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 PLAINTIFFS ON THE DEFENDANT'S APPLICATION TO STRIKE THE AMENDED NOTICE OF CIVIL CLAIM

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OVERVIEW

1. The Plaintiffs' action is acknowledged to be unique in several respects:

   (a) the Plaintiffs and the Class members they represent are in a unique position in relation to other members of Canadian society;

   (b) the unique sacrifices of members of the Canadian Forces have resulted in the creation and continuance of Canada as a free and independent nation;

   (c) as a result of the unique position of the Plaintiffs and the Class members they represent, they are the beneficiaries of a Social Covenant by the nation of Canada, through the Crown, to those who have served their country in the Canadian Forces; and

   (d) the Plaintiffs plead that the Social Covenant promises the Plaintiffs and Class members adequate recognition and benefits, which promises are given a constitutionally protected status by the principles related to the Honour of the Crown;

2. As members and veterans of the Canadian Forces, the Plaintiffs and the Class members they represent are in the unique position of being required by law to risk their lives and bodies to death or serious bodily injury.

3. They must accept and face such risks even in operational situations where their superiors have anticipated and planned to deal with deaths and casualties to achieve the military and policy objectives of their country as ordered by their military commanders in accordance with policies determined by the Government of Canada.

4. As members of the Canadian Forces, the Plaintiffs and the Class members they represent are required by law to obey the orders of their superior officers. They cannot choose to avoid risk by the exercise of their own judgment as to the actions they may take while under military orders. Until 1998 when the *National Defence Act*, R.S.C. 1985, c. N-5 was changed, the death penalty existed for several military offences, such as a commander acting traitorously in action or a soldier showing cowardice before the enemy.

5. No Canadians other than members of the Canadian Forces may be ordered to take actions where their life and limb are not only at risk but casualties are anticipated and planned for.

6. The Plaintiffs and the Class members they represent say that the Social Covenant by the nation of Canada, through the Crown, to those who have served their country was first promised to those who served in the First World War, a promise that has been continued to all who have subsequently served and continue to serve Canada.

7. The Plaintiffs say that the New Veterans Charter has seriously adversely affected thousands of potential individual Class members. None of those affected potential individual Class members could afford to individually litigate the serious issues raised in this litigation. For that reason, this action is brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, even though, as an action based on constitutional issues, it is not the type of action that is typically brought as a claim under the *Class Proceedings Act.*

8. Although (in paragraph 35 of the Defendant's Argument) the Defendant acknowledges the gravity of the injuries suffered by members of the proposed Class, the Defendant argues that it should be granted this application to strike the pleadings before the filing of any responsive pleading or discovery because the Plaintiffs in the action are attacking what the Crown asserts is validly enacted federal legislation expressing policy decisions of the Government. In response, the Plaintiffs submit that they have raised serious and substantial arguments challenging the validity of the legislation and submit that the application to strike should be dismissed.

9. The law is forever evolving. In fact recently, the Supreme Court of the United Kingdom has recognized that the laws with respect to the rights of soldiers, being soldiers of her Majesty's other forces fighting in the same theatre of operation as the Plaintiffs, should be expanded.

Smith and Others (FC) v. The Ministry of Defence, [2013] UKSC 41

10. Given the unlimited resources of the Crown, applications to strike pleadings have become known to the private bar to be page 1 in the defensive playbook of the Government of Canada analogous to the obstructionist strategy which Mr. Justice Mosely in the case of *McEwing and Kerr v. Attorney General Of Canada*, described as "trench warfare in an effort to prevent this case from coming to a hearing on the merits."

McEwing and Kerr v. Attorney General of Canada, 2013 FC 525 at para. 261

11. Giving effect to the object of the Supreme Court Civil Rules to secure the just, speedy and inexpensive determination of every proceeding on its merits, for the reasons that follow, the Defendant's application to strike should be dismissed.

LAW AND ARGUMENT

Test for Striking a Notice of Civil Claim

12. Rule 9-5(1) 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
>
> (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.

13. The onus on an applicant seeking to strike a claim is high. The stringent legal test under Rule 9-5(1)(a) is as follows:

> Thus, the test in Canada . . . is . . .: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in R.19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under R.19(24)(a). [Emphasis added.]

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

Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15

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

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

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

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

16. The Supreme Court of Canada has recently reaffirmed these tests for striking out defences that have no reasonable prospect of success in *R v. Imperial Tobacco Canada Ltd.*

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

17. The Plaintiffs' accept that in some respects their claim has raised novel legal issues that have not yet been before the Courts. However, important and novel causes of action should be resolved at trial and not on the basis of pleadings.

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

18. The Supreme Court of Canada noted in *R. v. Imperial Tobacco Canada Ltd.*:

> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [Emphasis added.]

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

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

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

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

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

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

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

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

22. It is the Plaintiffs' position that it is not plain and obvious that the claim will not succeed. The Plaintiffs have pled detailed material facts outlining the bases for their various

claims which should be properly investigated at trial on a full record and not struck out on the pleadings.

23. It should always be borne in mind that the object of the Rules requires the Court to consider issues of proportionality. As with all Rules, Rule 9-5(1) is informed by the underlying principles set out in Rule 1- 3:

> **Rule 1-3 — Object of Rules**
>
> **Object**
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> **Proportionality**
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

24. While Rule 1-3 speaks of a speedy and inexpensive determination, it also requires matters to be determined on their merits in a manner that is proportionate. Considering the object of proportionality, the Plaintiffs stress that not only is this matter complex, it is a matter of national importance.

Honour of the Crown

25. The Defendant is wrong to assert that "no Canadian court has applied the concept of Honour of the Crown outside of an aboriginal context".

26. In fact, the legal doctrine of the "Honour of the Crown" is not confined to Aboriginal issues alone and has been an evolving part of the Canadian common law for centuries.

27. Historically, the Honour of the Crown or the "King's Honour" was applied to disputes over grants of land and to ensure a just result when technicalities resulted in disputed or void claims.

> *The Case of the Churchwardens of St. Saviour in Southwark*
> (1613), 77 E.R. 1025 at 1027 [*Southwark*]

28. Under the Honour of the Crown doctrine, the Court must make an assumption which favours a fair result to the benefit of the subject. In *Southwark*, the Court's assumption was that the King would not grant land in a manner that would render the land void.

29. In general, the prevailing assumption under the doctrine is that the Crown will enter into dealings, make grants and carry out its duties with honourable intentions. The Honour of the Crown doctrine is premised on the notion that the Crown would not enter into dealings with ignoble intentions. Justice and law are deemed to flow from the Crown and the law is for the benefit of the Crown's subjects.

Lord W. Blackstock, *Commentaries on the Laws of England; in Four Books*, Thomas Cooley, ed. (Chicago: Callaghan and Cockraft, 1871) Book 3, c.17 at paras. 254-255 and 266.

30. Canadian courts have continued to apply the Honour of the Crown doctrine in a number of circumstances. In an 1852 decision, the Upper Canada Court of Appeal held:

> And when the Crown does resolve to sell its lands, its contracts ought to be binding upon it, in absence of deceit or fraud of any kind; for it is a maxim that where the Crown receives valuable consideration for its grant, there the effect of the patent shall always, for the honour of the Crown be allowed most strongly in favour of the grantee. In case of gratuitous grants the rule is otherwise.

Doe d. Henderson v. Westover (1852), 1 E & A, 465 (U.C.C.A.) at 468

31. The Honour of the Crown doctrine has also been applied by Canadian courts in a number of instances as a principle of statutory interpretation.

R. v. Belleau (1881), 7 S.C.R. 53 at 71
Windsor & Annapolis Railway v. R., [1885] 10 S.C.R. 335 at 371.

32. The Honour of the Crown doctrine continues to evolve in Canadian jurisprudence, with its most recent incarnation as a defining feature of Aboriginal case law.

33. The historical and continued application of the Honour of the Crown doctrine demonstrates that Canadian courts apply the doctrine when considering notions of law, justice and equity in a number of circumstances.

34. The implication of this evolving legal doctrine to the case at bar is that, at this early stage of the proceedings, it is impossible to conclude that it is plain and obvious that the Plaintiffs will be unable to convince the Court to expand the doctrine's reach to apply to the Government of Canada's relationship with Canadian Forces members and veterans.

35. The Crown's duty to act honourably arose when it covenanted with Canadian Forces members to risk their lives and bodies in service of the nation.

36. The Plaintiffs and Class members are entitled to assume that the Crown intends to fulfill its promises and will engage in a process of honourable consultation, which at minimum gives rise to a duty to discuss important decisions with those affected by the promise, and honourable efforts to reconcile and accommodate the promise with other rights and interests.

37. The important question of law concerning whether the Honour of the Crown doctrine may be extended to benefit these Plaintiffs is appropriately left for determination by the Trial Judge on the merits.

Breach of Fiduciary Duty

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

interests, the Honour of the Crown gives rise to a fiduciary duty in relation to specific interests flowing from their service to Canada.

39. Specifically, Canadian soldiers are bound by an obligation to serve under the *National Defence Act*, (which until 1998 was enforced by the death penalty). If a soldier is injured in the course of service, he or she is essentially fired without the benefit of the right to accommodation which is open to all other Canadians under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. In practice, a soldier is ineligible for private insurance and therefore he or she is left to depend on the benefits conferred by the Crown under the applicable disability benefits scheme in force at the time. If the benefits provided under that scheme are insufficient, a soldier has no legal recourse because the Crown purports to be immune to suit under section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

40. 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. Given these unique facts, there is a very strong argument that the special relationship between the Crown and those who serve her gives rise to a fiduciary duty.

41. The Crown breached that fiduciary duty when, notwithstanding a positive duty of loyalty and a duty to act honourably, unilaterally enacted a new diminished compensation scheme during a time of war when members of the Class were under an obligation to serve but believed that they were to be compensated pursuant to the *Pension Act*, R.S.C. 1985, c. P-6.

42. The law of fiduciary duty is not settled in Canada and the development of new fiduciary relationships is ongoing.

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

43. Specifically, the courts have repeatedly refused to strike claims for breach of fiduciary duty against the Crown made by members and veterans of the Canadian Forces.

Stopford v. Canada, 2001 FCT 887 [*Stopford*]
Duplessis v. Canada (2000), 197 FTR 87, (on appeal) 2001 FCT 1038
Cross v. Sullivan, 2003 CanLii 44082

44. In *Stopford*, Prothonotary Aronovitch, in refusing to strike the claim against the Crown, concluded that the Supreme Court of Canada contemplated a broad definition of fiduciary duty which is based on the nature of the relationship at issue and not the actors involved:

> [25] This Court has recently dealt with a motion to strike a statement of claim in which the plaintiff alleged, *inter alia*, that the Crown breached its fiduciary duty by failing to provide adequate support and counseling to the plaintiff upon his return from military service in Croatia (see *Duplessis v. Canada* (2000), 8 C.C.E.L. (3d) 75 (F.C.T.D.)). At paragraphs 30 and 31, the Court determined that:
>
> > From the jurisprudence, it is evident that the categories giving rise to a fiduciary duty remain open. Terms such as "power" and "particularly vulnerable" have scope for interpretation and have not been judicially considered in respect of the relationship of the soldier to the Minister of National Defence. No jurisprudence was submitted wherein these terms have been considered in the context of military service or would preclude a

> determination that the relationship of soldier to the Crown may be a unique relationship in the manner of *Guerin*. The defendant may have a stronger argument in that regard, but it is not conclusive.
>
> Given the facts pleaded and continued prospects for the development of new fiduciary relationships, I cannot conclude that it is plain and obvious that Sergeant Duplessis' claim should fail. There is a serious question of law here that is more appropriately left for determination by the trial judge on the merits.

[26] Notwithstanding the able arguments of Crown counsel, I do not agree that *Duplessis* was wrongly decided on this issue. While it is clear that the application of fiduciary duty has been generally restricted to private law, I am not satisfied that it has been categorically excluded from the public law context. I take the following words of Dickson J. (as he then was) in *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335, at pages 384-385 to be instructive.

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed. See, *e.g. Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385 (Ont. C.A.), at p. 392; *Golden Mines Ltd. v. Revill* (1974), 7. O.R. 216 (Ont. C.A.), at p. 224.
>
> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obliged to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. [Emphasis added.]

[27] I appreciate that Dickson J. viewed the fiduciary duty in *Guerin* to be in the nature of a private law duty. However, I am more impressed by his concern to articulate a broad definition based on the nature of the relationship at issue, not the actors involved. That he viewed the concept of fiduciary duty as possibly extending beyond the private law sphere is revealed in his qualifiers "generally arise", "not normally" and "not typically". Moreover, I do not take his words to imply that the only exceptions to the private/public law restriction occur in the context of *sui generis* relationships or where the duty at issue "is in the nature of a private law duty".

Stopford, at paras. 25 to 27

45. In the case at bar, in an effort to meet the high onus to strike the Plaintiffs' claim, the Defendant focuses on a narrow application of fiduciary duty which fails to contemplate that "the relationship of soldier to the Crown may be a unique relationship in the manner of *Guerin*".

Duplessis v. Canada (2000), 197 F.T.R. 87 at para. 30

46. In the context of a "unique relationship" where the Crown may unilaterally exercise its discretion in such a way as to affect the legal and practical interests of members of the Canadian Forces, the courts must balance the Crown's fiduciary duties with its legislative authority.

47. In the case of both Sergeant Duplessis and Warrant Officer Stopford, the Crown was unsuccessful in its application to strike their claims or obtain summary judgment dismissing their claims. In both cases, the Court concluded that the soldiers' claims deserved to be tried on their merits. And to date no court has determined the soldiers' claims on their merits and the question of Crown fiduciary duties in the context of military service remains untested.

Duplessis v. Canada, 2004 FC 154
Stopford v. Canada, 2003 FC 994

48. The case at bar presents an important opportunity to finally determine whether the relationship of a soldier to the Crown may be a unique relationship in the manner of *Guerin* giving rise to a fiduciary duty.

49. At this stage of proceedings, the inescapable conclusion for this Court is that it is not plain and obvious that the Plaintiffs' claims will fail. There is a serious question of law here that is more appropriately left for determination by the Trial Judge on the merits.

Public Law Duty

50. The Plaintiffs assert that they are owed public law duties to recognize and give effect to the Social Covenant of Canada, which give rise to fiduciary duties as between the Government of Canada and Canadian Forces members and veterans.

51. By virtue of the unique relationship between the Crown and Canadian Forces members and veterans, the Crown owes a public law duty to exercise its legislative functions in a manner consistent with the Social Covenant it entered into with Canadian Forces members to recognize the obligations of the people and Government of Canada to provide proper compensation to those members of the forces who have died or have been disabled as a result of military service.

52. The Courts have left open the possibility that fiduciary duties could be included in the public law context.

Stopford v. Canada, 2001 FCT 887

53. Furthermore, the Plaintiffs are not seeking judgment on public law duties, but rather seek a declaration that duties are owed to them.

Amended Notice of Civil Claim Part 2 at para. 387(b)(c)

54. The Plaintiffs submit that their pleadings meet the requirements for having their claim for declaratory relief heard, namely that

(a) the plaintiff has an interest;

(b) there is a serious contradictor for the claim; and

(c) the issue raised, and upon which a declaration is sought, is a real and serious one and not merely hypothetical or academic.

Montana Band of Indians v. Canada, [1991] 2 F.C. 30 (C.A.), leave to appeal to S.C.C. refused (1991), [1991] S.C.C.A. No. 164, 136 N.R. 421 n).

Daniels v Canada (Minister of Indian Affairs and Northern Development), 2008 FC 823 at paras 6-8

55. In *Canada v Solosky*, the Supreme Court of Canada stated the test for the availability of declaratory relief:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [[1921] 2 A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):
>
> > The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [[1958] 1 Q.B. 554], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):
>
> > ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

Canada v Solosky, [1980] 1 SCR 821 at paras 11-13, 105 DLR (3d) 745

56. The Supreme Court of Canada has again recently affirmed the basic principles applicable to such cases. In *Canada (Prime Minister) v Khadr*, the Supreme Court said:

> In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

Canada (Prime Minister) v Khadr, 2010 SCC 3, [2010] 1 SCR 44 at para. 46

57. The availability of declaratory remedies to the Plaintiffs is consistent with the Latin maxim: "*Ubi ius ibi remedium; Ubi remedium ibi ius*" ("Where there is a right, there is a remedy") and the *dicta* of Chief Justice Holt *in Ashby v. White* (1703) 2 Ld. Raym. 938, at 953: "...if the plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it" and the more recent words of Lord Nicholls of Birkenhead: "A legal right is not more valuable in law than the remedy provided for its breach. It is therefore vital that remedies should match the wrong."

Lord Nicholls of Birkenhead , "Foreword", in Burrows and Peel eds., *Commercial Remedies—Current Issues and Problems* (Oxford Norton Rose Law Colloquium, 2003)

Charter of Rights- Section 15(1)

58. Section 15(1) of the *Charter* 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.
>
> *The Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, enacted as Scheduled B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*]

59. In order to succeed on a claim under section 15(1) of the *Charter*, the Plaintiffs must establish that:

    (a) the law in question creates a distinction based on an enumerated or analogous ground; and

    (b) the distinction creates a disadvantage by perpetuating prejudice or stereotyping.

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

60. Whether the above is established will be determined on the basis of a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous ground.

Quebec, at para 331.

61. It is not "plain and obvious" that the facts pled in the Amended Notice of Civil Claim do not support a claim that the New Veterans Charter violates the Plaintiffs' section 15 *Charter* rights.

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

    (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 section 15(1) of the *Charter*.

Step 1: Distinction Based on Enumerated or Analogous Grounds

63. The Plaintiffs submit they are members of a class of persons entitled to protection under section 15(1) on the analogous ground of Canadian Forces Members.

64. Since its decision in *Law Society v Andrews*, the Supreme Court of Canada has recognized that as society evolves, analogous grounds may be added to those expressly protected under section 15(1).

Law Society v Andrews, [1989] 1 S.C.R. 143

65. Employment status has not yet been recognized as an analogous ground because, generally speaking, employment status lacks the immutability that is common to the listed grounds and is required for the analogous grounds.

Peter Hogg, *Constitutional Law in Canada* 5th Edition Supplemented, looseleaf (Scarborough: Thomson/Carswell, 2007), page 55-86 [*Hogg*].

66. In *R v Genereux*, *obiter dictum* in the reasons of Lamer J. specifically indicates that employment in the Canadian Forces may be an analogous ground in special circumstances:

> 6. Section 15 of the Charter
>
> The appellant sought as well to rely on s. 15 of the *Charter*. I think that this submission equally can be dealt with briefly. In my opinion, the appellant, in the context of this appeal, cannot claim to be a member of a "discrete and insular minority" so as to bring himself within the meaning of s. 15(1) of the Charter: *Andrews v. Law Society of British Columbia*, supra. For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in s. 15(1), or one analogous thereto.
>
> I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can never be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the Armed Forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances. However, no circumstances of this sort arise in the context of this appeal, and the appellant gains nothing by pleading s. 15 of the Charter [emphasis added].

R v Genereux, [1992] 1 S.C.R. 259 at 311 [*Genereux*]

67. More recently, in *Cross v Sullivan*, Panet J. held that it was not plain and obvious that the courts' previous refusal to recognize employment in the Canadian Forces as an analogous ground was fatal to a plaintiff's section 15(1) claim.

Cross v Sullivan, 2003 CanLII 44082 (ON SC),

68. Further, the Supreme Court of Canada's recent decision in *Ontario (Attorney General) v Fraser,* suggests an openness on the part of the Court to find occupational status as an analogous ground *in the right circumstances.*

Ontario (Attorney General) v Fraser, 2011 SCC 20 [*Fraser*]

69. In *Fraser*, the plaintiffs sought to challenge provincial legislation which purported to exclude agricultural workers from the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. The claim was brought on the basis of sections 2(d) and 15 of the *Charter*. The Court dismissed the plaintiff's section 15 claim on the basis that it was premature and not on the basis of occupational status not being an analogous ground:

> [116] The s. 15 discrimination claim, like the s. 2(d) claim, cannot succeed on the record before us. It is clear that the regime established by the AEPA does not provide all the protections that the LRA extends to many other workers. However, a formal legislative distinction does not establish discrimination under s. 15. What s. 15 contemplates is substantive discrimination, that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. The AEPA provides a special labour regime for agricultural workers. However, on the record before us, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature [emphasis added].

Fraser, at para. 116

70. The Plaintiffs submit that the facts pled disclose special circumstances on which the Court may recognize the analogous ground of Canadian Forces Member. More specifically, the Plaintiffs submit that the facts pled establish that service of Canada in the Canadian Forces gives rise to a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity and risk of criminal sanction.

Amended Notice of Civil Claim at paras. 218-220

71. When a person becomes a member of the Canadian Forces, pursuant to section 23 of the *National Defence Act*, he or she is bound to serve until they are lawfully released. This imposes a legal obligation upon Canadian Forces members unlike any member of civilian society. Civilians who decide to quit their job may face the prospect of loss of employment or threat of legal action for breach of contract. However, if Canadian Forces members abandon their duty or fail to report for duty, they will face far more serious repercussions. For example:

(a) a member on active service who is convicted of desertion before a service tribunal is potentially liable to a punishment of life imprisonment;

(b) a member not on active service who deserts is liable to imprisonment for five years;

(c) a member who is absent without leave is liable to imprisonment for two years less a day; and

(d) a reservist who, without lawful excuse, neglects or refuses to attend any parade or training, may be found guilty of an offence that is punishable, on summary conviction, by a civilian court.

National Defence Act, s. 88, 90 and 294

72. The unique nature of service in the Canadian Forces combined with the threat of imprisonment for abandoning one's duty makes membership in the Canadian Forces an immutable characteristic.

73. It is not plain and obvious that the Plaintiffs' claims are bound to fail because of their failure to point to a previously recognized analogous ground. The Courts continually recognize new analogous grounds as society develops.

Selection of Comparator Group

74. The Defendant also appears to take issue with the fact that the Plaintiffs have not specifically identified a comparator group against whom they contrast their treatment under the New Veterans Charter.

Defendant's Written Argument, paras. 70 and 71.

75. The Plaintiffs are not required to identify a precise comparator group. As noted by Professor Hogg,

> In *Withler v Canada* (2011), the Court suddenly resiled from its insistence on finding a precise comparator group to which the claimant's position was to be compared...the Court was obviously

> signalling a concern about their reasoning in *Hodge* and *Auton*, where 'the definition of the comparator group determines the analysis and the outcome'.

Hogg, page 55-34.4.

76. It is not plain and obvious that their section 15(1) claim is bound to fail because they did not plead a precise comparator group.

Step 2: Disadvantage that is Discriminatory

77. The Plaintiffs submit it is plain and obvious that the facts as pled support the proposition that they suffer disadvantage, affront to their human dignity, prejudice and stereotype as a result of the distinction created by the New Veterans Charter.

78. In *Quebec (Attorney General) v* A, the Supreme Court of Canada revisited the second step of the section 15(1) analysis.

Quebec (Attorney General) v A, 2013 SCC 5 [*Quebec*]

79. The Defendant, citing reasons delivered by Lebel J. in *Quebec*, asserts that:

> 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.

Defendant's Written Argument, para. 68.

80. The Plaintiffs submit that the Defendant is mistaken as to the proper analysis to apply to the second step of the test under section 15(1). The analysis set out by Lebel J. in *Quebec* was not endorsed by a majority of the Court in that case. Rather, a majority of the Court concurred in the section 15(1) analysis set out by Abella J.

Quebec (Attorney General) v A, 2013 SCC 5 at paras 385 (reasons of Deschamps, Cromwell and Karakatsanis JJ.) and 415 (reasons of McLachlin C.J.).

81. The section 15(1) analysis on which the Defendant relies wrongly emphasizes prejudice or stereotyping at the expense of a fuller contextual analysis of whether the challenged law violates the norm of substantive equality under section 15(1) of the *Charter*:

82. Madam Justice Abella framed the appropriate analysis to apply at the second step of the test under section 15(1) as follows:

> [325] In referring to prejudice and stereotyping in the second step of the *Kapp* reformulation of the *Andrews* test, the Court was not purporting to create a new s. 15 test. *Withler* is clear that "[a]t the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the Charter?" (para. 2 (emphasis added)). Prejudice and stereotyping are two of the indicia that may help answer that question; they are not discrete elements of the test which the claimant is obliged to demonstrate, as Professor Sophia Moreau explains:
>
> > Such a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against. This would include cases, for instance, that do not involve either overt prejudice or false stereotyping, but do involve oppression or

> unfair dominance of one group by another, or involve a denial to one group of goods that seem basic or necessary for full participation in Canadian society [emphasis added].
>
> ("*R. v. Kapp*: New Directions for Section 15" (2008-2009), 40 Ottawa L. Rev. 283, at p. 292)

[...]

> [327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. In explaining prejudice in *Withler*, the Court said: "[W]ithout attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered" (para. 38).
>
> [328] It is the discriminatory conduct that s. 15 seeks to prevent, not the underlying attitude or motive, as Dickson C.J. explained in *Action Travail*:
>
> > It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. [p. 1139, citing the Report of the Commission on Equality in Employment (1984).]
>
> This was reiterated in *Withler*, where the Court said: "[W]hether the s. 15 analysis focuses on perpetuating disadvantage or stereotyping, the analysis involves looking at the circumstances of members of the group and the negative impact of the law on them" (para. 37 (emphasis added)).
>
> [...]
>
> [330] Requiring claimants, therefore, to prove that a distinction perpetuates negative attitudes about them imposes a largely irrelevant, not to mention ineffable burden.
>
> [331] *Kapp* and *Withler* guide us, as a result, to a flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. As *Withler* makes clear, the contextual factors will vary from case to case — there is no "rigid template":
>
> > *The particular contextual factors relevant to the substantive equality inquiry at the second step [of the Andrews test] will vary with the nature of the case. A rigid template risks consideration of irrelevant matters on the one hand, or overlooking relevant considerations on the other*: *Kapp*. Factors such as those developed in *Law* — pre-existing disadvantage, correspondence with actual characteristics, impact on other groups and the nature of the interest affected — may be helpful. However, they need not be expressly canvassed in every case in order to fully and properly determine whether a particular distinction is discriminatory. . . . [Emphasis added; para. 66.]

Quebec (Attorney General) v A, 2013 SCC 5 at para 325.

83. Chief Justice McLachlin concurred in the reasons delivered by Abella J., emphasizing that, while prejudice and stereotyping are useful indicia, they are not determinative:

> [418] Most recently, this Court has articulated the approach in terms of two steps: (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 false stereotyping? : *Kapp*, at para. 17; *Withler*, at para. 30. While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as pre-existing disadvantage of the claimant group, the

> degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected: *Withler*, at para. 38; *Kapp*, at para. 19.

84. The Plaintiffs submit that the facts pled disclose a negative impact of the New Veterans Charter on them. More specifically, the facts pled establish that the New Veterans Charter perpetuates arbitrary disadvantage.

Amended Notice of Civil Claim at paras. 331 to 354

85. The pleadings as they stand provide the basic facts regarding the Plaintiffs' injuries and awards made under the New Veterans Charter. The further particulars of the disadvantage perpetuated by those awards will be further adduced at trial on the whole of the evidence.

86. At this stage of proceedings, the inescapable conclusion for this Court is that it is not plain and obvious that the Plaintiffs' claims will fail. There is a serious question of law here that is more appropriately left for determination by the Trial Judge on the merits.

Section 7 of the Charter

The Plaintiffs' Claims

87. It is not "plain and obvious" that the facts pled in the Amended Notice of Civil Claim do not support a claim that the New Veterans Charter violates the Plaintiffs' section 7 *Charter* rights.

88. Taking the pleadings as they stand or may be amended, the Plaintiffs submit that:

(a) The New Veterans Charter deprives them of their security of the person by failing to provide adequate compensation for their injuries sustained in the service of Canada, despite assurances that they would be so compensated;

(b) The New Veterans Charter deprives them of their security of the person as a result of the serious state imposed psychological distress which results from its application; and

(c) The above deprivations do not accord with the principles of fundamental justice, namely the principle of the Honour of the Crown, the government's obligations to fulfill its promises, and the Crown's Fiduciary duties, as well as the principle that laws should not be arbitrary.

89. These are issues which ought to be determined on the evidence and not summarily.

90. What is apposite in these circumstances is what the Supreme Court of Canada has said about the task of the courts on section 7 issues, which is to evaluate the issue in the light, not just of common sense or theory, but of the evidence.

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

91. The question on this application is whether there is a fit question to be tried, regardless of the complexity or novelty. The Plaintiffs submit there is such a question raised in these pleadings. The Supreme Court of Canada has left open the possibility that there

could be unique facts where an economic interest could found a claim for a *Charter* breach. The Plaintiffs submit the questions of whether:

(a) in the face of a prior obligation or promise to provide support and compensation to members and veterans of the Canadian Forces injured in the service of their country, can a failure to provide adequate disability benefits amount to a deprivation of the Plaintiffs' security of the person; and

(b) whether the Honour of the Crown amounts to a principle of fundamental justice

are fit questions to be tried, despite that they are novel.

The Section 7 Interest at Stake- Security of the Person

Economic Rights

92. It has been suggested in *obiter* that security of the person includes the economic capacity to satisfy basic human needs.

Singh v. Minister of Employment and Immigration, [1985] 1 SCR 177, and

Irwin Toy ltd. v. Quebec (Attorney General), [1989] 1 SCR 927 [*Irwin Toy*]

93. The Defendant points to the fact that the test for section 7 requires a deprivation and that nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty and security of the person. The Defendant points to the authorities, such as *Gosselin v. Quebec (Attorney General)* to suggest that section 7 is not extended to economic rights, nor does it create positive obligations.

Gosselin v. Quebec (Attorney General), 2002 SCC 84, [2002] 4 S.C.R. 429 [*Gosselin*]

94. The Court in *Gosselin* held that it was not the case for advancing the law because the evidence of hardship was wanting. The Plaintiffs intend on bringing evidence of the representative Plaintiffs, as well as other members of the Class, which demonstrate the significant hardships that are suffered by Canadian Forces members and veterans and their families as a result of the insufficient compensation they receive for disabilities that are a direct result of their service to Canada. Given the weight placed on the lack of evidence of hardship by the Supreme Court in *Gosselin*, the Court should be reluctant to strike the Plaintiffs' claim without first hearing that evidence from the Plaintiffs.

95. The Courts have left open the question of whether section 7 could operate to protect economic rights:

> [20] To date the Supreme Court has not extended the protection afforded by s. 7 of the *Charter* to cases involving economic or proprietary rights. However, so far as economic interests are concerned, the Supreme Court has not ruled out the possibility that, in future, s. 7 may be extended to embrace such interests. In *Gosselin* it was argued that s. 7 imposes a positive obligation on a government to provide adequate welfare benefits to the poor. While the argument was rejected, the majority of the Court acknowledged that although s. 7 had yet to be extended to economic rights or to rights wholly unconnected with the administration of justice, those facts did not foreclose the possibility that, in future, s. 7 might be given a more expansive interpretation. However, the majority concluded that *Gosselin* was not the case for advancing the law because the evidence of "actual hardship" was wanting.

Melanson v New Brunswick, 2007 NBCA 12;

See also *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at para. 105

96. In addition, the Supreme Court of Canada has left open the possibility that section 7 could include positive obligations. In *Gosselin*, the Court went so far as to stress the importance of not limiting the application of section 7:

> [82] One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in Blencoe, supra, at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.
>
> [83] I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

Gosselin at paras. 82 and 83

97. The case authorities have left open the possibility of a case that would warrant a novel application of section 7, and the Plaintiffs submit that this is that novel case and the Court should be loath to dispose of the argument summarily without hearing the full body of the Plaintiffs' evidence about their hardships.

98. The cases suggest that the inclusion of economic rights would require special circumstances. The Plaintiffs submit that the facts pled disclose special circumstances in various regards, but specifically including the fact that:

(a) the source or reason for the Plaintiffs' economic needs are by virtue of their interaction with the Crown in their service to the country; and

(b) the positive obligations exist on behalf of the Crown independent of the *Charter*.

99. On the first point, for example, *Gosselin* can be differentiated on the basis that the Plaintiff's difficulties which led to her unemployment status were not a result of state action. The very reason that the Plaintiffs in this case are disabled and in economic

need is their service to the government of Canada. This makes the Plaintiffs' case unique.

100. Military service is uniquely distinct from civilian society. The *National Defence Act*, includes, embodied in section 23, the obligation to serve. By joining the Canadian Forces these obligations are entered into under the terms and conditions of service, including unlimited liability and foregoing certain *Charter* rights. Members risk their life, liberty and security of the person under their terms of service and face criminal sanctions if they do not. These terms in essence render the members of the Canadian Forces uninsurable requiring the government to care for them. The effect of this statute which obliges members to put themselves at risk, is compounded by the fact that the *Crown Liability and Proceedings Act* prohibits government employees from suing the government with respect to disabilities for which they receive a pension. The combination of this statutory scheme should place a high burden on the Crown to ensure that Canadian Forces Members and Veterans are adequately compensated. To then create a pension scheme which results in hardship is a violation of security of the person.

101. With regards to the second point, on these facts, the positive obligation on behalf of the Crown exists independently of the *Charter* – the Social Covenant exists in the promise that was made to soldiers who risked their lives in the service of Canada that, if they got injured, they would be compensated.

102. Canadian veteran legislation recognizes the "obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants".

Pension Act, R.S.C. 1985, c. P-6, s. 2;

Veterans Review and Appeal Board Act, .C. 1995, c.18, s. 3.

103. The way in which the Crown has framed the issues and couched its arguments largely ignores the context in which the section 7 claim is being advanced; which is in light of positive obligations that already exist.

104. In the present case, section 7 is not being invoked to create a positive obligation, but to prohibit the Defendant from enacting legislation that breaches an obligation that already existed and depriving the Plaintiffs of the compensation that was owed and promised to them. This also makes the case unique from previous section 7 authorities.

105. While a *Charter* violation may not be grounded on a mere change in the law, where there is a constitutional obligation to enact the legislation in the first place, there can be a constitutional right to the continuation of measures voluntarily taken.

Flora v Ontario Health Insurance Plan, 2008 ONCA 538 at para. 104;

see also *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 577 at para. 94

106. The Plaintiffs submit that by virtue of the Honour of the Crown there exists a constitutional obligation to act in the first place, and as a result the change in the legislation here has resulted in a deprivation. This again makes this case unique from the prior authorities.

107. The Supreme Court has held that courts should proceed cautiously in dealing with section 7 claims:

> [193] Section 7 gives rise to some of the most difficult issues in Canadian *Charter* litigation. Because s. 7 protects the most basic interests of human beings — life, liberty and security — claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society's conception of "principles of fundamental justice" as to be constitutionally entrenched.

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para. 193, [2005] 1 S.C.R. 791 [*Chaoulli*]

108. As a result, the Court should allow a full record to develop rather than dismissing what it may view as a novel section 7 claim.

109. Policy decisions are not immune from *Charter* scrutiny.

PHS Community Services Society v. Canada (Attorney General), 2010 BCCA 15 at paras. 60 and 61

State Induced Psychological Stress

110. Government action that seriously interferes with the psychological integrity of a person can be the foundation for a breach of security of the person. In other words, state induced psychological stress would be a breach of security of the person.

R v. Morgentaler, [1988] 1 S.C.R. 30

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 SCR 307; and

Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519 .

111. In *New Brunswick*, the Court held as follows:

> [59] Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in *Morgentaler*, *supra*, at p. 56, suggested that security of the person would be restricted through "serious state-imposed psychological stress" (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. Nor will every violation of a fundamental freedom guaranteed in s. 2 of the *Charter* amount to a restriction of security of the person. I do not believe it can be seriously argued that a law prohibiting certain kinds of commercial expression in violation of s. 2(*b*), for example, will necessarily result in a violation of the psychological integrity of the person. This is not to say, though, that there will never be cases where a violation of s. 2 will also deprive an individual of security of the person.
>
> [60] For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46 at para. 59 and 60

112. State imposed psychological stress can found a breach of security of the person. Here the economic strain placed on the Plaintiffs and Class members creates enormous amounts of undue stress. In addition, the government's breach of its promise causes emotional stress and feelings of betrayal amongst Canadian Forces members and veterans.

113. The Crown, notwithstanding a positive duty of loyalty and a duty to act honourably and uphold its promise to compensate Canadian Forces members and veterans who are injured in service of Canada, unilaterally enacted a new diminished compensation scheme during a time of war when members of the Class were under an obligation to serve but believed that they were to be compensated pursuant to the *Pension Act*.

114. The provision of inadequate compensation for disability benefits to those injured in the service of Canada, those who legitimately believed that pursuant to the Social Covenant they would be taken care of, has a profound effect on their psychological integrity. In addition, the emotional stress suffered by those who feel that the country they served has turned its back on them, is profound. The Plaintiffs and Class members are subjected to state imposed psychological and emotional stress, constituting a breach of security of the person.

115. The fact that the effect of the Government's actions rises above ordinary stress and anxiety, is evidenced by the pleadings with respect to Major Mark Campbell. After 32 years of service in the Canadian Forces, Mr. Campbell lost both his legs along with suffering other injuries. As a result of the inadequacy of the compensation scheme under the New Veterans Charter he suffered psychological injuries as well:

> Mr. Campbell experienced severe mental health injuries initially stemming from his physical injuries, but more recently and predominantly due to his perceived betrayal and abandonment by the Canadian Forces, VAC and the Federal Government.
>
> *Amended Notice of Civil Claim* at para. 104

116. These allegations will be expanded upon in the evidence at trial through the evidence of Major Campbell as well as other Plaintiffs and Class members suffering similar psychological effects and ought not to be struck at this stage.

Principles of Fundamental Justice

117. Having alleged that the New Veterans Charter breaches the right to security of the person, it must be considered whether the breach is in accordance with the principles of fundamental justice.

The Honour of the Crown as a Principle of Fundamental Justice

118. The Plaintiffs submit that the Honour of the Crown is one of the fundamental principles underlying the Canadian constitution and therefore a violation of that honour cannot be in accordance with fundamental justice.

> 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.

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4; [2004] 1 S.C.R. 76

119. The Honour of the Crown embodies notions of law, justice and equity. The doctrine that the Crown will carry out its duties with honourable intentions is a basic norm regarding how the state should deal with its citizens.

120. As a general principle, promises made by the Government to its citizens should not be broken. However there is a higher duty that the Crown owes to its serving members; that those promises to compensate them for their losses occasioned in the service of Canada, ought not to be broken.

121. The pleadings have gone through great details about the traditions around the Government of Canada's relations and obligations to its armed forces. Canadian veteran legislation included paragraphs reiterating the recognition by Canada of the Social Covenant and the obligation of the nation to be generous towards veterans and those who serve in the Canadian Forces, including that the legislation should be construed liberally to the end that "the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled".

Pension Act;

Veterans Review and Appeal Board Act, .C. 1995, c.18, s. 3.

122. In light of this recognized obligation of the people and Government of Canada to Canadian Forces members and veterans, the New Veterans Charter is clearly not in relation to, and is inconsistent with, Canada's interests in meeting its obligations.

123. As a result, the deprivations suffered by the Plaintiffs and Class members are not in accordance with the principle of the Honour of the Crown which the Plaintiffs submit is a principle of fundamental justice.

124. While authorities have not yet recognized the Honour of the Crown as a principle of fundamental justice, any reasoned society would view the obligation of the Crown towards its armed forces as essential. As the Ontario Court of Appeal held in *Lalonde*, the fundamental values do not need to be enshrined in text to have weight:

> [174] Fundamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating a specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law. Before the advent of the Charter and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation and to assess the legality of administrative action. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344. The fundamental rights and freedoms of a liberal democracy are very much a product of our British parliamentary heritage. As explained by Rand J. in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 at 329, "[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Although these fundamental rights and freedoms had no place in the text of the Constitution until 1982, the courts were entitled to take them into account when deciding cases and interpreting statutes, and when considering the legality of governmental actions.

Lalonde v. Ontario (Commission de restructuration des services de santé) (2001), 56 O.R. (3d) 577 (C.A.)

125. The Plaintiffs submit that the notion that the Honour of the Crown, or the fact that the Crown should not breach its fiduciary duties, could be considered principles of fundamental justice, raise a fit question to be tried and the claim ought not to be prematurely struck.

Arbitrariness

126. In addition, it is a principle of fundamental justice that laws should not be arbitrary.

127. In *Chaoulli*, the Court discussed arbitrariness as a principle of fundamental justice as follows at para. 129-131 as follows:

> Laws Shall Not Be Arbitrary: A Principle of Fundamental Justice
>
> [129] It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine*, at para. 135; *Rodriguez*, at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.
>
> [130] A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> [131] In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

Chaoulli, at para. 129 to 131

128. The Plaintiffs submit that the Table of Disabilities and the assessment process prescribed under the New Veterans Charter is arbitrary. For example, Bombardier Daniel Scott was given a 0% disability rating for the loss of his spleen under this legislative scheme.

Amended Notice of Civil Claim at paras. 36 and 38

129. In addition, Master Corporal Gavin Flett was given a 0% disability rating for a left femur fracture.

Amended Notice of Civil Claim at para. 61

130. It is plain and obvious that a 0% disability rating for acknowledged injuries of this magnitude is arbitrary and capricious and not in accordance with the principles of fundamental justice.

131. In addition, the notion that a cap should apply to the amount a veteran can recover and the capricious selection of the amount of that cap are arbitrary and serve no legitimate objective and therefore cannot be in accordance with the principles of fundamental justice.

132. The preamble to the New Veterans Charter states that its purpose is to provide services, assistance and compensation to or in respect of Canadian Forces members and veterans.

133. While the legislators have stated that the purpose of the New Veterans Charter is to provide compensation, the facts pled by the representative Plaintiffs suggest that this is not borne out in the application of the legislation, but rather has resulted in the contrary; inadequate compensation that effects veterans' ability to meet their basic needs.

134. The recognized objective of the legislation is compensation, putting a cap on the amount of that compensation and setting it at an arbitrarily low amount that does not account for the full scope of the veterans' losses, has no legitimate connection to the legislative goals and is manifestly unfair and therefore is not in accordance with principles of fundamental justice.

135. The Crown points to cases where the court imposed cap on non-pecuniary damages, or provincial insurance caps on non-pecuniary damages for minor motor vehicle accidents have withstood *Charter* scrutiny. However what they recognize is that a cap on non-pecuniary damages is not a violation due to the nature of non-pecuniary damages.

> [70] The plaintiff attacks the premise that the cap imposes an artificial limit on an otherwise appropriate non-pecuniary damage award, but this argument ignores the fact that non-pecuniary damage awards, by their nature, are arbitrary figures which do not fit with the concept of "full" or "adequate" compensation. In *Lindal v. Lindal*, supra, the Court emphasized that non-pecuniary damages are intended to provide solace, and are not dependant solely upon the severity of the injury sustained by the plaintiff.

Lee v. Dawson, 2006 BCCA 159 at para. 70

136. The cases cited by the Defendant all deal with non-pecuniary damages which are not intended to provide compensation but rather solace. The stated purpose of the New Veterans Charter is to provide compensation and therefore the awards under the New Veterans Charter are not akin to non-pecuniary damages. The disability awards made to the Plaintiffs all awarded percentage amounts for their injuries as well as separate percentage amounts for pain and suffering. This illustrates the fact that the cap applies to more than non-pecuniary damages.

137. In addition, in many instances the moment a soldier is injured, the process of his or her discharge starts in motion. The universality of service requirement and section 15(9) of the *Canadian Human Rights Act*, exempt members from being accommodated in their employment by the Canadian Forces, therefore their losses go beyond pain and suffering.

138. The disability pensions awarded to Canadian Forces members and veterans cannot be classified as being similar to non-pecuniary damages in the Court context. A plaintiff can always get additional compensation beyond that for their pecuniary losses and may have additional private insurance to protect themselves. The veteran's entire compensation is limited to the scheme of the New Veterans Charter by virtue of the *Crown Liability and Proceedings Act*.

139. Furthermore, the Court in *Lee v Dawson* recognized that non-pecuniary awards are not proportional to the severity of the injury:

> [79] Those authorities are consistent with the view that non-pecuniary awards are not proportional to the severity of the injury suffered by the plaintiff, because the rationale for a non-pecuniary

> award provides no direct relationship between the degree of the injury sustained and the quantum of non-pecuniary damages that is appropriate.
>
> *Lee v. Dawson*, 2006 BCCA 159 at para. 79

140. The same can certainly not be said of the New Veterans Charter where the entire system is based on a ranked percentage of disabilities contained in the Table of Disabilities, resulting in a direct relationship between the degree of the injury and the award given.

141. The complexities of the Defendants' own compensation scheme illustrate that it is not plain and obvious that the cap on damages under the New Veterans Charter is not arbitrary.

Conclusion on Section 7 Claims

142. The Plaintiffs submit that the facts pled support their allegation that the New Veterans Charter violates their security of the person and does not accord with the principles of fundamental justice. At the very least it is not plain and obvious that their claims will fail.

143. In *Duplessis v. Canada*, the Plaintiff member of the Canadian Forces brought a claim alleging that his section 7 *Charter* rights were violated by the Canadian Forces and Department of National Defence due to a failure to provide him with counselling for his PTSD. In refusing the Crown's application to strike, the Court held:

> [46] That said, there can be no doubt that the jurisprudence on section 7 of the Charter is developing. I agree with the plaintiff, that there has been an incremental expansion of the rights protected under section 7. For example, the courts have moved away from requiring direct interaction with the criminal justice system to encompass civil proceedings and most recently in *Blencoe*; the British Columbia Human Rights Commission, with the government as its ultimate source of authority, was held by the Supreme Court to be administering a governmental program that calls for Charter scrutiny. The Supreme Court has also incrementally broadened the purview of what is encompassed within the notion of "security of the person" and continues to further define the notion (see for example the discussion of the protection of "dignity" in *Blencoe*).
>
> [47] Of additional importance, section 7 rights are context specific and a claim should not be rejected unless it is clearly and definitively outside the range of contexts that may be accepted. Justice L'Heureux-Dubé emphasises the importance of context at page 322 of *R. v. Gènèreux* [1992] 1 S.C.R.
>
> > ... Context has been especially useful in determining the scope of "the principles of fundamental justice" for the purposes of s. 7. (Besides the reasons of Cory J. in *Wholesale Travel* see also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513 (per Lamer J.), *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 848-50 (per McLachlin J.), and my dissenting reasons in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 647.) As Wilson J. pointed out, a right or freedom may have different meanings in different circumstances and to ignore these circumstances at the level of the substantive right or freedom would be to ignore a substantial amount of information at a critical stage of the analysis.
>
> [48] The elements pleaded by Sergeant Duplessis include the allegation that the refusal to provide him with assistance for the trauma he had experienced as a peace keeper had a serious and profound effect on Sergeant Duplessis' psychological integrity. The defendant, in light of a positive duty to assist him, failed in its duty and in so doing acted out of improper motives. The treatment he was accorded was acknowledged to be a disgrace, in violation, claims Sergeant Duplessis, of his rights and the principles of natural justice. Can the actions or principally inaction of the Armed Forces, in this context, and the circumstances alleged, be impugned as depriving the plaintiff of his right to life liberty and security of the person? Given the state of the jurisprudence, the matter is arguable and not as the defendant suggests, evident beyond doubt.

> [49] In light of the allegations of the plaintiff and notwithstanding that some elements of the applicable test may not be clearly or conventionally made out, I cannot conclude that the claim must inexorably fail. Moreover, it is appropriate that the question of the scope and application of section 7 of the Charter in these circumstances, be determined by the court on the merits, taking into account the full factual context.

Duplessis v. Canada, 2000 CanLII 16541 at paras. 46 to 49

144. Similarly, despite the novel aspects of this claim, the Plaintiffs submit that their unique circumstances make this a strong case for the expansion of section 7 principles and it is appropriate that it be determined on its merits, taking into account the full factual context, which can only be known following a full trial on the facts.

Section 24 of the Charter

145. The Plaintiffs submit that the wording of section 24 is generous enough to permit a stand-alone remedy for unconstitutional effects, as it confers on the Court a discretion to grant "such remedy as the court considers appropriate in the circumstances" to anyone who's rights and freedoms have been infringed. The cases have left open the possibility of situations where a section 24 remedy may be available in conjunction with section 52, and it is not plain and obvious that the Plaintiffs' claim will fail

146. While there is a general rule that section 24 damages cannot be brought in conjunction with a claim under section 52 of the *Charter*, the Supreme Court has left open the possibility of departing from this general rule.

Guimond v. Quebec (Attorney General), [1996] 3 S.C.R. 347 at para. 19

Mackin v. New Brunswick (Minister of Finance), 2002 SCC 13 at para. 81, [2002] 1 S.C.R. 405 [*Mackin*]

147. One example of that departure is that cited by the Defendant, which is in the event of conduct that was clearly wrong, in bad faith or an abuse of power, in which case section 24 damages can be awarded in conjunction with a declaration that a law is unconstitutional pursuant to section 52.

Mackin, at para. 78

148. *Mackin* suggests that there is a limited immunity enjoyed by legislative bodies such that invalidity of legislation without something more should not found a claim for section 24 *Charter* damages. While the Plaintiffs have not pled bad faith on behalf of the Government, the Plaintiffs allege that the "something more" in this case is the Crown's breach of fiduciary duties and breach of the Honour of the Crown. The facts pled allege not just the enactment of unconstitutional legislation, but the enactment of legislation which breaches both a promise to Canadian Forces members and veterans, as well as a breach of their rights.

149. It lies open to this Court to consider if these unique circumstances warrant another exception to the general rule.

150. Another example of an exception is where Courts have granted prospective remedies in conjunction with section 52. In the event that a declaration of invalidity is temporarily suspended to allow the legislature time to amend the legislation, the Courts have allowed that a litigant may seek a section 24 remedy if the Government fails to amend.

R. v. Demers, 2004 SCC 46 [2004] 2 S.C.R. 489 at para. 63

151. At this point in the proceedings neither party can state what remedy the Court will ultimately impose if it finds the New Veterans Charter to be unconstitutional. In the event that the Court grants a stay, it should remain open to the Plaintiffs to seek a prospective section 24 remedy, and as a result the claim should not be struck prematurely.

152. Further or in the alternative, there is nothing in the law to preclude a party from pleading the remedies in the alternative:

> [181] *Ferguson* does not suggest that where a tribunal finds that a law does not have an unconstitutional effect (and is therefore constitutional), that tribunal cannot go on to consider whether a s. 24(1) remedy is nevertheless warranted because the actions of government actors under that constitutional law created an unconstitutional outcome.

Sazant v. The College of Physicians and Surgeons, 2011 ONSC 323 at para. 181

153. At this stage in the proceedings it would be premature to strike out the remedies sought by the Plaintiffs under section 24 of the *Charter* as it is not plain and obvious that these claims will fail.

Property Rights

154. The Plaintiffs assert they have been unlawfully deprived of the property rights of their causes of action arising from the injuries they have suffered and that they have been unlawfully deprived of the property rights in the government benefits they were entitled to receive prior to the enactment of the New Veterans Charter.

155. The existence of property rights and the right not to be deprived thereof except through due process and with compensation has been recognized in Canada and internationally.

156. American precedents hold that once the government has established a system that creates a claim of entitlement for an individual, the due process clause will apply should the government decide to discontinue the entitlement. Canadian legal scholars have posited that that protection of these types of property rights might be achieved with a wide interpretation of the "security of the person" clause in section 7, as discussed above.

Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights," *Alberta Law Review*, 1988, p. 548

157. In the 1989 decision of *Irwin Toy*, the Supreme Court of Canada left open the possibility that economic rights fundamental to human life or survival could be protected by section 7 of the *Charter*.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927, paragraph 282

158. The Plaintiffs submit that the property rights they assert are within the class of rights that are fundamental to human life or survival referred to in *Irwin Toy*.

159. The *Charter* is not the only source of rights available to the Plaintiffs. Property rights are part of Canada's common law and can be traced back to the year 1215, when the *Magna Carta* was signed which protected the property of British feudal lords from arbitrary seizure by the Monarch.

160. The right to own property was also included in the English Bill of Rights in 1689 which limited the power of the King to seize property.

161. In 1948, Canada signed the *United Nations Universal Declaration of Human Rights*, Article 17 of which reads:

(a) Everyone has the right to own property alone as well as in association with others.

(b) No one shall be arbitrarily deprived of his property.

162. While the Declaration does not have binding legal effect, it is pled by the Plaintiffs as a reflection of the normative values of Canadians.

163. Finally property rights are also recognized in the 1960 *Canadian Bill of Rights*, S.C. 1960, c. 44, which affirms the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law. As federal legislation, the Bill of Rights applies to areas within federal jurisdiction, including those that are the focus of this litigation.

164. The Supreme Court of Canada, in the case of *Harrison v. Carswell*, commented upon property rights in Canadian law as follows:

> Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, of any interest therein, save by due process of law.

Harrison v. Carswell, (1975), 62 D.L.R. (3d) 68 at 83

165. The Plaintiffs submit that these common law protections of property rights against the Crown are preserved by Section 26 of the *Charter*, which provides "[t]he guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada". The common law rule provides that, absent express legislative language directing otherwise, courts will order compensation to owners of property rights taken by the state.

Manitoba Fisheries Ltd. v. Canada, [1979] 1 S.C.R. 101;
British Columbia v. Tener, [1985] 1 S.C.R. 533;
Canadian Pacific Railway Co. v. Vancouver (City), 2006 SCC 5; [2006] 1 S.C.R. 227

166. The enactment of the New Veterans Charter and the discontinuation of the superior benefits under the *Pension Act*, was not done in accordance with due process. Rather, the change was unilaterally imposed during a time of war despite the Social Covenant which the Canadian Forces members and veterans understood to be in place and notwithstanding the obligations of the Crown towards those members.

Canadian Human Rights Act

167. The Plaintiffs are not making a claim under the *Canadian Human Rights Act* and reference to the Act does not appear anywhere in the Relief Sought.

168. The Plaintiffs plead the Act as part of the factual background and legislative scheme that addresses the various rights of Canadian Forces members and veterans who are disabled in their employment with the Government and the corresponding obligations of the Government with respect thereto.

169. The Plaintiffs submit that the exemption provided in the Act to the Canadian Forces does not abrogate the duties owing by the Government of Canada to its disabled members and veterans.

170. Since there is no claim being advanced under the Act, the references thereto as part of the factual background to the claim ought not to be struck.

Crown Liability and Proceedings Act

171. The purpose of section 9 of the *Crown Liability and Proceedings Act* is to prevent double recovery for the same claim where the Government is liable for misconduct but has already made a payment in respect thereof:

> In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. 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.

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

172. For section 9 of the *Crown Liability and Proceedings Act* to apply there must be clear evidence that a pension paid or payable to the Plaintiffs was intended to cover and does cover the injuries which form the basis of the claim.

Duplessis v. Canada, [2000] 197 F.T.R. 87

173. In *Duplessis v. Canada*, Sergeant Duplessis, suffered from a variety of post-traumatic stress-related symptoms arising from his official duties during several peace keeping missions. Upon his return from these missions, Sergeant Duplessis requested assistance from his superiors and medical personnel but received no counselling, treatment or assistance.

174. Sergeant Duplessis brought a claim against the Crown alleging, among other things, breaches of his *Charter* rights and a breach of fiduciary duty. He argued that his true losses are greater than the compensation which he received by way of pension. In other words, the breaches of the Crown in not providing the support necessary to him were stated to have consequences separate from his post-traumatic stress disorder for which he received compensation.

175. The Crown sought to strike the claim as being barred under section 9 of the *Crown Liability and Proceedings Act*. It argued that the injuries alleged to have arisen from the mistreatment of Sergeant Duplessis were indistinguishable from the syndrome for which he was already being compensated.

176. The Court refused to strike the plaintiff's claim, citing that more complete evidence was required to assess whether Sergeant Duplessis' pension entitlement was intended to cover the injuries which formed the basis of his claim:

> Absent clearer evidence that the pension entitlement was intended to cover and does cover the injuries which form the basis for this claim, and that these injuries are in fact related to or indistinguishable from the aggravation of his syndrome, I cannot find it plain and obvious that the plaintiff has already been awarded a pension in relation to the injuries claimed.

Duplessis at para. 71

177. Section 9 of the *Crown Liability and Proceedings Act* has no application to the case at bar. The misconduct alleged by the Plaintiffs relates to the enactment of the New Veterans Charter on the basis that it is unconstitutional and in violation of fiduciary duties owed to the Plaintiffs.

178. It is clear that any pension award the Plaintiffs may be entitled to do not contemplate, nor were they intended, to cover the injuries arising from the enactment of the New Veterans Charter.

179. The Plaintiffs seek a determination that their rights and freedoms under the *Charter* have been infringed and constitutional damages as a remedy. The *Crown Liability and Proceedings Act* does not exempt pension legislation from *Charter* scrutiny.

180. The distinct remedy of constitutional damages serve three interrelated functions. The first function is to serve as compensation to recognize that breaches of an individual's *Charter* rights may cause personal loss which should be remedied. Secondly, the function of vindication recognizes that *Charter* rights must be maintained. Finally, damages serve as deterrence to future breaches by state actors.

Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28

181. The constitutionality of the New Veterans Charter and the basis of any constitutional damage award raise separate and distinct claims not subsumed by the pensions paid or payable to the Plaintiffs.

182. Similarly, the Plaintiffs' claim in breach of fiduciary duties is not in respect of an injury for which a pension was or may be awarded to the Plaintiffs. The breaches of the Crown in failing to provide adequate support and compensation schemes have consequences separate from the injuries the Plaintiffs sustained in military service.

183. There is no prospect of double recovery warranting the application of section 9 of the *Crown Liability and Proceedings Act* and as a result that provision does not apply to justify striking the Plaintiffs' claims or at all.

Statutory Instruments Act

184. It is submitted that more than a "deemed referral" to a Committee of the House of Commons or Senate is required to validly enact the statutory instrument.

185. The Defendant's suggestion that no Parliamentary Committee need actually do anything with statutory instruments purportedly referred to the Committees is contrary to the legislative intent.

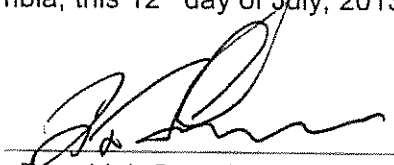
186. The Plaintiffs maintain their submission that the Table of Disabilities has not been properly enacted.

Conclusion

187. The Plaintiffs' claim raises serious issues of national importance. While some of the claims raise novel questions of law, the claims are based on sound principles of law, justice and equity and it is not plain and obvious that they will fail. Rather the Plaintiffs submit they have raised important legal issues that ought to be addressed following a full trial on the merits. Given the principles of proportionality which underlie our Rules of Court, the Plaintiffs should not be driven from the judgment seat.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, in the Province of British Columbia, this 12th day of July, 2013.



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