

**BRIEFING MEMORANDUM
SCOTT AND OTHERS V. ATTORNEY GENERAL OF CANADA
(Veterans Class Action)**

**Prepared by Miller Thomson LLP
February 18, 2014**

This memorandum is to update the developments in this litigation.

The Action

Miller Thomson commenced an action in the Supreme Court of British Columbia in October 2012 on behalf of all veterans who have made claims under the New Veterans Charter ("NVC"). This action has been brought as a class action under the British Columbia *Class Proceedings Act* with a global focus, rather than pursuing individual soldier's claims against the NVC. By bringing this lawsuit on behalf of all veterans that have made claims under the NVC, the intention is to show that the NVC is inherently unfair, not in accordance with the duties of honour and loyalty that the Crown owes to its soldiers, and contrary to the *Canadian Charter of Rights and Freedoms*.

Federal Government preliminary motion to have the case struck out

At the outset of the litigation and before filing a Response to Civil Claim, the federal government brought a preliminary motion to dismiss the action. This motion was argued before the assigned Case Management Judge, Mr. Justice Weatherill on July 22 to 24, 2013.

On September 6, 2013, Mr. Justice Weatherill issued his reasons for judgment dismissing the federal government's motion to strike the claim and permitting the actions to proceed with some minor amendments to the Notice of Civil Claim.

The Plaintiffs filed a further amended Notice of Civil Claim as directed by the Court and proceeded with the action.

Appeal of the rejection of the preliminary motion to have the case struck

On October 2, 2013 the federal government filed a Notice of Appeal to the British Columbia Court of Appeal seeking to overturn the decision of Mr. Justice Weatherill and have the action struck out.

Both the federal government (as Appellant) and the Plaintiff veterans (as Respondents) have filed factums (written memoranda of argument) with the Court of Appeal. Depending on the availability of the court, the appeal may be heard as early as June, 2014.

Continuation of the action

Pleadings

Although the motion to dismiss the action is being appealed, The Plaintiffs brought a motion before the Case Management Judge that other aspects of the action continue while the appeal.

The Plaintiffs brought a Case Management application before Mr. Justice Weatherill on November 12, 2013, which resulted in an order that the federal government shall file and serve its Response to Civil Claim on or before January 31, 2014. The federal government complied with this deadline.

Position on Key Issues

The federal government has now filed a written factum with the Court of Appeal on the appeal from the decision rejecting the motion to dismiss the claim and a Response to Civil Claim outlining the government's defence to the claim. There is a legal distinction between the positions the government may take in each of these documents. On a motion to strike, 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. In the Response to Civil Claim, the Defendant may take issue with the facts pleaded and assert that they are not true.

With respect to the key constitutional positions raised in the law suit, summarized in the chart below is the position taken by the Plaintiffs and the positions taken by the federal government in their Court of Appeal factum and in their Response to Civil Claim.

Issue – The Social Covenant

Plaintiff	Government factum	Government Response
As a result of the unique sacrifices of members of the Canadian Armed Forces, the plaintiffs and the class members that they represent are the beneficiaries of a Social Covenant by the nation of Canada, through the Crown, to those who have served their country, which promises them adequate recognition and benefits.	Nowhere in the government's argument dealing with the Honour of the Crown is there any reference to the Social Covenant which the respondents argue the Crown is honour bound to uphold pursuant to the Honour of the Crown.	The defendant pleads that the statements made by Sir Robert Borden and the coalition government in 1917 were political speeches that reflected the policy positions of the government at the time and were never intended to create a contract or covenant. It is further pleaded that at no time were these statements intended to bind future governments and, in any event, the principle of parliamentary sovereignty would have prevented such a result had it been intended.

<p>In the Canadian context, the Social Covenant was first promised to those who served in the Canadian Armed Forces in the First World War, a promise that has been continued to all who have subsequently served and continue to serve Canada. It is the Plaintiffs' position that these historical promises are given a constitutionally protected status by the principles related to the Honour of the Crown, namely that the Crown is bound to act honourably with respect to its solemn obligations.</p>		<p>The defendant admits the content of the legislation referred to but denies that this reiterates or recognizes any alleged social contract or social covenant with the attributes pleaded by the plaintiffs.</p>
<p>The Social Covenant to members of the Canadian armed forces follows upon the Military Covenant which had long been recognized as a commitment of the Crown and British nation and Empire to the British Military (of which the Canadian military was a part until World War I) and is recognized by actions of the Crown and statutes in England since the 16th century.</p>		<p>The defendant admits that items (a) to (e) are accurate quotes from the report entitled "Moving Forward: A Strategic Plan for Quality of Life Improvements in the Canadian Forces" but denies that they are an articulation of any alleged social contract with the attributes pleaded by the plaintiffs.</p>
<p>The speeches of Sir Robert Borden were not selfish political speeches by a politician campaigning for votes or attempting to gain personal advantage; rather, they were solemn addresses of a statesman speaking on behalf of the Canadian nation in the best interest of the country</p>	<p>The government has referred to Sir Robert Borden's speeches setting forth the Social Covenant to the Canadian forces in WWI as "a political speech"</p>	<p>The government expresses its care for veterans through legislation intended to provide an appropriate level of benefits and services to disabled veterans.</p>
<p>Sir Robert Borden's</p>		<p>The defendant pleads that</p>

<p>speeches have significance beyond the fact that they were made by a statesman because:</p> <p>(a) they inspired Canadian troops to great Canadian military victories;</p> <p>(b) a significant proportion of the Canadian soldiers who heard the speeches were casualties of battle for their Country;</p> <p>(c) the sacrifices of the Canadian soldiers resulted in Canada being treated as a country independent of Britain for the first time at the Versailles Peace Treaty proceedings and as an independent treaty signatory; and</p> <p>(d) the sacrifices of the Canadian soldiers resulted in Canada being afforded full legal autonomy by Canada's own declaration of independence, The Statute of Westminster 1931.</p>		<p>there is no written, defined, or articulated "social covenant" or "social contract" between members of the CAF and the government and people of Canada which has the attributes of creating a fiduciary duty on the government's part under which it is obliged to place the interests of disabled veterans above the interests of all other Canadians and as a result of which the government is prohibited from legislating so as to effect any policy change in regard to their compensation and treatment.</p>
<p>The Social Covenant was enshrined in every piece of veterans' legislation until the NVC and found its way into the representations that were made by recruiters to those members who agreed to risk their lives in exchange.</p>		<p>At no time in Canada's history has any alleged "social contract" or "social covenant" having the attributes pleaded by the plaintiffs been given effect in any statute, regulation, or as a constitutional principle, written or unwritten.</p>
		<p>No set of principles exist that can be stated with certainty, understood with clarity, or accepted with unanimity among the people of Canada to define a "social contract" or "social covenant" as alleged.</p>

		The defendant pleads that parliament, within the bounds of constitutional limits, has the unfettered discretion to change or reverse any policy set by a previous government.
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Issue – The Honour of the Crown

Plaintiff	Government factum	Government Response
The Plaintiffs plead that the Social Covenant promises the Plaintiffs and class members adequate recognition and benefits, which promises are given a constitutional protected status by the principles related to the Honour of the Crown	The Honour of the Crown doctrine should only be applied in circumstances that closely parallel those that exist in the Aboriginal context	The defendant pleads that the principle of "the Honour of the Crown" has no application to the factual allegations made by the plaintiffs.
There has been historical application of the Honour of the Crown outside of the Aboriginal context	There are no similarities between the origin, foundation, and history of the Honour of the Crown doctrine as it is known in Canadian law and the way in which the plaintiffs seek to apply it in this action. Extending the doctrine of the Honour of the Crown to Canada's relationship with members of the Canadian Armed Forces would require a monumental change in the law.	The defendant pleads that the principle of the Honour of the Crown is not a fundamental principle underlying the Canadian constitution and is not capable of invalidating otherwise valid legislation.
The government's argument conflates the concept of the Honour of the Crown with the solemn promises to which it is applied and ignores the underlying principles to the Honour of the Crown which are that the Crown will enter into dealings, make grants and carry out its	While the appellant concedes that the doctrine of the Honour of the Crown has evolved in the Aboriginal context, it is submitted that to apply the doctrine to the Canadian Armed Forces would require a major shift in the direction of the law.	The defendant pleads that there are no similarities between the origin, foundation, and history of the Honour of the Crown doctrine as it is known in Canadian law and the way in which the plaintiffs seek to apply it in this action. Extending the doctrine of the Honour of the Crown to

<p>duties with honourable intentions and that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.</p>		<p>Canada's relationship with members of the CAF would require a monumental change in the law.</p>
<p>The notion that the Crown must act honourably is the fundamental principle being espoused; its application will vary with the context.</p>		<p>The defendant pleads that the evolution of the law as it relates to the Honour of the Crown remains confined to the Aboriginal context. Any application outside of the Aboriginal context would require a dramatic shift, not an evolution.</p>
<p>In the context of the Canadian Armed Forces, the concept is applied by the respondents to suggest that the Crown is honour bound to uphold the Social Covenant, the historical promise made to them in exchange for their sacrifices.</p>	<p>In the Aboriginal context, this concept is applied such that the Crown is honour bound to uphold the promises that were made at the time of the Crown's assertion of sovereignty in light of the Aboriginal peoples of Canada's pre-existing sovereignty and territorial rights</p>	
<p>The implementation of the Social Covenant through the concept of the Honour of the Crown is appropriate given the significant constitutional achievements that were achieved by Canada as a result of the Covenant being entered into between Canada and its Armed Forces.</p>	<p>The evolution of the law as it relates to Honour of the Crown remains confined to the Aboriginal context. Any application outside of the Aboriginal context would be a dramatic shift, not an evolution.</p>	
	<p>It is submitted that a court could only dramatically expand the doctrine in circumstances that closely parallel those that exist in the Aboriginal context both in terms of the relationship between Canada and the group asserting the doctrine and in the foundational</p>	

	elements of the doctrine as it applies to that group.	
	<p>The Plaintiffs allege that the Honour of the Crown, as it applies to members of the Canadian Armed Forces, originated in a political speech.</p> <p>It is submitted that, without a similar basis upon which the doctrine can be said to have been founded, and a provision within the written constitution to support it, it is plain and obvious that the Honour of the Crown cannot be extended to encompass the relationship between Canada and members of the Canadian Armed forces.</p>	

Issue – The Charter - section 7

Plaintiff	Government factum	Government Response
<p>The Plaintiffs submit that:</p> <p>(a) The NVC deprives them of their security of the person by failing to provide adequate compensation for their injuries sustained in the service of their country, despite assurances that they would be so compensated;</p> <p>(b) The NVC deprives them of their security of the person as a result of the serious state imposed psychological distress which results from the application of the NVC; and</p> <p>(c) The above deprivations do not accord with the principles of fundamental justice, namely the principle of the Honour of the Crown,</p>	<p>What the plaintiffs seek is to increase the amount of benefits they are entitled to receive; they do not seek to eliminate a deprivation. In other words, they seek to impose a positive obligation on the government that has never before been recognized under s. 7 of the <i>Charter</i>.</p>	<p>The defendant pleads that what the plaintiffs seek is to increase the amount of benefits they are entitled to receive; they do not seek to eliminate a deprivation. In other words, they seek to impose a positive obligation on the government that has never before been recognized under s. 7 of the <i>Charter</i>.</p>

<p>the government's obligations to fulfill its promises, and the Crown's Fiduciary duties.</p>		
<p>In the present case, section 7 is not being invoked to create a positive obligation, but to prohibit the Defendants from enacting legislation that breaches an obligation that already existed and depriving them of the compensation that was owed and promised to them.</p>	<p>There is no jurisprudence which holds that s. 7 of the <i>Charter</i> either encompasses economic rights or creates positive obligations on the state to ensure each person enjoys life, liberty and security of the person.</p> <p>Rather, s. 7 protects against state interference with a person's ability to make essential life choices.</p>	<p>The defendant pleads that the plaintiffs have not been "deprived" of anything. Rather, the NVC confers benefits on the plaintiffs by way of services, assistance, and compensation.</p>
<p>Military service is uniquely distinct from civilian society. The <i>National Defence Act</i>, R.S.C. 1985, c. N-5, includes, embodied in section 23, the obligation to serve. The effect of this statute which obliges members to put themselves at risk, is compounded by the fact that the <i>Crown Liability and Proceedings Act</i>, R.S.C. 1985, c. C-50, prohibits government employees from suing the government</p>	<p>The appellant submits that there is nothing in the facts alleged by the plaintiffs that suggests their circumstances are such as to require such a far-reaching and dramatic change to our understanding of s. 7 <i>Charter</i> rights. For the plaintiffs to succeed, not only must the Court find that economic claims are now protected by s. 7, but further that such protection extends to a positive obligation on the part of government to ensure the security of the plaintiffs' persons, rather than simply to avoid actions which may deprive them of that security, as has been the case to date.</p>	<p>The defendant pleads that economic interests are not protected by s. 7.</p>
<p>The Plaintiffs can demonstrate the significant hardships that are suffered by veterans and their families as a result of the insufficient compensation they received for disabilities</p>		<p>The defendant pleads that s. 7 cannot apply in circumstances concerning the passage of <i>intra vires</i> legislation by Parliament.</p>

that are a direct result of their service to their country.		
The Plaintiffs accept that their claim relates to economic rights, however the case law has not foreclosed the possibility that the <i>Charter</i> can protect such interests.		
The Plaintiffs say that section 7 may be extended to include both economic rights and positive obligations in the special circumstances of this case.		

Issue – The Charter - section 15

Plaintiff	Government factum	Government Response
The Plaintiffs submit that the NVC : (a) creates a distinction based on an enumerated or analogous ground; (b) creates a disadvantage for members of the Class by perpetuating prejudice or stereotyping; and (c) is therefore inconsistent with s. 15(1) of the <i>Charter</i> .	The plaintiffs also fail to plead any facts capable of supporting the proposition that their treatment is discriminatory because it perpetuates arbitrary disadvantage, prejudice, or stereotyping.	The defendant pleads that in order to succeed on this aspect of their claim, the plaintiffs must establish that (a) the law in question creates an adverse distinction based on an enumerated or an analogous ground and (b) the impact of the distinction perpetuates disadvantage, prejudice, or stereotype.
The Supreme Court of Canada has recognized that as society evolves, analogous grounds may be added to those expressly protected under section 15(1)	The plaintiffs 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 which is not an analogous ground for the purpose of s. 15 of the <i>Charter</i> .	The defendant pleads that no circumstances exist in the present case which could create a scenario in which the Court might find that members of the CAF constitute a class of persons analogous to those enumerated ins. 15(1).

<p>The Plaintiffs submit they are members of a class of persons entitled to protection under section 15(1) on the analogous ground of Injured Armed Forces Members.</p>	<p>The plaintiffs seek to compare themselves with those who can sue in tort or in the context of Workers Compensation schemes or under the <i>Pension Act</i> to recover compensation for their injuries. Such a distinction would turn on the "forum" for compensation, which is clearly not an enumerated or analogous ground for the purpose of s. 15 of the <i>Charter</i>.</p>	<p>The defendant denies that the effect of the NVC is to impose a differential treatment on injured members and veterans compared to other Canadians who are injured on the job.</p> <p>Section 15(1) does not prohibit the imposition of differential treatment save where that treatment is discriminatory.</p>
<p>Further, occupational status is recognizable as an analogous ground in the circumstances of this case.</p>		
<p>Military service is uniquely distinct from civilian society. The <i>National Defence Act</i>, R.S.C. 1985, c. N-5, includes, embodied in section 23, the obligation to serve and the universality of service requirement and section 15(9) of the <i>Canadian Human Rights Act</i>, R.S.C. 1985, c. H-6 exempt members from being accommodated in their employment by the Canadian Forces, section 3(1) of the <i>Government Employees Compensation Act</i>, R.S.C. 1985, c. G-5 (the "GECA") specifically excludes members of the regular force of the Canadian Forces from coverage and members rights to collectively bargain are restricted.</p>		
<p>The Plaintiffs submit that they suffer disadvantage, affronts to their human dignity, prejudice and</p>		

stereotype as a result of the distinction created by the NVC		
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Issue – The Charter - section 24

Plaintiff	Government factum	Government Response
The Plaintiffs submit that the wording of section 24 is generous enough to permit a stand-alone remedy for unconstitutional effects, as it confers on the Court discretion to grant “such remedy as the court considers appropriate in the circumstances” to anyone whose rights and freedoms have been infringed.	The plaintiffs, however, have not alleged any action or exercise of discretion that is unconstitutional. The crux of the plaintiffs' claim is that the NVC violates the plaintiffs' <i>Charter</i> rights.	The defendant pleads that an action for damages brought under s. 24(l) of the <i>Charter</i> cannot, as a general rule, be combined with an action for a declaration of invalidity based on s. 52 of the <i>Constitution Act, 1982</i> .
The Plaintiffs submit that a section 24 remedy may be available in conjunction with section 52 for declaratory relief and where there is an abuse of power by failing to act in accordance with the honour of the Crown.	It is the legislation which the plaintiffs attack and not any individual exercise of discretion by a government official.	
	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)	
Acting contrary to the Honour of the Crown is an abuse of power. [NTD: Don I don't think we actually pled this, rather I think our argument was that we are not alleging bad faith etc. but rather that there is still something more in this case which is the breach of the social covenant]	Section 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.	

Issue – Fiduciary Duty

Plaintiff	Government factum	Government Response
<p>In the context of a “unique relationship” where the Crown may unilaterally exercise its discretion in such a way as to affect the legal and practical interests of members of the Armed Forces, the courts must balance the Crown’s fiduciary duties with its legislative authority.</p>		<p>The defendant further pleads that the Crown has not assumed discretionary control over any specific interests of the plaintiffs capable of giving rise to a fiduciary duty, either in fact or in law.</p>
<p>The plaintiffs submit that that the Honour of the Crown gives rise to a fiduciary obligation or a private law duty of care which has been breached by the Government of Canada, in part because of the legislative scheme of the NVC</p>		<p>The defendant pleads that the principle of the Honour of the Crown is not capable of giving rise to a fiduciary duty, either in fact or in law.</p>
<p>Under the NVC legislative scheme, an injured Canadian Forces member, left to the whim of the Crown’s veterans’ disability pension scheme, is the very picture of vulnerability. Only the Crown has the ability to protect a member’s interests and the Crown, through the Social Covenant, has undertaken to make it its first priority to protect those interests when a wounded soldier returns.</p>		<p>The government owes duties and obligations to many groups of individuals who compete for resources, not to mention the duty that it owes to act in the best interests of society as a whole. Deciding how to fund various groups and programs requires constant balancing of competing interests among all segments of the population.</p>
<p>In these special circumstances, the Crown has assumed discretionary control over the specific interests of those who serve and have served, which gives rise to a</p>		<p>Absent a forsaking of all other interests, the plaintiffs’ interest is simply one of many that must be balanced and prioritized.</p>

fiduciary duty in relation to their needs for care and compensation flowing from their service to Canada.		
		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 broader Canadian public. Fiduciary duties do not arise in respect of the government's exercise of its legislative functions.
		The defendant pleads that no specific pre-existing, distinct, and complete legal entitlement exists on the part of the plaintiffs.

Issue – Parliamentary Sovereignty

Plaintiff	Government factum	Government Response
The Plaintiffs say that they are raising a constitutional objection to the NVC on the basis that it violates or is inconsistent with the Constitution of Canada, including the <i>Canadian Charter of Rights and Freedoms</i> .	Even if the doctrine of the Honour of the Crown could be said to extend to the relationship between Canada and members of the Canadian Armed Forces (which is denied) the doctrine cannot be used to invalidate legislation.	Even if the doctrine of the Honour of the Crown could be said to extend to the relationship between Canada and members of the CAF (which is denied) the doctrine cannot be used to invalidate legislation. The defendant pleads that any attempt to use the Honour of the Crown to invalidate legislation would violate the principle of parliamentary sovereignty.
The Constitution of Canada includes the Social Covenant and the concept of the Honour of the Crown	There is no jurisprudence that supports the proposition that the Honour of the Crown principle exists as an unwritten constitutional principle exists	The defendant further pleads that parliamentary sovereignty negates the doctrine of legitimate expectations as a government cannot be bound by the undertakings

		of its predecessor.
	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 <i>Charter</i> .	The defendant pleads that the proposition that the "Honour of the Crown is one of the fundamental principles underlying the Canadian constitution." is unsupported at law.
	Parliamentary sovereignty negates the doctrine of legitimate expectations as a government cannot be bound by the undertakings of its predecessor.	
	Section 52 of the <i>Constitution Act, 1982</i> 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 or effect, it is essential that a "provision" of the Constitution with which it is inconsistent be identified.	The defendant pleads that Section 52 of the <i>Constitution Act, 1982</i> 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 or effect, it is essential that a "provision" of the Constitution with which it is inconsistent be identified.
	Legislation cannot be invalidated based upon the notion of an unwritten principle that allegedly underlies the Constitution.	
	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.	
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