RECEIVED
MAY 31 2013
VANCOUVER
SUPREME COURT SCHEDULING

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.

WRITTEN ARGUMENT OF THE DEFENDANT ON APPLICATION TO STRIKE THE AMENDED NOTICE OF CIVIL CLAIM

Donald J. Sorochan, Q.C.
Miller Thompson LLP
1000-840 Howe Street
Vancouver, BC V6Z 2M1
Tel: (604) 643-1214
Fax: (604) 643-1200

Lawyer for the Plaintiffs

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

Fax: 604-775-5942

Lawyers for the Defendant

OVERVIEW

1. The Defendant brings this application seeking to strike out the amended notice of civil claim ("the Claim") in its entirety, pursuant to the provisions of Rule 9-5 of the *Supreme Court Civil Rules*, and in particular subrules 9-5(1)(a) and (b) thereof, on the grounds that the Claim fails to disclose any reasonable claim, is unnecessary, frivolous or vexatious or otherwise an abuse of process of the Court.

2. In its essence, the Representative Plaintiffs' complaint is that the provisions of the governing federal legislation, referred to as the New Veterans Charter ("NVC") and Enhanced New Veterans Charter ("the legislation") treat disabled veterans, and in particular, severely disabled veterans, less generously than the formerly applicable provisions of the *Pension Act*, ("the former legislation") and do not accord with the damages which would be recoverable in an action in the Superior Courts, or under provincial Workers Compensation legislation for "analogous personal injuries."

3. The *Pension Act* remains in force and there are a number of veterans who receive benefits under that Act. Canadian Forces veterans who applied for benefits after April 1, 2006 receive them under the NVC. Canadian Forces veterans who applied for benefits before April 1, 2006 receive them under the *Pension Act*. Some CF veterans may receive a disability pension under the *Pension Act* and Rehabilitation or a Disability Award under the NVC.

4. In support of their Claim, the Representative Plaintiffs assert the existence of a "social covenant," a public law duty, and a fiduciary duty on the part of the federal government. They invoke the Honour of the Crown and the *Universal Declaration of Human Rights*, and assert that the legislation is inconsistent with Canada's Constitution, that the class is discriminated against contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, that the class has suffered deprivation of life, liberty and security of the person contrary to section 7 of the *Charter*, that the Defendant failed to accommodate the needs of the disabled members of the class contrary to the *Canadian Human Rights Act*, and that the class has been deprived of property rights contrary to the *Bill of Rights*.

5. The Defendant submits that none of the claims asserted by the Representative Plaintiffs constitutes a reasonable claim, that the claims are frivolous or vexatious, and accordingly that they should be struck out in their entirety.

FACTS

6. The Amended Notice of Civil Claim was filed as a proposed class proceeding by six members and former members of the Canadian Forces, on their own behalf and on behalf of all 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 ("New Veterans Charter" or "NVC.")[1]

The Benefit Regime

7. The New Veterans Charter was enacted in 2005[2] and subsequently amended in 2011.[3] The New Veterans Charter established, *inter alia*, a lump sum payment program for Canadian Forces members in lieu of disability pensions as previously provided under the *Pension Act.*[4]

8. The NVC empowers the Minister to provide to eligible members and veterans a roster of benefits and services on application, including:

    (1) Earnings loss benefits (s. 18(1));
    (2) Permanent impairment allowance for veterans experiencing permanent and severe impairments in respect of physical or mental health problems (s. 38);
    (3) Career transition services (3(1));
    (4) Rehabilitation services (8(1));
    (5) Clothing allowances (s.60);
    (6) Detention benefits (s. 64(1));
    (7) Supplementary retirement benefits (25(1)); and
    (8) Canadian Forces income support benefits (for eligible veterans who received or but for their level of income would have received the earnings loss benefit but are no longer entitled to it) (s. 27.)

9. The NVC also empowers the Minister to provide a similar roster of services to the spouses, common law partners, and survivors of veterans and to enter into a contract for a group health insurance program and make contributions and premiums under the program (s. 66(1)(a)-(c)). In certain circumstances, members and veterans benefit from prohibitions on the recovery of overpayments made to them (s. 88.) Any amount payable under the NVC is protected from seizure and execution (s. 89(2)).

10. The NVC empowers the Minister to provide disability awards for eligible members and veterans who are suffering from a disability resulting from a service-related injury or disease, or a non-service-related injury or disease that was aggravated by service (s. 45(1)).

---

[1] Amended Notice of Civil Claim ("Claim"), para 5.
[2] Claim, para 327.
[3] Claim, para 329.
[4] Claim, paras 323, 326.

11. Disability awards may also be made at any time in respect of the loss, impairment, or permanent loss of the use of paired organs or limbs for any cause whatsoever, where the member or veteran has received a disability award under s. 45 for the loss or permanent loss of the use of the other paired organ or limb (s. 47(1)).

12. If a member or a veteran to whom a disability award under sections 45 or 47 has been paid, in whole or in part, establishes that their extent of disability has subsequently increased, they may be paid an additional disability award which corresponds to the extent of that increase (s. 48(1)).

13. Disability awards are payable whenever, in the opinion of the Minister, the disability has stabilized (s. 53.) Prior to 2011, disability awards were payable as lump sum amounts; claimants now have the option of annual payments (52.1(1)) subject to some conditions.

14. In decisions in respect of disability, death, or detention benefits, veterans or members are given the benefit of the doubt, in that every reasonable inference is drawn from the evidence and the circumstances in favour of the applicant. Any credible uncontradicted evidence for the applicant is accepted, and any doubt in weighing evidence is resolved in favour of the applicant (s. 43.)

Table of Disabilities

15. Subsection 51(1) of the New Veterans Charter, and section 35(2) of the *Pension Act* provide for the assessment of the extent of a disability based on the instructions and a Table of Disabilities to be made by the Minister.[5]

16. The Table and instructions are exempt from the application of sections 3, 5, and 11 of the *Statutory Instruments Act* (s. 51(2)).

17. The Plaintiffs admit that the Table and instructions are statutory instruments and regulations under the *Statutory Instruments Act* ("*SIA*") and that these instruments are exempt from the application of sections 3, 5, and 11 of the *SIA* by virtue of section 35(2.01) of the *Pension Act*.[6]

The Plaintiffs

18. Each of the named Plaintiffs has claimed and received a pension and other compensation from the Department of Veterans Affairs ("VAC") for service-related injury, loss, or damage.[7] The compensation that each Plaintiff has received includes, but is not limited to, lump sum payments ranging from $41,411.96 to $260,843.84[8] in accordance with the New Veterans Charter.

---

[5] Claim at para 355.
[6] Claim at para 358.
[7] Claim at paras 19, 36, 48, 59,117, 132-135, 155, 178, 190, 201.
[8] Claim at para 327.

19. There are no allegations that compensation has been claimed or provided for any separate or additional events.

20. The Plaintiffs allege that the compensation awarded under the New Veterans Charter is less to some members and veterans than the compensation that was awarded under the *Pension Act.*[9] The Plaintiffs also allege that Canadian Courts and provincial Workers' Compensation schemes award greater compensation than is available to them under the New Veterans Charter.[10]

21. The Plaintiffs assert the existence of a "social covenant" between Canada and members of the Canadian Forces that guarantees adequate recognition and benefits to the members of the Canadian Forces.[11] The Plaintiffs have alleged that this "social covenant" should be recognized and given effect pursuant to the "Honour of the Crown"[12] and that this gives rise to a fiduciary duty.[13]

22. The Plaintiffs allege that portions of the New Veterans Charter are inconsistent with the Constitution and have identified sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") as being sources of the unconstitutionality.

23. The Plaintiffs allege that the Table of Disabilities, which is a statutory instrument and regulation under the New Veterans Charter, is *ultra vires* in that it was enacted contrary to the *Statutory Instruments Act.*[14]

24. The Plaintiffs also allege breaches of the *Canadian Human Rights Act,*[15] the *Canadian Bill of Rights,*[16] and the *United Nations Universal Declaration of Human Rights.*[17]

LAW AND ARGUMENT

Test for Striking a Notice of Civil Claim

25. Rule 9-5(1) of the *Supreme Court Civil Rules*[18] provides:

> 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:

---

[9] Claim at paras 236, 335-336.
[10] Claim at paras 331-334, 349.
[11] Claim at para. 218, 220, 222.
[12] Claim at para 387(b).
[13] Claim at para 250.
[14] Claim at paras 355, 358-363.
[15] Claim at paras 375-377.
[16] Claim at para 363.
[17] Claim at paras 373, 387(l).
[18] *Supreme Court Civil Rules*, BC Reg 168/2009.

> (a) It discloses no reasonable claim or defence, as the case may be,
> (b) It is unnecessary, scandalous, frivolous or vexatious,
> (c) It may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> (d) It is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

26. The British Columbia Court of Appeal has recently described the test for striking a Notice of Civil Claim under Rule 9-5(a) as follows:

> The test for striking pleadings because they fail to disclose a reasonable cause of action is well-known. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, Chief Justice McLachlin stated it in these terms:
>
> > [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.[19]

27. In *R. v. Imperial Tobacco Canada Ltd.*, the Supreme Court of Canada further stated that:

> It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated.[20]

---

[19] *British Columbia (Director of Civil Forfeiture) v Flynn*, 2013 BCCA 91 at para 10.
[20] *R. v. Imperial Tobacco Canada Ltd. at* para 22.

28. It is well settled that a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.[21] In *Endean v. Red Cross Society*, Smith J. succinctly summarized the key principles when considering whether pleadings disclose a cause of action:

> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
> (b) The defendant, in order to succeed, must show it is plain and obvious beyond doubt that the plaintiffs could not succeed;
> (c) The novelty of the action will not militate against the plaintiffs; and
> (d) The statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting deficiencies.[22]

29. On an application to strike, conclusions of law, unlike material facts, are not assumed to be true.[23]

30. The existence of a fiduciary duty or public law duty is not an allegation of fact, but is rather a conclusion of law which must depend on allegations of fact. Rule 3-7(9) provides that "conclusions of law may be pleaded only if the material facts supporting them are pleaded."[24]

31. It is clear that the Court may also strike out less than an entire pleading where the portions to be struck out constitute separate and distinct causes of action which cannot succeed.[25]

32. Charter claims are as susceptible to being struck as other kinds of claims. As stated by M.E. Saunders J.A. for the British Columbia Court of Appeal:

> [A] s. 15 enquiry requires the court to not only review the particular deficiency alleged, but to do so in the context of a comparator group that is chosen bearing in mind the characteristics of the individual. Although the Association contends that it is for the trial judge to determine whether there is a *Charter* breach justifying the relief sought, the plaintiff is still required to plead material facts that warrant the court's enquiry into the matter. This means **there must be a pleading that, if all facts are taken as true, can lead to the relief sought**. Such is not the case here.[26] [Emphasis added]

---

[21] See *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at para 15; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at page 980.

[22] *Endean v Red Cross Society* (1997), 148 DLR (4th) 158 (BCSC) at para 26, citing Moldaver J. in *Abdool v. Anaheim Management Ltd.* (1995), 21 OR (3d) 453 (Ont DC).

[23] *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 (CanLII) at para 30.

[24] *Crooks v. Manolescu*, [1995] B.C.J. No. 17 (Q.L.) (S.C.) at para 8, cited approvingly in *Young v. Borzoni et al*, 2007 BCCA 16 (CanLII) at paras 52-53.

[25] *Montgomery v Scholl-Plough Canada Inc* (1989), 70 OR (2nd) 385 at para 6 (HCJ).

[26] *Canadian Bar Association* (2008), 290 DLR (4th) 617 (BCCA) at para 51.

33. Further, a pleading is embarrassing if it does not state the real issue in an intelligible form, is prolix, or includes irrelevant facts, argument or evidence. It is prejudicial if it is constructed in a manner calculated to confuse the defendants and make it difficult, if not impossible, to answer. It is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time.[27] It is "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known to law.[28]

34. The fact that the within action is a class proceeding does not affect how the Court should apply the law on a motion to strike. As the Federal Court of Appeal has stated:

> A motion to strike may be brought at any time against a statement of claim in a proposed class action for failure to comply with the rules of pleading or for failure to state a viable cause of action: *Pearson v. Canada*, 2008 FC 62, [2008] 4 F.C.R. 373 *per* Prothonotary Aalto. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; mandatory and essential it truly is.[29]

35. The Supreme Court of Canada has commented favourably upon the utility of a preliminary motion to strike. In *R. v. Imperial Tobacco Canada Ltd.*, Chief Justice McLachlin noted:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods—efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be—on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.[30]

36. The Defendant acknowledges the gravity of the injuries suffered by many of the members of the proposed class. Indeed, the legislation has as an objective the amelioration of the effects of such injuries. In the submission of the Defendant, however, the present action cannot be the appropriate vehicle for the expression of the concerns raised by the Representative Plaintiffs, which are directed at validly enacted federal legislation expressing policy decisions of the Government that are not subject to review by the Courts.

---

[27] *McNutt v. AG. Canada et al*, 2004 BCSC 1113 (CanLII), 2004 BCSC 1113 at paras. 40-41.
[28] *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.).
[29] *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para 40.
[30] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at paras 19-20 [*Imperial Tobacco*]

Public Law Duty

37. The Defendant submits that there is no cause of action recognised in Canadian law based upon breach of a public law duty of care. As described by Justice Roberts of the BC Supreme Court in *Bingo City Games Inc.*, "there is no such beast."[31] The Supreme Court of Canada has repeated on a number of occasions that no cause of action can be founded upon a breach of a public law duty.[32] The Plaintiffs' claims as to the breach of a public law duty are bound to fail and as such, should be struck.

38. At no point in the Claim do the Plaintiffs plead that Canada owes them a private law duty of care, nor could they on the facts. Absent a private law duty of care, there can be no tort based cause of action against Canada[33].

39. Further, a significant portion of the Claim focuses on allegations that the provisions contained in the legislation are arbitrary, sub-standard and inadequate.[34] These provisions are however contained in legislation and the law is clear that the exercise of a legislative function does not give rise to any private law duty of care,[35] nor can validly enacted legislation be challenged on such a ground.

40. As Huddard J.A. stated in *Kimpton*:

> As I view the case against British Columbia, there is only one issue. In my view the chambers judge correctly found the establishment of the BCBC [B.C. Building Code] to be an act of lawmaking. See *Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)* (1970), [1971] S.C.R. 957. Immunity from the application of tort law flows from that fact. As the chambers judge noted at paragraph 63 of his reasons for judgement, "[t]o the extent a government negligently governs, the voting public may impose a potential consequence at an election." It follows I would not accede to the grounds of appeal that apply to British Columbia.[36]

41. To the extent the Claim makes allegations against Canada with respect to the subject matter of the legislation, the Defendant submits that such claims must be struck on the basis of the *Welbridge* principle.

42. The Plaintiffs have not pleaded any action, conduct or exercise of discretion that deviates from the legislation. In fact, the harm that the Plaintiffs complain of is based on the proposition that Canada has proceeded in accordance with the legislation.[37] Canada's conduct in that regard is protected, not only as a function of lawmaking but also as a

---

[31] *Bingo City Games Inc & Other v BC Lottery Corp*, 2003 BCSC 637 at para 56.
[32] 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.
[33] *Imperial Tobacco*, *supra* note 30 at para 38.
[34] Constitutionality will be dealt with later.
[35] *Welbridge Holdings Ltd v Winnipeg*, [1971] SCR 957.
[36] *Kimpton v Canada (AG) and British Columbia (HMTQ)*, 2004 BCCA 72 (CanLII) at para 6.
[37] Claim at para 369.

formulation of policy. As the Supreme Court of Canada stated in *Imperial*, "...where it is 'plain and obvious' that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort."[38]

Honour of the Crown

43. The Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*[39] has recently held that the Honour of the Crown "is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled."[40]

44. The Court outlined four situations where the Honour of the Crown has been applied:

    1. The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
    2. The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982,* and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: *Haida Nation*, at para. 25;
    3. The honour of the Crown governs treaty-making and implementation: *Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
    4. The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47.[41]

45. No Canadian court has applied the concept of Honour of the Crown outside of the aboriginal context and indeed, the Supreme Court of Canada has stated that, "[t]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."[42]

46. The Honour of the Crown concept has been applied to situations in which the Crown asserts discretionary control over a specific Aboriginal interest, with respect to the Crown's

---

[38] *Imperial Tobacco, supra* note 30 at para 91.
[39] 2013 SCC 14 (CanLII).
[40] *Ibid* at para 73, emphasis in original.
[41] *Ibid.*
[42] *Ibid* at para 66.

conduct in negotiations and consultations and with respect to interpretation (land grants, section 35 of the Constitution, etc.)

47. The Plaintiffs allege, at paragraph 248 of the Claim, that the "Honour of the Crown is one of the fundamental principles underlying the Canadian constitution."[43] There is, however, no jurisprudence which supports this proposition or its use outside of the aboriginal context. There is no indication whatsoever in the jurisprudence that the concept may be used to invalidate otherwise validly enacted legislation.

48. Indeed the Supreme Court of Canada has noted that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. See *Bacon v. Saskatchewan Crop Insurance Corp.* 1999 CanLII 12234 (SK CA), (1999), 180 Sask. R. 20 (C.A.), at para. 30; Elliot, at pp. 141-42; Hogg and Zwibel, at p. 718; and Newman, at p. 187."[44]

49. Section 52 of the *Constitution Act, 1982* provides that: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." However, for a law to be declared of no force and effect, it is essential that a "provision" of the Constitution with which it is inconsistent be identified. Absent the *Charter* claims, which will be addressed below, the plaintiffs have not identified any provision of the Constitution with which the legislation is said to be inconsistent.

50. The principle of parliamentary sovereignty stands for the proposition that Parliament may make or unmake laws on any matter that falls within its legislative competence and that are compliant with the *Charter*.[45] There is no allegation in the Claim that the legislation is *ultra vires* the legislative competence of Parliament, nor could such an allegation reasonably be made.

Honour of the Crown and Fiduciary Duty

51. It appears from paragraph 250 of the Claim that 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."[46]

52. The Plaintiffs plead that:

> Where, as is the case with those who serve and have served, including the Plaintiffs and proposed Class members, the Crown has assumed a discretionary control over specific

---

[43] Claim at para 248.
[44] *Imperial Tobacco, supra* note 30 at para 66.
[45] See *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 at para 55.
[46] Claim at para 249.

interests, the Honour of the Crown gives rise to a fiduciary duty in relation to specific interests flowing from their service to the country."[47]

53. This pleading mirrors the Supreme Court of Canada's explanation of Honour of the Crown in *Haida,*[48] with the omission of "Aboriginal" from the Court's description of "specific Aboriginal interests."[49]

54. Assuming that the concept of the Honour of the Crown could apply in the present situation, (which is denied) and that it is not limited to "specific Aboriginal interests," the plaintiffs have not in any event pleaded a specific interest that could give rise to the Honour of the Crown and a consequent fiduciary duty. As stated in *Haida*:

> As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > ..."fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship...overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.[50]

Without a specific interest being articulated, the Honour of the Crown cannot give rise to a fiduciary duty.

55. It is submitted that fiduciary duties will not often be imposed on the government, even where a fiduciary duty appears, at first, to be made out based on the general principles.[51] A fiduciary duty requires that the person who owes the duty put the interests of the person to whom the duty is owed above their own interests. However, because the government represents and must serve multiple public interests, it will not normally be expected that government will be bound to act in the best interests of one individual or group in preference to all others.[52]

56. As stated by the Supreme Court of Canada in *Elder Advocates*:

> Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance:

---

[47] Claim at para 249.
[48] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
[49] *Ibid* at para 18.
[50] *Ibid.*
[51] *Alberta v Elder Advocates of Alberta Society,* 2011 SCC 24 at para 36, [2011] 2 SCR 261 [*Elder Advocates*].
[52] *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71.

Sagharian (Litigation Guardian of) v. Ontario (Minister of Education), 2008 ONCA 411 (CanLII), 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408 (CanLII), [2002] 2 F.C. 484, at para. 178.[53]

57. What the Plaintiffs complain of is not the assumption of discretionary control over specific interests, but rather Parliament's decision, by the enactment of legislation which was clearly within its legislative competence, to provide a particular regime of benefits and entitlements to those individuals affected by disabilities incurred during their service in the Armed Forces.

58. It is submitted that 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.[54]

59. In the event it is asserted that the alleged fiduciary duty attaches to something other than the passage of legislation, it is submitted that 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.[55]

60. The Plaintiffs have pleaded "Canada's Covenant to Service Members and Veterans" and cited a number of statutes in support of this proposition.[56] However, if the fiduciary relationship is said to arise from a statute, the language in the legislation must clearly support it.[57] None of the statutes cited contains any language that suggests Canada has undertaken an obligation of undivided loyalty to the Plaintiffs, in preference to all others, so as to create a fiduciary relationship.

61. The only commitments alleged in the Claim are to provide veterans with compensation that is variously described as, "fair," "equitable," "suitable," and "adequate." No facts have been pleaded to suggest that these terms were ever defined, much less defined as requiring that Canada provide compensation based upon the principle of undivided loyalty.

62. A further requirement for the establishment of a fiduciary duty in the government context is that the interest at issue must be a specific private law interest to which the person or class

---

[53] *Elder Advocates*, *supra* note 51 at para 44.
[54] *Ibid* at para 62.
[55] *Ibid* at paras 31, 58, 59.
[56] See Claim at para 229, *Pension Act*, RSC 1985, c P-6, *War Veterans Allowance* Act, RSC 1985, c W-3, *Veterans Review and Appeal Board Act*, SC 1995, c 18.
[57] See *KLB v British Columbia*, 2003 SCC 51 at para 40, [2003] 2 SCR 403 and *Elder Advocates*, *supra* note 51 at para 45.

of persons has a pre-existing distinct and complete legal entitlement.[58] The entitlement must not be contingent on future government action.[59]

63. The Plaintiffs have not pleaded a specific pre-existing private law interest that could be subject to a fiduciary duty. The only interest alleged in the Claim is with respect to compensation under the legislation. The Supreme Court of Canada has held that, "[a]ccess to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty."[60] This is due to the fact that such an entitlement is the creation of public not private law.

64. The distinction between a pre-existing private law interest and a public law entitlement was examined by the Ontario Court of Appeal in *Authorson.*[61] Canada was found to have a fiduciary duty when, under legislation, it took control of managing the pension benefits paid to identified veterans who were incapable of managing the funds themselves. Undertaking to manage the pension benefits paid to those individuals was distinguished from the award, increase, decrease, suspension, or cancellation of such benefits, which could not give rise to a fiduciary duty.

65. Finally, even assuming that a fiduciary duty could exist in the circumstances outlined in the Claim, no facts have been pleaded to support the legal conclusion that Canada has breached the alleged duty. A fiduciary "does not breach his or her duties by simply failing to obtain the best result for the beneficiary."[62] Fiduciary duties hold the fiduciary to a certain type of conduct; they do not create an obligation to guarantee a particular outcome.

Charter of Rights—Section 15(1)

66. The Plaintiffs allege, at paragraph 391 of the Claim, that "the arbitrary, sub-standard and inadequate support and compensation scheme(s) established by the Defendant under the New Veterans Charter violate the equality rights of the Plaintiffs and the Class protected under s. 15 of the *Canadian Charter of Rights and Freedoms* in a manner that is inconsistent with the principles of fundamental justice.[63]

67. Section 15(1) of the *Charter of Rights* reads as follows:

> 15.(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

---

[58] *Elder Advocates*, supra note 51 at para 51.
[59] *Ibid.*
[60] *Ibid* at para 52.
[61] *Authorson (Guardian of) v Canada (Attorney General)*, 2002 CanLII 23598 (ON CA) at paras 73-74, 215 DLR (4th) 496.
[62] *EDG v Hammer*, 2003 SCC 52 at para 34, [2003] 2 SCR 459.
[63] Claim at para 391.

68. 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.[64]

69. It is submitted that there is no reasonable prospect that the Plaintiffs' Claim can succeed because the Claim is devoid of any supporting allegations whatsoever with regard to either aspect of the test.

70. The Plaintiffs have not identified any enumerated or analogous grounds upon which they intend to base a section 15 *Charter* claim. Factually, they appear to contrast their treatment under the legislation with the treatment of those whose entitlement was pursuant to the former legislation. This however would be a clearly temporal distinction and as noted by Professor Hogg, citing *Hislop:*

    "every change in the law creates a distinction between those who were governed by the law before the change and those who are governed by the new law, but this is not discrimination under s. 15, because a *temporal* distinction is not an analogous ground."[65] [Emphasis in original.]

71. Alternatively, the Plaintiffs may seek to compare themselves with those who can sue in tort or in the context of Workers Compensation schemes or under the *Pension Act* to recover compensation for their injuries. Such a distinction however would turn on the "forum" for compensation, which is clearly not an enumerated or analogous ground for the purpose of s. 15 of the *Charter*.

72. Government is entitled to create different regimes that provide different benefits designed to address different needs (and therefore subject to varying eligibility rules and, potentially, resulting in varying amounts of compensation.) The Ontario Court of Appeal in *Wareham v. Ontario (Minister of Community and Social Services)*, 2008 ONCA 771, confirming (2008), 166 C.R.R. (2d) 162 (Ont. S.C.J.), affirmed that creating different public benefit regimes which entail different access rules does not amount to discrimination. The lower court judgment of Cullity J. is more explicit. He indicated that a s. 15 comparison must be made by having regard to other groups and individuals *who had access to the benefit denied to the claimants*, and not another benefit materially different from the one denied.[66]

---

[64] *Quebec (Attorney General) v A*, 2013 SCC 5 at para 186. This is a slightly modified encapsulation of the s. 15 test unanimously established in *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 and *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, which was (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[65] Peter W Hogg, *Constitutional Law in Canada*, 5th Edition Supplemented, looseleaf (Scarborough: Thomson/Carswell, 2007), page 55-25.

[66] *Wareham v. Ontario (Minister of Community and Social Services)*, 166 C.R.R. (2d) 162 (Ont. S.C.J.) at para 65.

73. The Plaintiffs also fail to plead any facts capable of supporting the proposition that their treatment is discriminatory because (i) it perpetuates prejudice or (ii) it stereotypes.

74. A claim which is completely devoid of material facts in its support cannot succeed and should be struck out.

Charter of Rights—Section 7

75. The Plaintiffs allege, at paragraph 390 of the Claim, that "the arbitrary, sub-standard and inadequate support and compensation scheme(s) established by the Defendant for the Plaintiffs, their families and for the Class in the New Veterans Charter violate s. 7 of the *Canadian Charter of Rights and Freedoms* in depriving the Plaintiffs and the class with [sic] the right to life, liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice."

76. Section 7 of the *Charter* states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

77. The Supreme Court of Canada in *R. v. Malmo-Levine,* [2003] 3 SCR 571 at para. 83 has described two steps in a section 7 Charter claim:

> a) Is there an infringement of one of the three protected interests, that is to say a deprivation of life, liberty or security of the person?
> b) Is the deprivation in accordance with the principles of fundamental justice?

It is submitted that the Plaintiffs have failed to plead the material facts necessary to support either of the two steps.

78. The Plaintiffs have pleaded that they "have suffered real or imminent deprivations of life, liberty [sic] and security of the person contrary to section 7 of the *Charter.*"[67] They have identified the "real or imminent deprivations" to their life and security of the person as the adverse effects on their physical and psychological integrity; their individual human dignity; and their personal autonomy and independence.[68]

79. The Plaintiffs have not however pleaded any material facts to support a conclusion that: the New Veterans Charter adversely affects their alleged section 7 interests; that there has been a deprivation by the state; or that the alleged deprivation was not in accordance with an identified principle of fundamental justice.

Section 7 Interest

---

[67] Claim at para 387(h).
[68] Claim at para 354.

80. The right to life, liberty and security of the person encompasses fundamental life choices, not pure economic interests.[69]

81. While the Plaintiffs appear to identify their section 7 interests as their physical and psychological integrity, their individual human dignity, and their personal autonomy and independence, after an analysis of the Claim, it is clear that the interest the Plaintiffs seek to protect is in fact an economic interest: the amount of compensation to which they are entitled.

82. It is the alleged deprivation of this economic interest that the Plaintiffs allege impacts their integrity, dignity, and autonomy. Thus, in paragraph 339 the Plaintiffs state that they, "...have been provided with a total financial compensation package [sic] the New Veterans Charter that is insufficient to maintain a normal lifestyle for those of similar employment background in Canadian society." 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.

83. Economic interests are not, however, interests that are protected by section 7. The language chosen for section 7 of the *Charter* is very different than that used in the United States Constitution and in the *Canadian Bill of Rights*, which explicitly protect property rights. This difference, as Professor Hogg has stated, dictates that "s.7 must be interpreted as not including property ..., as not including *economic* liberty" [Emphasis in original.][70] In keeping with this, Canadian courts have not provided any protection for economic interests under section 7 of the *Charter*.

84. As stated by the New Brunswick Court of Appeal in *Melanson*:

> As mentioned earlier, it is generally accepted that s. 7of the *Charter* does not extend to the protection of economic interests. As Professor Hogg explains, there are good reasons for cautioning against the expansion of the concept of liberty: Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (Scarborough, Ontario: Thomson Canada Limited, 2006), at page 44-9. It is also self-evident that s. 7 makes no reference to the liberty or security of one's property. This means that s. 7 affords no guarantee of compensation or even a fair procedure for the taking of property by government.[71]

Deprivation by the State

85. The only material facts that the Plaintiffs plead with respect to a "deprivation" is that the New Veterans Charter provides less compensation than courts,[72] Workers Compensation

---

[69] *Siemens v Manitoba (AG)*, 2003 SCC 3 at para 45, [2003] 1 SCR 6; *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 81, [2002] 4 SCR 429 [*Gosselin*].
[70] Peter W Hogg, *Constitutional Law in Canada*, 5th Edition Supplemented, looseleaf (Scarborough: Thomson/Carswell, 2007), page 47-10.
[71] *Melanson et al v New Brunswick (Attorney General) et al*, 2007 NBCA 12 at para 25, 280 DLR (4th) 69.
[72] See Claim at paras 331-334, 337, 349, 368, 370.

programs,[73] and the previous *Pension Act* regime.[74] It is submitted, however, that characterizing the difference between what is available under the New Veterans Charter and such other sources as a deprivation cannot be supported. The New Veterans Charter in no way "deprives" the Plaintiffs. As described by the Plaintiffs, the New Veterans Charter provides services, assistance, and compensation to them.[75] The legislation confers benefits on the Plaintiffs; it deprives them of nothing. The distinction is significant.

86. As stated by Chief Justice McLachlin, for the majority in *Gosselin*:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.[76] [Emphasis in original.]

87. The Plaintiffs are seeking an increase in the amount of benefits that they are entitled to receive, not the elimination of a deprivation. Simply stated, the Plaintiffs are seeking to impose a positive obligation on Canada, which is something that cannot be done under section 7 of the *Charter*.[77]

Remedies under Section 24(1) of the Charter

88. The Plaintiffs also seek remedies under section 24(1) of the Charter, which reads:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

89. 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."[78] In such cases, the unconstitutional actions, while performed under the authority of a particular law, do not flow inexorably from that law; rather, they are the result of the individual government actor exercising a discretion conferred by the law, and doing

---

[73] See Claim at, paras 337, 343, 344.
[74] See Claim at paras 335-336.
[75] Claim at para 5.
[76] *Gosselin, supra* note 69 at para 81.
[77] Cases standing for proposition that *Charter* does not typically impose positive obligations See *Russell v Ontario (Health Services Restructuring Commission)*, 175 DLR (4th) 185, [1999] OJ No 2045, at para 23, citing *Ferrel v Ontario (Attorney General)* (1998), 42 OR (3d) 97 (CA), leave to appeal denied: [1999] SCCA No 79. No positive obligations under s. 7: *Flora v Ontario (Health Insurance Plan, General Manager)* [2008] OJ No 2627; *Lalonde v Ontario* (2001), 56 OR (3d) 505 at para 94.
[78] *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.

so in an unconstitutional manner. If the particular action is found to violate the *Charter,* it is remedied under s. 24(1), but the law which afforded the discretion stands, since the discretion it affords may be exercised in a manner which does not violate the *Charter.*

90. The Plaintiffs, however, have not alleged any actions that are unconstitutional. The crux of the Plaintiffs' claim is that the New Veterans Charter violates the Plaintiffs' *Charter* rights. The Plaintiffs have stated that the legal basis for their claim includes:

> 390. Further, the arbitrary, sub-standard and inadequate support and compensation scheme(s) established by the Defendant for the Plaintiffs, their families and for the Class in the New Veterans Charter violate s. 7 of the *Canadian Charter of Rights and Freedoms* in depriving the Plaintiffs and the Class with [sic] the right to life, liberty and security of the person in a manner that is inconsistent with the principles of fundamental justice.
>
> 391. Further, and in the alternative, the arbitrary, sub-standard and inadequate support and compensation scheme(s) established by the Defendant under the New Veterans Charter violate the equality rights of the Plaintiffs and the Class protected under s. 15 of the *Canadian Charter of Rights and Freedoms* in a manner that is inconsistent with the principles of fundamental justice.

91. It is clear then that it is the legislation which the Plaintiffs attack and not any individual action by a government official.

92. It is, in addition, trite law that 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)."[79] In the Supreme Court's words:

> ...well-established principles of public law rule out the possibility of awarding damages when legislation is declared unconstitutional, be it on the grounds of a violation of the separation of legislative powers within the Canadian federation or of non-compliance with the *Canadian Charter.*[80]

93. The Court's position was explained in *Mackin v. New Brunswick (Minister of Justice),*[81] where it stated:

> [a]ccording to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg* [1971] S.C.R. 957;

---

[79] *Schachter, supra* note 77 at page 720.
[80] *Québec (Commission des droits de la personne et des droits de la jeunesse)* v *Communauté urbaine de Montréal,* 2004 SCC 30 at para 19, [2004] 1 SCR 789.
[81] 2002 SCC 13, [2002] 1 SCR 405 [*Mackin*]. See also *Guimond v Quebec (Attorney General)* [1996] 3 SCR 347 at para 18.

Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42.) (Emphasis added, J. Dryer.)[82]

94. Noting the applicability of this principle in the *Charter* context, the Court continued:

> ...the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded. (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.))[83]

95. It is well-established, based on the foregoing, that s. 24(1) damages awards will generally not be available to remedy government actions taken to give effect to laws which are valid at the time but subsequently declared to be invalid pursuant to s. 52(1). The only exception to this rule is in cases of government conduct that is clearly wrong, in bad faith, or an abuse of power.

96. This principle was recently reaffirmed by the Supreme Court of Canada in *Vancouver (City) v. Ward*:[84]

> In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power:"
>
> > para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid.
> >
> > ...
>
> Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act*, 1982: *Mackin*, at para. 81."[85]

---

[82] *Mackin, supra* note 81 at para 78.
[83] *Ibid* at para 79.
[84] 2010 SCC 27, [2010] 2 SCR 28.
[85] *Ibid* at paras 39 and 41.

97. 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.[86] 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.

Principles of Fundamental Justice

98. In *Canadian Foundation for Children, Youth and the Law,*[87] the Supreme Court of Canada stated the following with regard to the principles of fundamental justice:

> Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74 (CanLII), at para. 113.
>
> First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee;" second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 503.
>
> Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice.
>
> Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.[88]

99. The Plaintiffs have not identified any principle of fundamental justice that they contend has been violated. In *Auton,*[89] the Supreme Court of Canada rejected a claim under section 7 of the *Charter* for failing to clearly identify the principle of fundamental justice alleged to have been breached.[90]

100. The Plaintiffs have alleged in the Claim that the New Veterans Charter is arbitrary.[91] The allegations that the New Veterans Charter is "arbitrary" focus on the limits set for disability benefits. An example can be found at paragraph 368 of the Notice of Civil Claim, which alleges, "...that capped disability benefits payable are set arbitrarily and inappropriately

---

[86] See for example Statement of Claim para 369.
[87] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4.
[88] *Ibid* at para 8.
[89] *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657.
[90] *Ibid* at para 66.
[91] Claim at paras 348, 349, 354, 370, 389.

low" and at paragraph 390, which references "...the arbitrary, sub-standard and inadequate support scheme(s)..."

101. The British Columbia Court of Appeal, in *PHS Community Services*, has applied the following test to determine if a law is arbitrary:

> Mr. Justice Binnie and LeBel J. in *Chaoulli* articulated a convenient three-step analysis based on the *Rodriguez* test for arbitrariness:
> (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 (at para. 235)?"[92]

102. The Plaintiffs' 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. The Plaintiffs in fact plead that one of the Canadian Forces long-term strategic imperatives is:

> To improve resource stewardship by striking a careful balance between the investments needed to maintain current operations and the investments in people, infrastructure and equipment needed to prepare for emerging risks and future challenges.[93]

103. A limit on benefits is perfectly consistent with the balancing required above. It must also be remembered, as the Supreme Court of Canada held in *R. v. Malmo-Levine,*[94] that the *Charter* does not allow the courts to "engage in a free-standing inquiry under s. 7 into whether a particular legislative measure 'strikes the right balance' between individual and societal interest in general."[95]

104. The Plaintiffs argue, in part, that the legislation is "arbitrary" simply because the upper limit of benefits under the New Veterans Charter is different (and less than) the upper limits established by the courts in personal injury litigation. However, the upper limit established by the courts is itself arbitrary in nature. The upper limit on court awarded damages to which the Plaintiffs refer was first established by the Supreme Court of Canada in *Andrews.*[96] In establishing the upper limit, Justice Dickson (as he then was) noted that such an award of damages, "must also of necessity be arbitrary" and "is a philosophical and policy exercise more than a legal or logical one."[97]

---

[92] *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15 at para 275.
[93] Claim at para 318.
[94] 2003 SCC 74, [2003] 3 SCR 571.
[95] *Ibid* at para 96.
[96] *Andrews v Grand & Tory Alberta Ltd*, [1978] 2 SCR 229, 1978 CanLII 1 (SCC).
[97] *Ibid* at page 261.

105. This court imposed cap, while instituted prior to the enactment of the *Charter*, has withstood *Charter* scrutiny by the British Columbia Court of Appeal,[98] despite being "arbitrary" in nature.

106. Caps or limits set out for particular types of injuries in provincial insurance statutes have withstood *Charter* scrutiny by the Courts of Appeal of Alberta[99] and Nova Scotia, [100] and the Ontario Superior Court.[101]

107. As the Plaintiffs have failed to plead material facts to support either of the two steps required to establish a section 7 *Charter* claim, it is plain and obvious that this claim has no reasonable prospect of success and should be struck out.

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

108. The Plaintiffs have alleged that they have been unlawfully deprived of their property rights under the *Canadian Bill of Rights*[102] 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. Even if the Plaintiffs had pleaded material facts in support of this allegation, it would remain plain and obvious that no reasonable cause of action based upon the *Bill of Rights* or Section 26 of the Charter could be made out.

109. In *Authorson,*[103] the Supreme Court of Canada examined the impact of the *Bill of Rights* on duly enacted legislation. In that case, plaintiffs argued that because they were given no opportunity to comment or offer input on the proposed legislation, they were deprived of their property rights under the *Bill of Rights*. The Court held that a court could not compel Parliament to change its legislative procedures based on the *Bill of Rights* and that due process protections cannot interfere with the right of the legislative branch to determine its own procedure.[104] *Authorson* dealt with a specific group of disabled veterans to whom Canada conceded it owed a fiduciary duty. Despite any duties that were owed by Canada, the Court held that, "[t]he due process protections of property in the *Bill of Rights* do not grant procedural rights in the process of legislative enactment"[105] and that "...there is no due process right against duly enacted legislation unambiguously expropriating property interests."[106]

110. Based upon the Supreme Court of Canada's conclusions in *Authorson*, even a properly pleaded claim based upon the *Bill of Rights* would be doomed to fail.

---

[98] *Lee v Dawson*, 2006 BCCA 159, 267 DLR (4th) 138.
[99] *Morrow v Zhang*, 2009 ABCA 215, 307 DLR (4th) 678.
[100] *Hartling v Nova Scotia (Attorney General)*, 2009 NSCA 130 (CanLII).
[101] *Hernandez v Palmer*, [1992] OJ No 2648 (Gen Div).
[102] Claim at para 387(l).
[103] *Authorson v Canada* (AG), 2003 SCC 39, [2003] 2 SCR 40.
[104] *Ibid* at para 40.
[105] *Ibid* at para 62.
[106] *Ibid* at para 63.

111. Section 26 of the *Charter* does not provide the basis for a stand-alone cause of action. The section does not guarantee property rights, but rather only indicates that the *Charter* does not limit or interfere with any additional rights which already existed.[107] There is no allegation in the pleadings that the *Charter* has been applied in a manner that limits or interferes with existing rights.

United Nations Declaration

112. It is submitted that it is also plain and obvious that the *United Nations Universal Declaration of Human Rights* ("Declaration") cannot support a cause of action in Canadian domestic law.

113. Declarations of the United Nations General Assembly do not have and are not intended to have any binding legal effect.[108] In essence, they are general policy or guidance documents meant to project the values agreed upon by the General Assembly in accordance with its mandate, including the promotion of human rights.[109]

114. Declarations, international treaties and other international instruments are enforceable domestically only through implementing legislation. Such provisions are not part of Canadian law and cannot independently nourish the court's jurisdiction under the *Charter* or otherwise. They must, to have direct effect, be implemented by legislation to ensure that they are effected under domestic law.[110]

115. This principle was affirmed by the Ontario Court of Appeal in *Ahani v. Canada (Attorney General)*:

> [34] The principle that international treaties and conventions not incorporated into Canadian law have no domestic legal consequences has been affirmed by a long line of authority in the Supreme Court of Canada. For example, in *Capital Cities Communications Inc., Taft Broadcasting Co. and WBEN, Inc. v. Canadian Radio Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, the court considered the effect of the Inter-American Radiocommunications Convention of 1937, which Canada had ratified but not incorporated into its domestic law. Writing for a majority of the court, Laskin C.J.C. held, at p. 173, "[t]here would be no domestic, internal consequences unless they arose from implementing legislation giving the Convention a legal effect within Canada." And more recently in *Baker v. Canada*

---

[107] *R v MacAusland et al*, (1985), 19 CCC (3d) 365 (PEICA).

[108] *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.

[109] See also: General Assembly of the United Nations, Backgrounder Regarding the "Functions and Powers of the General Assembly pars. 3 and 5, Affidavit of Claudia Rutherford, Exs. P, Q and R, AGC Record at Tab 3(P), (Q) and (R).

[110] Peter W Hogg, *Constitutional Law in Canada*, 5th 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.

> *(Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at 861, the full court agreed with L'Heureux-Dubé J. that "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute."[111]

116. It is submitted that all allegations with respect to this Declaration should be struck as failing to disclose a reasonable cause of action.

The Canadian Human Rights Act

117. It is plain and obvious that the Plaintiffs do not have a reasonable cause of action based on the *Canadian Human Rights Act* ("*CHRA*.") As such, the allegations contained at paragraphs 375 – 377 should be struck.

118. The Defendant submits that it is not open to the Plaintiffs to pursue *Canadian Human Rights Act* claims other than through the administrative vehicle of the statute—in this case, the Canadian Human Rights Tribunal. The Plaintiffs cannot assert a claim under the *Canadian Human Rights Act* in the Supreme Court of British Columbia.[112]

119. Even if the Plaintiffs were able to pursue an action based on an alleged failure to accommodate the needs of disabled individual class members pursuant to the *CHRA*, under section 15(9) of the *Canadian Human Rights Act,* the case law is clear that such an action would fail.

120. Section 15(9) of the *Canadian Human Rights Act* is an exception to the requirement that an employer establish accommodation to the point of undue hardship, though the provision might more properly be characterized as a statutory acknowledgement of what jurisprudence already established: that accommodation by the Canadian Forces of an individual who cannot perform a soldier's duties will always constitute undue hardship.[113]

121. In *Best v. Canada,*[114] the Federal Court described the impact of section 15(9) as follows:

> [It] provides that the Universality of Service policy is a bona fide occupational requirement and is thus an exception to the requirement under subsection 15(2) CHRA to establish that accommodation would result in undue hardship…The above provision means that the policy itself cannot be challenged as discriminatory.

---

[111] *Ahani v Canada (Attorney General)*, 2002 CanLII 23589 (ON CA) per Laskin JA, at para 34. See also *Dumont c Québec (Procureur général)*, 2012 QCCA 2039, at paras 111 and 118 (leave to appeal to SCC denied, 16 May 2013, docket # 35168).

[112] [1981] 2 SCR 181.

[113] 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).

[114] 2011 FC 71, at paras 26-27, aff'd 2011 FCA 351.

122. Finally, it must be noted that accommodation is not about compensation; it is about adjusting work duties so that an individual will be permitted within reason to participate in the workplace. In, *Hydro-Québec,*[115] the SCC held:

> [14] As L'Heureux-Dubé J. stated, the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.
> [15] However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration. The burden imposed by the Court of Appeal in this case was misstated. The Court of Appeal stated the following:
>
> > [translation] Hydro-Québec did not establish that [the complainant's] assessment revealed that it was impossible to [accommodate] her characteristics; in actual fact, certain measures were possible and even recommended by the experts. [Emphasis added; para. 100.]
>
> [16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

123. Regarding those claimants who are unable to meet the requirements of the universality of service policy, it is submitted that for the Canadian Armed Forces to be required to accommodate them would meet the definition of undue hardship. There is no entitlement to compensation in relation to a failure to accommodate under the Canadian Human Rights Act. As a result, even assuming that such a cause of action could be asserted in this Court, it could not succeed.

124. For these reasons, it is plain and obvious that the Plaintiffs have no cause of action under the *Canadian Human Rights Act.*

Crown Liability and Proceedings Act, Section 9

125. Apart from the general insufficiency of the Claim, the action brought by the Representative Plaintiffs is in any event statute barred by virtue of the provisions of section 9 of the *Crown Liability and Proceedings Act ("CLPA",)* which reads as follows:

> 9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue

---

[115] *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, [2008] 2 SCR 561.

> 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.[116]

126. The purpose of this section is to prevent double recovery by way of a civil action for damages where a pension or compensation has been paid. As stated by the Supreme Court of Canada in *Sarvanis v. Canada:*

> In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.[117]

127. The Supreme Court of Canada then went further to state that:

> This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 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.[118]

128. It is submitted that, based upon the holding of the Supreme Court of Canada in *Sarvanis*, it is plain and obvious that 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 that on that basis alone, the claims must be struck out.

129. There is no allegation whatsoever that seeks to impugn section 9 of the *Crown Liability and Proceedings Act* or attack its validity.

130. Section 9 of the *CLPA* has been applied to cases involving military disability pensions on numerous occasions, resulting in the claims being dismissed on motions to strike[119] and motions for summary judgement.[120]

131. In addition, several courts, including the British Columbia Court of Appeal in *Sulz v. Minister of Public Safety,*[121] have applied s. 9 of the *CLPA* as a bar to claims alleging breach

---

[116] RSC 1985, c C-50, s 9.
[117] *Sarvanis v Canada*, 2002 SCC 28 at para 28, [2002] 1 SCR 921.
[118] *Ibid* at para 29.
[119] *Brownhall v. Canada* 2007 CanLII 31749 (ON SCDC) [*Brownhall*]; *Dionne v. Canada* 2002 CanLII 49481 (ON SC), (2002), 59 OR (3d) 566 (CA).
[120] *Sherbanowski v Canada*, 2011 ONSC 177 (CanLII) [*Sherbanowski*].
[121] 2006 BCCA 582 (CanLII) [*Sulz*].

of fiduciary duties where the claims were made in respect of the same factual basis as the compensation paid.[122]

132. In *Dumont v. Canada*, the Federal Court of Appeal held that:

> I conclude that, even if the appellants rely on the fiduciary relationship of the Crown, their actions are essentially tort actions. These actions are prohibited under section 9 of the Act because any loss or damage that is claimed gives entitlement to payment of a pension. These actions must be struck because it is "plain and obvious beyond a reasonable doubt" that they cannot succeed.[123]

133. In *Sherbanowski*, Justice Brown applied the following analysis used by Justice Swinton of the Ontario Divisional Court in *Brownhall* to uphold the motion court's striking out of a statement of claim:

> [37] *Sarvanis* makes it clear that the question to be asked is whether the factual basis for the pension and the action is the same. Does the same loss or injury underlie both? If it is plain and obvious, on the facts as pleaded, that the same loss underlies both, the action is barred by s. 9 of the *CLPA*.
>
> ...
>
> [44] Section 9 of the *CLPA* requires a determination whether the respondent's pension is paid "in respect of . . . injury, damage or loss in respect of which the claim is made". Applying *Sarvanis* in the context of a Rule 21 motion, the question to be asked is whether it is plain and obvious that the factual basis for the pension and the claims in the civil action is the same...
>
> ...
>
> [50] In *Sarvanis,* the Supreme Court observed that all damages arising out of an incident that entitles a person to a pension are barred by s. 9, if the pension is given on the same basis as the injury or damage giving rise to the claim... In Dionne, *supra*, the claim was dismissed on a summary judgment motion, even though the plaintiff made allegations that his initial injury had been aggravated by subsequent negligence by military officials. Similarly, in *Kift v. Canada (Attorney General),* [2002] O.J. No. 5448 (S.C.J.), the court granted summary judgment and held that the action was barred because the plaintiff had been awarded a pension for post-traumatic stress disorder suffered as a result of a motor vehicle accident. The fact that he claimed damages for conduct occurring after the accident, such as a failure to transfer and to provide proper medical treatment, did not take the action outside s. 9. See also *Sulz v. Canada (Attorney General)*, [2006] B.C.J. No. 121 (S.C.), which was decided after a trial.[124]

134. In *Sherbanowski*, as in the case at bar, a plaintiff had received a disability award under the New Veterans Charter. He had subsequently brought an action seeking general damages, loss of past and future income that were not compensated by a VAC disability award, aggravated, exemplary and punitive damages, based on causes of action including breach of

---

[122] *Ibid*; *Lebrasseur v Canada*, 2007 FCA 330 (CanLII).
[123] [2004] 3 FCR 338 at para 73.
[124] *Sherbanowski, supra* note 120 at para 15.

sections 7and 8 of the *Canadian Charter of Rights and Freedoms* and breach of fiduciary duty. His mother also claimed damages for loss of care, guidance and companionship pursuant to the *Family Law Act.*

135. In *Sherbanowski*, as in the case at bar, a complete identity existed between the losses asserted by the plaintiff veteran in his civil action and the losses for which awards of disability benefits had been granted to him. The factual basis upon which the plaintiffs rested their claims for damages were the same as those upon which they rested their applications for disability awards under the New Veterans Charter. Their claims, including breach of fiduciary duty and breach of *Charter* rights, all either arose out of, or were directly connected with, the veteran plaintiffs' service in the Forces and they sought compensation for disabilities or injuries resulting from service-related injury or disease.[125] Their action was, accordingly, dismissed.

136. The Defendant submits that it is plain and obvious that the Plaintiffs' claims are statute barred by virtue of section 9 of the *CLPA*. The crux of the Plaintiffs' Claim is that the quantum of compensation provided with respect to their specific circumstances is inadequate. Such a claim cannot succeed in light of section 9.

Statutory Instruments Act

137. The Plaintiffs acknowledge, at paragraph 358 of the Claim, that the Table of Disabilities upon which assessments of disability are based, is by statute, exempt from the requirements of sections 3, 5, and 11 of the *Statutory Instruments Act.*[126] Notwithstanding this concession, it is alleged at paragraph 360 that the Table and instructions have not been referred to a Committee of the House of Commons or of the Senate as is allegedly required by section 19 of the *Statutory Instruments Act.*

138. The Defendant submits, however, that 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.

139. 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.

140. It is also alleged that the Table of Disabilities and instructions are invalid because they are said not to have been enacted as required by the statute pursuant to which they were made; constitute an unusual or unexpected use of the authority pursuant to which they were made; and trespass on the Plaintiffs' existing rights and freedoms and are inconsistent with the

---

[125] *Sherbanowski, supra* note 120 at paras 43-45.
[126] *Statutory Instruments Act*, RSC 1985, c S-22.

Charter and the *Bill of Rights*. The Plaintiffs have pleaded no material facts to support any of these conclusions of law.

141. The Plaintiffs' allegations reproduce three of the four criteria in respect of which proposed regulations subject to subsection 3(2) of the *Statutory Instruments Act* must be examined by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice. However, as acknowledged by the Plaintiffs, the Table of Disabilities and instructions are not subject to section 3 of that *Act*. In any event, pursuant to section 8 of that *Act,* no regulation is invalid by reason only that it was not examined in accordance with subsection 3(2).

Conclusion

142. In the submission of the Defendant, there are no allegations in the Claim that have any reasonable prospect of succeeding should this action be permitted to continue to trial. Accordingly, it is submitted that the Claim must be struck out in its entirety pursuant to subrules 9-5(1) (a) to (d) on the grounds that the Claim fails to disclose any reasonable claim, is unnecessary, frivolous or vexatious or otherwise an abuse of the process of the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, in the Province of Ontario, this 31st day of May, 2013.

Jasvinder S. Basran
Regional Director General

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

Fax: 604-775-5942

Lawyers for the Defendant

TO: **The Registrar**

AND TO: **Donald J. Sorochan, Q.C.**
Miller Thompson LLP
1000-840 Howe Street
Vancouver, BC V6Z 2M1
Tel: (604) 643-1214
Fax: (604) 643-1200

Lawyer for the Plaintiffs