9-5 for disclosing no cause of action.

### *Constitutional Claims*

31. In order to succeed on a claim under section 15(1) of the *Charter*, the plaintiffs must establish: (a) that the law creates an adverse distinction based on an enumerated or analogous ground and (b) that the disadvantage is discriminatory because (i) it perpetuates prejudice or (ii) it stereotypes.<sup>26</sup>
32. The Plaintiffs have not pleaded any material facts whatsoever with regard to either aspect of the test.
33. In order to succeed on a claim under section 7 of the *Charter*, the Plaintiffs must establish: (a) that there is an infringement of one of the three protected interests, that is to say a deprivation of life, liberty or security of the person; and (b) that the deprivation is not in accordance with the principles of fundamental justice.<sup>27</sup>
34. The plaintiffs have not pleaded any material facts to support a conclusion that: the legislation adversely affects their alleged section 7 interests; that there has been a deprivation by the state; or the alleged deprivation was not in accordance with an identified principle of fundamental justice. There is no allegation that the New Veterans Charter has any direct impact on the plaintiffs' integrity, dignity, or autonomy other than through the alleged deprivation of their economic interest.
35. The only material facts that the plaintiffs plead with respect to a "deprivation" is that the New Veterans Charter provides less compensation than courts,<sup>28</sup> workers' compensation programs,<sup>29</sup> and the previous *Pension Act* regime.<sup>30</sup> The legislation confers benefits on the plaintiffs; it deprives them of nothing.

---

<sup>24</sup> *Ibid* at para 62.

<sup>25</sup> *Ibid* at para 52.

<sup>26</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 at para 186.

<sup>27</sup> *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74 at para 83.

<sup>28</sup> See Claim at paras 331-334, 337, 349, 368, 370.

<sup>29</sup> See Claim at paras 337, 343, 344.

<sup>30</sup> See Claim at paras 335-336.



36. The interest plaintiffs seek to protect is in fact an economic interest: the amount of compensation to which they are entitled. Economic interests are not interests that are protected by section 7.<sup>31</sup>
37. The plaintiffs have also not identified any principle(s) of fundamental justice that they contend have been violated. Claims under section 7 of the *Charter* may be struck for failing to clearly identify the principle of fundamental justice alleged to have been breached.<sup>32</sup>
38. The plaintiffs have alleged in the Claim that the New Veterans Charter is arbitrary.<sup>33</sup> The British Columbia Court of Appeal, in *PHS Community Services*, has applied the following test to determine if a law is arbitrary:
- (i) What is the “state interest” sought to be protected?
  - (ii) What is the relationship between the “state interest” thus identified and the [impugned legislation]?
  - (iii) [Has the rights claimant] established that the [impugned legislation] bears no relation to, or is inconsistent with, the state interest?”<sup>34</sup>
39. The Plaintiffs’ allegations that the New Veterans Charter is “arbitrary” focus on the limits set for disability benefits. Their use of the term “arbitrary” does not meet the requirements set out in the test. There are no material facts pleaded to support the requirement that the New Veterans Charter bears no relation to, or is inconsistent with Canada’s interest.
40. The Plaintiffs claim for breach of the *Charter* should be struck pursuant to Rule 9-5 for disclosing no cause of action.

### ***Remedies under Section 24(1) of the Charter***

41. Section 24(1) “is used as a remedy not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional.”<sup>35</sup>
42. An individual remedy under s. 24(1), and particularly one for damages, will “rarely be available in conjunction with an action under s.52(1)”.<sup>36</sup> The only exception to this rule is

<sup>31</sup> *Melanson et al v New Brunswick (Attorney General) et al*, 2007 NBCA 12 at para 25, 280 DLR (4th) 69.

<sup>32</sup> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78.

<sup>33</sup> Claim at paras 348, 349, 354, 370, 389.

<sup>34</sup> *PHS Community Services Society v. Canada (Attorney General)* 2010 BCCA 15 at para 275.

<sup>35</sup> *Ibid.*, at para. 60.

<sup>36</sup> *R v Ferguson*, 2008 SCC 6 at para 60, [2008] 1 SCR 96. On the different roles played by ss. 52(1) and 24, see also *Schachter v Canada*, [1992] 2 SCR 679 at pages 719-20 [*Schachter*] and *R v 974649 Ontario Inc (“Dunedin Construction”)*, 2001 SCC 81, [2001] 3 SCR 575.

in cases of government conduct that is clearly wrong, in bad faith, or an abuse of power.<sup>37</sup>

43. The plaintiffs, however, have not alleged any actions that are unconstitutional. The only allegations in the Claim that relate to “actions” as opposed to legislation are related to Canada failing to deviate from the provisions of the New Veterans Charter and Table of Disabilities.<sup>38</sup> There are no allegations of bad faith, abuse of power, or other misconduct required to combine a remedy under s. 24(1) with an action under s. 52 of the Constitution. As such, all claims related to remedies under s. 24(1) of the Constitution should be struck.

#### ***Property Rights Under the Bill of Rights and Charter s. 26***

44. The Plaintiffs have alleged that they have been unlawfully deprived of their property rights under the *Canadian Bill of Rights*<sup>39</sup> and Section 26 of the Charter. The plaintiffs have not, however, pleaded any material facts in support of this legal conclusion. With no basis in material facts, these allegations should be struck.

#### ***United Nations Declarations***

45. Declarations of the United Nations General Assembly do not have any binding legal effect<sup>40</sup> unless implemented by legislation to ensure that they are effected under domestic law.<sup>41</sup> It is not pleaded that the *United Nations Universal Declaration of Human Rights* has been implemented by legislation; accordingly it cannot support a cause of action in Canadian domestic law. All allegations with respect to this Declaration should therefore be struck as failing to disclose a reasonable cause of action.

#### ***The Canadian Human Rights Act***

46. It is not open to the claimants to pursue *Canadian Human Rights Act* claims in the Supreme Court of British Columbia.<sup>42</sup> Their claims in this respect should therefore be struck.

#### ***Crown Liability and Proceedings Act, Section 9***

<sup>37</sup> *Mackin v. New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 SCR 405 at para. 78.

<sup>38</sup> See for example Claim at para 369.

<sup>39</sup> Claim at para 387 (l).

<sup>40</sup> *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814 per Sharpe JA, at paras 46-47; and *Brown v. Canada (Attorney General)*, 2010 ONSC 3095 (CanLII), per Perell J., at para. 92-101.

<sup>41</sup> Peter W Hogg, *Constitutional Law in Canada*, 5<sup>th</sup> Edition Supplemented, looseleaf (Scarborough: Thomson/Carswell, 2007), ch 11.4, Implementing Treaties. See also: *Francis v The Queen* [1956] SCR 618 at p. 621 (refusal to enforce treaty granting customs exemption to Indians); and *Korrol v Canada (Deputy Attorney General)*, [1984] FCJ No 710 (TD) at 9 and 12.

<sup>42</sup> See for example *Canada v St. Thomas* (1993), 109 DLR 671 (FCA); *Husband v Canada*, [1994] 3 FC 188 (CA); and *Canada v Robinson*, [1994] 3 FC 228 (CA).

47. Section 9 of the *Crown Liability and Proceedings Act* bars proceedings against the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.<sup>43</sup>
48. All damages arising out of an incident giving rise to compensation under the legislation are barred by section 9, so long as that pension or compensation is given “in respect of”, or on the same basis as, the identical death, injury, damage or loss, regardless of whether the claimed head of damages matches the apparent head of damages compensated for in that pension.<sup>44</sup>
49. The claims of each of the representative plaintiffs are subsumed in the pensions paid or payable to them, as referred to in the Claim and on that basis alone are barred under section 9 and must be struck out.

### *Statutory Instruments Act*

50. The Plaintiffs allege that the Table of Disabilities has not been referred for review in accordance with Section 19 of the *Statutory Instruments Act*.
51. The Plaintiffs misinterpret the requirements of Section 19. Section 19 provides that every statutory instrument issued, made or established after December 31, 1971 shall stand permanently referred to any Committee that may be established for the purpose of reviewing and scrutinizing statutory instruments. It does not require that such Committee undertake a review of each such instrument, nor does it make such a review a prerequisite to the valid enactment of such an instrument.
52. It is therefore submitted that the allegation in paragraph 361 of the Claim that the Table of Disabilities and instructions are *ultra vires* cannot succeed, and should be struck out.

### **Part 4: MATERIAL TO BE RELIED ON**

1. Case law and statutes cited herein and as provided by counsel.

The applicants estimate that the application will take 3 days

This matter is within the jurisdiction of a master

This matter is not within the jurisdiction of a master

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, by July 12, 2013

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that

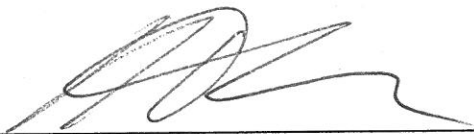
<sup>43</sup> R.S., 1985, c. C-50, s. 9;

<sup>44</sup> *Sherbanowski v Canada*, 2011 ONSC 177 (CanLII) at para 15.



- (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
- (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: May 31, 2013



Signature of  
 applicant       lawyer for applicant

Jasvinder S. Basran  
Regional Director General  
Per: **Mara Tessier** (Tel: 604-666-4021)  
**Paul Vickery** (Tel: 613-948-1483)  
Department of Justice  
British Columbia Regional Office  
900 - 840 Howe Street  
Vancouver, BC V6Z 2S9,

Fax: 604-775-5942

Lawyers for the Defendant

***To be completed by the court only:***

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1  
of this notice of application

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Dated: _____	_____ Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master
--------------	---

## APPENDIX

## THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

THIS NOTICE OF APPLICATION is prepared and served by Jasvinder S. Basran, Regional Director General, British Columbia Regional Office, Department of Justice (Canada), whose place of business and address for service is the Department of Justice, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: 604-666-4021, Facsimile: 604-775-5942, Attention: Mara Tessier.