

VANCOUVER

JUN 13 2016

COURT OF APPEAL  
REGISTRY

Court of Appeal File No CA041232  
Registry Vancouver

COURT OF APPEAL

BETWEEN

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

Respondents  
(PLAINTIFFS)

AND

THE ATTORNEY GENERAL OF CANADA

Appellant  
(DEFENDANT)

**MEMORANDUM OF SUBMISSIONS  
OF THE RESPONDENTS ON  
CASE MANAGEMENT CONFERENCE**

**Appellant:**

ATTORNEY GENERAL OF CANADA

**Counsel for Appellant**

Paul Vickery  
Lori Rasmussen  
Travis Henderson

**Department of Justice Canada**

900-840 Howe Street  
Vancouver, British Columbia  
V6Z2M1  
Telephone: (604) 775-5942

**Respondents:**

Daniel Christopher Scott, Mark Douglas  
Campbell, Gavin Michael David Flett,  
Kevin Albert Matthew Berry, Bradley  
Darren Quast, Aaron Michael Bedard

**Counsel for Respondents:**

Donald J. Sorochan QC  
Kelsey Thompson  
Aimee Schalles

**Miller Thomson LLP**

1000-840 Howe Street  
Vancouver, British Columbia  
V6Z 2M1  
Telephone: (604) 687-2242

**OPENING STATEMENT**

At the direction of the Honourable Mr. Justice Groberman by memorandum dated May 31, 2016, a Case Management Conference for this proceeding has been set to be held at the Law Courts, 800 Smithe Street, Vancouver at 9:30 a.m. on June 17, 2016 to consider what, if any, further steps should be taken as a result of the position communicated to the Court by Counsel for the

Appellants on May 16, 2016<sup>1</sup> that the Court is now free to render its decision in the appeal heard on December 3 and 4, 2014 and the position communicated to the Court by Counsel for the Respondents on May 18, 2016<sup>2</sup> that it would be inappropriate for the Court to do so.

In order for the Court to consider the issues raised by the differing positions of the parties, it is the submission of the Respondents that the Court must consider all of the circumstances surrounding the negotiation and performance of the settlement agreement known as the Abeyance Agreement dated May 27, 2015<sup>3</sup>.

In determining whether the Appellants have breached or evinced an intention to breach the settlement agreement the Court must objectively construe the purported breaching party's intention and to do so all of the surrounding circumstances to the agreement and its performance should be considered.<sup>4</sup> Since the surrounding circumstances to the settlement agreement involves political and national public policy issues, reference is made to Proceedings of Parliament as recorded in Hansard.<sup>5</sup>

## PART 1

### STATEMENT OF FACTS

1. The essential facts are set out in the Affidavit of Daniel James Scott (Jim Scott), sworn the 12 day of June 2016.

## PART 2

### ISSUES TO BE CONSIDERED

2. How to give effect to and enforce the commitments of the Government of Canada in the settlement agreement set out in the Abeyance Agreement.

---

<sup>1</sup> Exhibit "B-1" to the Affidavit of Jim Scott.

<sup>2</sup> Exhibit "B-1" to the Affidavit of Jim Scott.

<sup>3</sup> Exhibit "A" to the Affidavit of Jim Scott.

<sup>4</sup> *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 239 N.S.R. (2d) 270, Saunders J.A. at para. 89; *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10, 381 D.L.R. (4th) 1, at paras. 149, Cromwell J. at para. 149,164 and 171; *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576. *Union Carbide Canada Inc. v. Bombardier Inc.* [2014] 1 S.C.R. 800, Wagner, J. at para. 35.

<sup>5</sup> Hansard evidence is admissible as relevant to the background and purpose of legislation and to establish the political positions taken. *R. v. Morgentaler*, [1993] 3 S.C.R. 463 per Sopinka J. at 484.

### PART 3

#### SUBMISSIONS

3. The starting points for the Respondents' submissions are that it is well recognized that it is desirable for all parties to litigious disputes to settle their differences and that commitments in a settlement process should be respected and enforced by this Court.
4. Keeping commitments is stressed in the Prime Minister's Mandate Letter to the Appellant, Attorney General of Canada <sup>6</sup> which states (emphasis added):
  - (a) "We have promised Canadians a government that will bring real change . . . "
  - (b) "If we are to tackle the real challenges we face as a country – from a struggling middle class to the threat of climate change – **Canadians need to have faith in their government's honesty and willingness to listen.**"
  - (c) "I expect you to report regularly on your **progress toward fulfilling our commitments** and to help develop effective measures that assess the impact of the organizations for which you are answerable."
  - (d) "We have also committed to set a **higher bar for openness and transparency in government.**"
  - (e) "**Our platform guides our government.** Over the course of our four-year mandate, I expect us to **deliver on all of our commitments.** It is our **collective responsibility to ensure that we fulfill our promises**, while living within our fiscal plan."
  - (f) "As Minister, **you will be held accountable for our commitment to bring a different style of leadership to government.**"
  - (g) "Review our litigation strategy. This should include **early decisions to end appeals or positions that are not consistent with our commitments**, the Charter or our values."
  - (h) "I expect you to work closely with your Deputy Minister and his or her senior officials to **ensure that the ongoing work of your department is undertaken**

---

<sup>6</sup> Exhibit "L" to the Affidavit of Jim Scott.

**in a professional manner and that decisions are made in the public interest.”**

5. It is submitted that the facts set forth in the Scott Affidavit clearly establish that the position advanced by the Appellant Attorney General in this case amounts to a complete disregard for the formal settlement commitment of the Government of Canada in the Abeyance Agreement (signed personally by a Minister of the Crown) and the platform commitments of the Liberal Party of Canada to the Respondents, to veterans and to the public of Canada.
6. The procedure adopted by the Appellant in this case of asking the Court to rule on the appeal on the basis of the December 2014 arguments is, to say the least, objectionable.
7. In making this request to the Court, there was no disclosure to the Court by the Appellants that legal positions that the Appellant had advanced in the December 2014 hearing had been repudiated within a month by the former Conservative Government and were the subject of criticism and contrary to veterans' program positions of the current Liberal Government.
8. It is respectfully submitted that before the Court considers whether, in light of the settlement agreement, it is able to render judgment on the appeal, the Appellant should specifically confirm to the Court that it is the current position of the Government of Canada that:
  - (a) statements made by Sir Robert Borden and the coalition government in 1917 were political speeches that reflected the policy positions of the government at the time and were never intended to create a contract or covenant;
  - (b) at no time were these statements intended to bind future governments;
  - (c) there is no written, defined, or articulated "social covenant" or "social contract" between members of the CAF and the government and people of Canada which has the attributes of creating a fiduciary duty on the government's part under which it is obliged to place the interests of disabled veterans above the interests of all other Canadians;
  - (d) at no time in Canada's history has any alleged "social contract" or "social covenant" having the attributes pleaded by the plaintiffs been given effect in any statute, regulation, or as a constitutional principle, written or unwritten;

- (e) no set of principles exist that can be stated with certainty, understood with clarity, or accepted with unanimity among the people of Canada to define a "social contract" or "social covenant" as alleged;
  - (f) "the Honour of the Crown" principle has no application to government promises made to members of the Canadian Armed Forces;
  - (g) "the Honour of the Crown" principle is confined to the Aboriginal context.
  - (h) "the Honour of the Crown" principle does not encompass the relationship between Canada and members of the Canadian Armed forces.
9. It is further submitted that before the Court considers whether, in light of the settlement agreement, it is able to render judgment as requested by the Appellants, the current Liberal Government should confirm to the Court whether or not it accepts or repudiates the unanimous resolution of Parliament of May 11, 2015<sup>7</sup>:

That, in the opinion of the House, a standalone covenant of moral, social, legal, and fiduciary obligation exists between the Canadian people and the government to provide equitable financial compensation and support services to past and active members of the Canadian Armed Forces who have been injured, disabled or have died as a result of military service, and to their dependants, which the government is obligated to fulfil.

10. It is further submitted that the Court consider how to give effect to the provision in the Abeyance Agreement wherein the Appellants in paragraph L agree to the abandonment of the appeal by the Appellants.<sup>8</sup>
11. The Respondents acknowledge that, at the request of the Justice Groberman at a Chambers Hearing at which the abandonment was to be finalized, the Appellants did not in fact abandon the appeal, a position to which the Respondents did not object at the time because all of the political parties of Canada had gone on the record in Parliament as repudiating the positions that the Appellants advanced in the December 2014 appeal submissions and all parties had specifically gone on the record in Parliament as accepting the existence of the Social Covenant.<sup>9</sup>

---

<sup>7</sup> Exhibit "F" to the Affidavit of Jim Scott.

<sup>8</sup> Exhibit "A" to the Affidavit of Jim Scott, paragraph L.

<sup>9</sup> Affidavit of Jim Scott, paragraph 28.

12. The June 2014 unanimous Report of the Commons Standing Committee on Veterans Affairs included recommendations consistent with the Respondents' position. <sup>10</sup>
13. During the debate on May 11, 2015 Social Covenant motion, the Liberal Party position was stated by the party's Veterans Affairs Parliamentary Critic, Mr. Frank Valeriote. <sup>11</sup>
14. During the debate on May 11, 2015 Social Covenant motion, the New Democratic Party position was stated by the mover of the motion, Mr. Fin Donnelly <sup>12</sup> and Mr. Peter Stoffer, the Veterans Affairs Critic of the New Democratic Party <sup>13</sup>.
15. During the debate on May 11, 2015 Social Covenant motion, the Conservative Party position was stated by the Minister, Erin O'Toole<sup>14</sup>. Specifically, Mr. O'Toole stated:

At the outset I referred to this. My first day in the House as minister I quoted Sir Robert Borden and the obligation we owed, since Borden's time in 1917, when he first articulated it to our veterans. He termed the line "just and due appreciation that we owe our veterans". In fact, we have used his language to show the connection from 1917 to today of this obligation. I have termed the obligation "a tremendous obligation". Whether we call it "solemn", "sacred", "tremendous", it will be enshrined in Bill C-58, which I hope the hon. member looks into further, and gets behind and supports.<sup>15</sup>
16. The 2015 Election Platform of the Liberal Party with respect to veterans issues also supported the position advanced by the Plaintiffs/Respondents in this action, with the Leader, Mr. Trudeau, referring to the "Sacred Covenant" owed by Canada to veterans. <sup>16</sup>
17. The 2015 Election Platform of the New Democratic Party with respect to veterans issues did so as well. <sup>17</sup>

---

<sup>10</sup> Exhibit "E" to the Affidavit of Jim Scott. Paragraph 16 to the Affidavit of Jim Scott.

<sup>11</sup> Exhibit "F" to the Affidavit of Jim Scott. Speeches of Mr. Valeriote at Hansard pages 13696, 13701-13704, 13705, 13707

<sup>12</sup> Exhibit "F" to the Affidavit of Jim Scott. Speeches of Mr. Donnelly at Hansard pages 13692 – 13697, 13700 – 13701, 13710.

<sup>13</sup> Exhibit "F" to the Affidavit of Jim Scott. Speeches of Mr. Stoffer at Hansard pages 13740 – 13742.

<sup>14</sup> Exhibit "F" to the Affidavit of Jim Scott. Speeches of Mr. O'Toole at Hansard pages 13697 – 13701, 13704, 13715, 13733, 13748,

<sup>15</sup> Exhibit "F" to the Affidavit of Jim Scott. Speech of Mr. O'Toole at Hansard page 13699.

<sup>16</sup> Exhibit "I" to the Affidavit of Jim Scott - 2015 Election Platform of the Liberal Party with respect to veterans issues.

<sup>17</sup> Exhibit "J" to the Affidavit of Jim Scott - 2015 Election Platform of the New Democratic Party with respect to veterans issues.

18. In addition to breaching the settlement provisions of the Abeyance Agreement, the Appellant has breached the negotiation provisions of the Abeyance Agreement (paragraphs K, M, N, O and P).<sup>18</sup>

**PART 4**

**RELIEF SOUGHT**

19. Since the intervention of the Court precluded the abandonment of the appeal that had been negotiated in the Abeyance Agreement, it is submitted that the Appellants not be permitted to advance or rely upon any positions in the appeal that were repudiated by the Conservative Government in the Abeyance Agreement or are not in accordance with the Parliamentary or Platform Positions of the Liberal Party of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: June 13, 2016.



---

Donald J. Sorochan, QC

Counsel for the Appellants

---

<sup>18</sup> Exhibit "A" to the Affidavit of Jim Scott and paragraphs 44 – 45 of the Affidavit of Jim Scott.