Federal Court  Cour fédérale

Date: 20151008

Docket: T-1300-11

Citation: 2015 FC 1151

Toronto, Ontario, October 8, 2015

PRESENT: Prothonotary Kevin R. Aalto

BETWEEN:

THE ESTATE OF MORDRED HARDY, VETERAN, HELENA HARDY, KARL HARDY, BARTON HARDY, SANDRA HARDY (MAHON) AND DAVID HARDY

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] The motion before the Court by the Plaintiffs seeks leave of the Court to issue an amended statement of claim which has been previously struck out by order of the Court. Wrapped up in this motion is a motion by the Crown to strike the action in any event as it fails to meet the test for pleading and is bereft of any chance of success.

[2] There were many issues raised in the written representations of the parties and the oral submissions at the hearing. The issues are varied and complex. The issues include limitation periods; prejudice; failure to properly plead misfeasance in public office; lack of a duty of care; whether the specific claims can be asserted by an Estate; whether Honour of the Crown can be imported into non-aboriginal claims; and, whether there is any viable claim under the *Charter of Rights and Freedoms*.

I. **Facts**

[3] To understand better these issues, a brief overview of the facts is necessary. The following summary is taken from the Proposed Amended Statement of Claim (the Claim). The circumstances giving rise to the Claim began during WWII. The Claim involves a Veteran, one Mordred Hardy, now deceased (the Veteran). In March, 1943, the Veteran was injured during a military training exercise. Apparently, during that training exercise a significant explosion occurred and as the Veteran was in close proximity to the explosion, he was injured.

[4] The Veteran was hospitalized and then experienced trouble walking, problems with hearing, fever, disorientation, and ongoing pains with his head, neck, back, and legs. Notwithstanding these injuries, the Veteran was discharged from the hospital with a psychiatric diagnosis of schizophrenia. It is alleged this diagnosis was incorrect and did not refer to the physical injuries suffered by the Veteran. Thereafter, the Veteran was unable to obtain regular employment. The Veteran, who worked with Bell Canada prior to joining the Navy, lost his employment and it is alleged that this resulted from an improper diagnosis of schizophrenia. The Veteran's wife then became the sole bread winner for the family.

[5] Subsequent to his discharge from the Navy, the Veteran made several attempts to obtain compensation from the Department of Veterans Affairs (DVA). His first attempt at compensation was in February, 1944. This application for compensation was based on suffering from degenerative disc disease of the cervical spine arising from the injuries sustained in the explosion. The Veteran received no response from the DVA. In a second application later in February, 1944, the Veteran again sought compensation. This request for compensation was not processed by the DVA as it was not an application for pension entitlement. The Plaintiffs claim that the DVA failed to assist the Veteran in filing a proper application. In a decision of November 8, 1944, the Canadian Pension Commission (Commission) denied benefits to the Veteran and did not recognize the physical injuries.

[6] Nothing further occurred until the mid-1970s. In April, 1975, the Veteran applied a third time for financial assistance and submitted a pension application to the Commission on the basis of physical disability. At this juncture, the Veteran had begun to suffer from arthritis which exacerbated the prior injuries. In his application, the Veteran sought the assistance of a Pension's Advocate to assist in preparing and presenting his application to the Commission. This third application was not processed nor did a Pension's Advocate provide assistance to the Veteran.

[7] In 1997, the Veteran made a further application to the Commission and on November, 1997 the DVA approved the grant of a pension conditionally assessed at ten (10) percent. The DVA accepted the explosion in 1943 as a causative factor of the Veteran's deteriorated physical condition. The pension entitlement was retroactive to May, 1997. Apparently, the decision of

the Commission was never sent to the Veteran or any member of his family. The Plaintiffs claim they became aware of the contents of the decision only in 2010.

[8] The conditional grant of the pension was subject to a new medical assessment although the Veteran received no correspondence from the DVA.

[9] Unfortunately, in 1999, the Veteran passed away.

[10] It appears that in April, 2001 an internal administrative review of the Veteran's case was conducted by the DVA which concluded that insufficient information was provided by the Veteran to grant any benefits. In 2010, the spouse of the Veteran appealed the date of retroactivity and claimed entitlement either from 1944 or, in the alternative, 1975. This appeal resulted in a further decision of July 2, 2010 by a Review Panel. The Review Panel found the 1975 application was satisfactory, and found that the DVA's failure to respond to the Veteran's application related to administrative difficulties within the DVA beyond the control of the Veteran.

[11] The Review Panel granted an entitlement from November 27, 1994 in accordance with Section 39(1) of the *Pension Act*. The retroactivity was limited to this date because that was the maximum extent of pension retroactivity available under the *Pension Act*. This decision was appealed regarding the retroactivity and the Appeal Panel affirmed the 2010 decision of the Review Panel. The Plaintiffs claim that notwithstanding the pension award as granted there were shortfalls including failure to pay certain types of allowances including the full married rate.

[12] To further complicate this claim, the wife of the Veteran passed away in 2012 and more recently one of the four adult children has now also passed away.

A. *The Plaintiffs*

[13] In the materials filed on the motion the Claim included a different style of cause. The new proposed style of case names The Estate of Mordred Hardy, Veteran, Helena Hardy, Karl Hardy, Barton Hardy, Sandra Hardy (Mahon) and David Hardy. Karl Hardy is the spokesperson for the Plaintiffs as he is the one giving instructions in relation to this case. In an affidavit sworn March 5, 2015 provided to the Court at the outset of the hearing, Karl Hardy deposes that he has written authorization from his remaining siblings.

II. **The Claim**

[14] The Claim seeks a range of remedies. The remedies include the following:

a). A declaration that the Defendant owed a duty of care to the Veteran and breached that duty causing the Veteran and the Plaintiffs directly and indirectly physical and emotional distress, loss of income, and humiliation;

b). The Defendant breached the Plaintiffs' rights pursuant to section 7 of the *Charter*;

c). Damages pursuant to section 24 one of the *Charter*;

d). A declaration of the limitation on the ability to correct errors or failures of the Department pursuant to section 39 of the *Pension Act* violates section 7 of the *Charter* and is therefore of no force in effect;

e). An accounting of shortfalls in payment of pension benefits to the Veteran retroactive to 1994 and restitution of benefits unfairly denied from 1943 to 1994;

f). Damages for negligence including damages for mental suffering and distress;

g). Loss of employment;

h). Reduced capacity for employment;

i). An underpayment of pension benefits;

j). Damages for misfeasance [in public office];

k). Damages for vicarious liability for failing to adequately train and/or supervise medical officers and personnel;

l). General damages;

m). Aggravated damages;

n). Costs.

[15] Part of the Claim for breach of a duty of care includes an allegation that the Crown has breached a social covenant and social contract owed to members of the Canadian Armed Forces. It is alleged that the Crown breached the "Honour of the Crown". This latter claim is unique in this action in that Honour of the Crown is a concept which has developed in the context of Aboriginal claims. It is not a cause of action in a civil private law case.

III. **Issues**

[16] Against the facts as pleaded and the remedies sought in the Claim, the following issues arise:

1. Would the proposed claim, if allowed to be filed ultimately be struck on the ground that:

    a). It does not disclose a cause of action in misfeasance in public office, negligence, honour of the crown, or breach of any *Charter* rights?

    b). Is this action barred, in any event by virtue of the operations of sections 8 and 9 of the *Crowns Liability and Proceedings Act*?

2. Is the claim prejudicial to the position of the Crown?

[17] Before embarking on a consideration of these issues, it is necessary to first set out some general principles relating to motions to amend and motions to strike.

A. *Motion to Amend*

[18] Rule 200 provides that an amendment by made without leave "at any time before another party has pleaded thereto". However, this rule is qualified in the circumstances of this case as this is a case managed action and leave is required in accordance with prior orders of this Court regarding this action.

[19] The general principles relating to amendments are found in the well-known case of *Canderel Ltd. v Canada (C.A.)*, [1994] 1 F.C. 3 (FCA), wherein the Court stated "[a]n amendment should be allowed at any stage of an action for the purpose of determining the real questions and controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interest of justice" [at para. 9]. Notably, the Federal Court of Appeal has stated clearly that the two criteria of *Canderel* are mandatory in that an injustice to the other party is capable of being compensated for by an award of costs and, second, that the interest of justice would be served. Both these criteria must be met in this case [see for example *Sanofi-Aventis Canada Inc. v Teva Canada Limited*, 2014 FCA 65 at para. 15].

[20] However, even if both elements of *Canderel* are met, an amended claim must still overcome the hurdle of not being a claim that would be struck out in any event. Thus, even if the Claim meets the requirements of an amendment, it may still be scuttled on the shores of no viable cause of action. Therefore, it is necessary not only to consider the nature of the remedies sought in the Claim but the applicable law.

[21] In *Sivak v Canada*, 2012 FC 272, the Honourable Mr. Justice James Russell usefully summarized in detail the well-established test for striking a pleading for disclosing no reasonable cause of action and for being scandalous, frivolous and vexatious:

> 15. The test in Canada to strike out a pleading under Rule 221 of the *Rules* is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc*., [1990] 2 SCR 959

and *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42, at paragraphs 17 and 19.

16. In determining whether a cause of action exists, the following principles are to be considered:

a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;

b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and

c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

. . .

25. *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.

26. The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada*, 2002 FCA 209.

. . .

31. There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.*, 2009 FC 1209; appeal dismissed 2010 FCA 112.

32. In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, above.

33. I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true

. . .

89. In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:

> i. A document that demonstrates a complete absence of material facts;
>
> ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;
>
> iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;
>
> iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.

90. A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.

91. The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.

92. A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As

stated by this Court in *Ceminchuk v Canada*, [1995] FCJ No 914, at paragraph 10:

> A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

[22] In coming to the conclusions I have, these principles have been considered and applied.

IV. **Misfeasance in Public Office**

[23] As noted above, the Claim raises many different possible causes of action. One such possible cause of action is misfeasance in public office.

[24] This cause of action requires deliberate and unlawful conduct which would likely harm a claimant.

[25] *Odhavji Estate v Woodhouse*, [2003] 3 SCC 263, remains the leading authority setting out the elements of this cause of action. Utilizing the tests as set out in at para. 23 of that decision as they apply to the Claim, they are paraphrased as follows:

i. Did any identifiable person in public office engage in deliberate and unlawful conduct in her capacity as a public officer; and

ii. Was that public officer aware both that her conduct was unlawful and likely to harm the claimant?

[26] In considering the plea of negligence and misfeasance in public office a plaintiff must establish that not only did the Crown negligently breach a duty to that plaintiff but demonstrate a causal connection between the breach of duty and the injury and set out the actual loss [*Sivak v Canada, supra* at para. 46; *Odhavji, supra* at para. 32].

[27] The Plaintiffs submit that the facts must be taken as proven. The Plaintiffs assert that the Defendant is liable for misfeasance in a public office and argue that the facts as set out in the Claim support the cause of action of misfeasance in public office. The Plaintiffs argument is that unknown servants, who are agents of the Crown, acted maliciously or with serious careless or reckless indifference to carry out their statutory or legal obligations owed to the Veteran which they knew would cause damage to the Veteran.

[28] These are bald allegations and lack any particularity as to the identity of the wrongdoers involved in misfeasance. This cause of action requires particularity. As Mr. Justice David Stratus of the Federal Court of Appeal observed in *Merchant Law Group v Canada*, 2010 FCA 184:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v Canada,* 2005 FC 1612 (CanLII), 144 A.C.W.S.

> (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v USA Hockey, Inc*. (1997), 1997 CanLII 5256 (FC), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v Novopharm Limited*, 2010 FCA 112 (CanLII) at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v Painblanc*, (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (CanLII) at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[29] In reviewing the Claim, there are simply broad and bald allegations of deliberate and unlawful conduct without any of the essential and necessary facts to support such a cause of action. It is exactly the type of pleading that Mr. Justice Stratus opined on in the *Merchant Law Group* case. The allegations of misfeasance in public office cannot stand.

V. **Negligence**

A. *Negligence*

[30] Negligence and duty of care have been much discussed in the jurisprudence. The well-known *Anns* test is the basis for a claim in negligence. In *R v Imperial Tobacco*, 2011 SCC 42, at paras. 38-39, the Supreme Court affirmed the *Anns* test set out in *Cooper v Hobart*, 2001 SCC 79, for liability in negligence:

> i. Do the facts as pleaded disclose a proximate relationship between the plaintiff and the defendant wherein failure to take reasonable care might foreseeably cause loss or harm to the plaintiff; and,
>
> ii. If the answer to the first question is yes are there policy considerations which exist which outweigh recognizing a duty of care.

[31] In considering the plea of negligence and misfeasance in public office the Plaintiffs must establish that not only did the Crown negligently breach a duty to the Plaintiffs but demonstrate a causal connection between the breach of duty and the injury and set out the actual loss [see, *Sivak v Canada, supra* at para. 46; *Odhavji, supra* at para. 32].

[32] In the circumstances of this case, it can certainly be said that the Veteran did not do well by the DVA. Indeed, if it were the Veteran who had commenced this proceeding there would be sufficient proximity and the Claim would survive a motion to strike. Unfortunately, that is not the case.

[33] Any duty of care is owed to the Veteran. It is the Veteran who was injured by the Department's alleged negligence. In paragraph 39 of the Claim there is a lengthy list of allegations of negligence. They are as follows:

> 39. The Defendant breached its duty of care owed to the Plaintiffs by:
>
> a. Failing to provide reasonable supervision during the training exercise in 1943;
>
> b. Failing to recognize and properly diagnose the Veteran's injuries following the explosion;
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> c. Failing to recognize and documents the discharge from service was due to physical injuries rather than a nervous condition or as a consequence of major mental illness;
>
> d. Failing to assist the Plaintiff with his application in 1944;
>
> e. Committing an error of law by failing to assist the Plaintiff with his application in 1975;
>
> f. Failing to meet its statutory duties in the treatment of the Plaintiff in relation to his attempts at securing a pension;
>
> g. Failing to take steps to remediate the clear error noted in paragraph 33, above and;

> h. Failing to uphold the honour of the crown in its promise to ensure that injured veterans received adequate service, assistance and compensation.

[34] These are, for the most part, all directed toward a duty owed to the Veteran. Subparagraphs (a) through (d) are all directed toward the tragic events of 1943 and to the extent any duty is created they relate solely to the Veteran. Similarly, subparagraph (e) exists only in relation to the Veteran. This is so even though the paragraph refers to Plaintiffs.

[35] Subparagraph (f) speaks to statutory duties relating to obtaining a pension. There is no indication how this could apply to the grown up children of the Veteran. While the *Pension Act*, R.S.C., 1985, c. P-6, which is relied upon by the Plaintiffs, does refer to "spouses" and "dependents" it does not create a statutory duty of care. Rather, it is directed toward individuals who fall within the requirements of the legislation. It does not create a duty of care or a claim in negligence.

[36] With respect to subparagraph (g) this is an allegation that the Crown had a duty to remediate a "clear error" made by the Entitlement Appeal Panel which held it was statutorily bound by the limitations on retroactivity in the *Pension Act*. This allegation is not part of the lexicon of negligence and engages an attack on a decision of a properly constituted tribunal. If the decision was clearly in error then an appeal or a judicial review should have been pursued. It is not negligence as that concept has evolved in the jurisprudence.

[37] Subparagraph (g) refers to a failure to uphold the Honour of the Crown. This is an evolving concept and has been applied only to claims relating to aboriginal rights. It is not a claim in negligence. If anything, it is a separate claim and is discussed in greater detail below.

[38] In an effort to legitimize the negligence claims, the Plaintiffs relied upon *Canada v Keeping*, 2003 NLCA 21and *Samimifar v Canada (MCI)*, 2006 FC 1301, affirmed 2007 FCA 248. Neither of these cases is analogous to the facts in this case and do not support the position of the Plaintiffs.

[39] At issue in *Keeping* was a claim in negligence with respect to a named employee of the Ministry of Fisheries and Oceans who improperly measured the gross tonnage of a vessel as part of the processing of a crab licence application for the plaintiffs. The Court held the plaintiffs were owed a duty of care and that it had been breached. This was a case where the employee as part of the operations of the department had failed to properly measure the vessel and it was found that he was not qualified to measure vessels as he had no training and limited expertise [para. 40 of *Keeping*]. The issues did not engage policy. The plaintiffs were the persons wronged including the son of the owner of the vessel as it was determined that he had direct dealings with the department employee. The department employee asked the son for assistance in measuring the boat and had direct knowledge the involvement of the son in the business. The case would have had application had the Claim in this action been by the Veteran. In this case, there are no dealings with a specific DVA employee nor are there facts which would engage the proximity between these Plaintiffs and the decisions made which are at the heart of this case.

[40] In *Samimifar,* the plaintiff sought damages for failure of the Department of Citizenship and Immigration to process his claim for permanent residence in a timely way. The Crown moved to dismiss the claim by way of summary judgment. The Court dismissed the motion.

[41] The facts of the case were unique. Mr. Samimifar arrived in Canada in 1985 and for some 21 years while in Canada sought legal status as a permanent resident. He was given approval-in-principle in 1994 to accept and process his application. Through "inattention, inaction, and delay" his application did not proceed in a timely way and finally in 2003 he was denied permanent residence status on the grounds that he was a member of a terrorist organization. That decision was sent back for review and in the interim he commenced an action in negligence against the Crown.

[42] The Court observed that generally policy matters do not engage issues of individual proximity [para. 45 of *Samimifar*]. The Court also reviewed at length the jurisprudence relating to the negligence of the Crown. In particular, the Court considered *Premakumaran v Canada,* [2005] FC 507, aff'd [2006] FCA 213 and *Benaissa v Canada (Attorney General),* [2005] F.C.J. No. 1487.

[43] In *Premakumaran,* a motion for summary judgment dismissing the claim was granted. The case involved a married couple who came to Canada under the category of Professional Skilled Immigrants. They alleged that fraudulent misrepresentation and negligent misrepresentation regarding the job category system and the use of processing fees. The trial judge found that the Crown owes a duty of care to the public as a whole and not to individual

plaintiffs. The judge found that the first part of the *Anns* test was not met and therefore dismissed the claim. The Court of Appeal upheld the decision and observed as follows:

> In this case, however, no duty of care arises. As the Motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case. There were no personal, specific representations of fact made to these particular appellants upon which they could reasonably have relied. The printed documentation and information given to them was merely general material for them to use in making an application for immigrant status. As the Motions Judge observed, it is not correct to say that someone "who picks up a brochure or reads a poster at the High Commission is a 'neighbour'" and is owed a duty as a result. More is required. The information given to the appellants contained no guarantees of work, nor of guaranteed success in the licensing procedure, nor that any particular assistance would be forthcoming. The statement that Mr. Premakumaran would "have no trouble finding a job" was made by his brother, not a counter clerk at the High Commission, as found by the Motions Judge. There is no evidence of any special relationship that could be relied on to support a duty in this case. [para. 24]

[44] There were, however, specific facts which distinguished the Mr. Samimifar's circumstances. The hearings judge determined that there was "more" which distinguished the case from *Premakumaran*. Those facts included such matters as the identity of an individual who it could be construed committed the tort. In this case the Claim is devoid of any material facts which would bring the Plaintiffs within the *Anns* requirements.

[45] Further, in *Benaissa*, the proposition that a process where a decision making body gathers information and comes to a decision is not the subject of a claim in negligence [para. 37]. This was a case of bald allegations that some unknown servant of the Crown had failed to process an application in a timely way. The claim in *Benaissa* was struck. The hearings judge in *Samimifar* distinguished the facts of *Benaissa* and found that Mr. Samimifar had produced "disturbing

evidence" to demonstrate that the actions of officials "are far outside the of what we expect from our public servants" [para. 67]. Thus, Mr. Samimifar's case was allowed to proceed.

[46] Here, as noted, there is little but bald assertions of negligence and the case falls within the parameters of both *Premakumaran* and *Benaissa*. The "more" that is required is not present on these facts. Thus, the claims in negligence in this case must fail and would be struck if the Claim were allowed to proceed. There is no proximity between the Plaintiffs and the Crown in the sense used in the cases to meet the first test in *Anns*.

VI. **Honour of the Crown/Fiduciary Duty**

[47] The Claim alleges that by virtue of the Honour of the Crown there is a duty owed to the Plaintiffs. The nature of this duty as described in paragraph 38 of the Claim requires that the Crown keep the promises that Canada has made in its Social Covenant with those "who serve this country". The Claim goes on to state that "[T]he Crown gave an undertaking of utmost loyalty and responsibility to ensure that Canadian Forces members and veterans would be provided suitable and adequate care and compensation for their service to the county". This claim is really an allegation that there a fiduciary duty owed by the Crown to veterans generally. It is claimed to arise on the authority of *Scott v Canada (Attorney General)*, 2013 BCSC 1651.

[48] The Honour of the Crown doctrine is one that evolved from the aboriginal rights context. It is a principle that Crown servants should act with honour in when representing the sovereign

[see, *Scott*, at para. 27; and *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 65]. In *Métis*, the Supreme Court described the doctrine as follows:

> The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
> >
> > ("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

[49] In *Scott*, a group of veterans commenced a proposed class action who were injured, physically or psychologically, in the course of their service. The Court allowed the claim of Honour of the Crown to continue. The Court stated at para. 35 as follows:

> In *Manitoba Métis Federation*, the Supreme Court of Canada fashioned a new constitutional obligation derived from the Honour of the Crown albeit within the Aboriginal context. It appears to me that this doctrine may well be an evolving one. On the facts as pleaded, I cannot find it is plain and obvious that the Honour of the Crown doctrine could never be extended to impose an obligation on the Crown to fulfill the Social Covenant it made to its armed forces despite changes in government policy. It is conceivable that

> the promise to provide suitable and adequate care for the armed forces and their families meets the threshold of an overarching reconciliation of interests that engages the Honour of the Crown. The issue is an important one that is deserving of full inquiry and should appropriately be left for determination after a trial on the merits.

[50] This is a very wide ranging though laudable statement. In my view, however, it does not account for the Supreme Court of Canada's limitations on the use of this doctrine. In *Scott*, the hearings judge helpfully included a summary of the four situations in which the Honour of the Crown doctrine has been applied [see para. 29]. Each of those situations related to the aboriginal context. No court has applied it in any other context although in *Scott* the claim was allowed to proceed [the case appears to be under appeal but no decision has yet been rendered].

[51] The Supreme Court in the *Métis* case, however, is the determinative voice on the extent and application of this doctrine. The Supreme Court stated as quoted in para. 66 above that the doctrine arises from the *Royal Proclamation of 1763* and the "assertion of sovereignty over an Aboriginal people". Thus, in my view, this doctrine only applies in the aboriginal context and does not apply to Veterans. From a policy perspective, to analogize to the second part of the *Anns* test on negligence, to expand its scope would create indeterminate liability of the Crown in an endless array of circumstances involving disadvantaged groups or those who claim some right from the Crown. It does not create an individual right as asserted in the Claim.

[52] Honour of the Crown is therefore not a doctrine that can be asserted by these Plaintiffs.

A. *Fiduciary Duty*

[53] The Plaintiffs plead that the Crown owed a fiduciary duty to the Veteran. It is unclear from a reading of the Claim how it could possibly apply to these Plaintiffs. This Claim pleads: "[T]he Crown solemnly undertook to act in the best interests of injured veterans upon their return from battle, and specifically including the Veteran".

[54] There is jurisprudence which supports the proposition that a fiduciary duty between the Crown and those serving in the military is not recognized in Canadian Law [see, for example, *Dumont v Canada*, 2003 FCA 475 at paras. 62-73]. In *Dumont*, the Federal Court of Appeal characterized the fiduciary duty claim as a tort claim [para. 73]. The claim for a fiduciary duty in *Dumont* was struck. I am of the view that the fiduciary duty alleged in this case is a disguised tort claim and is bereft of any chance of success. As discussed below, section 9 of the *Crown Proceedings and Liability Act* prohibits such a claim.

VII. ***Charter* Remedies**

[55] The Plaintiffs seek various remedies under the *Charter*, particularly a declaration of a breach of their rights under section 7 and damages pursuant to section 24.

[56] Section 7 of the *Charter* grants everyone the "right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The Plaintiffs baldly plead that their section 7 rights were breached by the Crown. There are no material facts in support of this allegation. The only support appears to be

some reference to section 39 of the *Pension Act* which is alleged to be "overbroad and violates the Charter". There is nothing in the Claim which gives life to this allegation. It is simply devoid of any material facts.

[57] Further, as noted in the written representations of the Crown the *Pension Act* allegation deals with economic rights and interests which are not protected by the *Charter*. There is ample jurisprudence to support the proposition that a deprivation is not sufficient to engage this section of the *Charter* and that these economic rights do not create a positive obligation on the Crown [see, for example, *Gosselin v Quebec (Attorney General)*, 2002 SCC 3; *Siemens v Manitoba (Attorney General),* 2003 SCC 3; and , *Scott, supra,* at para. 104]. This part of the Claim therefore is bereft of any chance of success.

[58] Section 24 of the *Charter* provides a remedy if an action by government is found to violate a *Charter* right. In the Claim the nexus between the s. 24 remedy sought, i.e. damages, and the Plaintiffs flows from an allegation that the *Pension Act* is unconstitutional as it violates the Plaintiffs' *Charter* rights because errors made by the Department are unable to be corrected. That remedy is not available to the Plaintiffs. Justice Gonthier on behalf of the majority of the Supreme Court asserted in *Mackin v. New Brunswick (Minister of Justice*, 2002 SCC 13 as follows:

> 78. According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (Welbridge Holdings Ltd. v. Greater Winnipeg, [1971] S.C.R. 957; Central Canada Potash Co. v. Government of Saskatchewan, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly

should not be a basis for liability for harm caused by the action" (K. C. Davis, Administrative Law Treatise (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their Administrative Law: A Treatise (2nd ed. 1990), vol. 5, at p. 177, that:

In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]

However, as I stated in Guimond v. Quebec (Attorney General), supra, since the adoption of the Charter, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the Charter. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a Charter context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (Crown Trust Co. v. The Queen in Right of Ontario (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

> 80. Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in Schachter, supra, at p. 720:
>
> An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]
>
> 81. In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

[59] This statement of the law undermines the assertions of the Plaintiffs as no damages can be awarded arising from an unconstitutional statute.

[60] However, the Plaintiffs rely on *Arial v Canada (Attorney General)*, 2011 FC 848 in support of their *Charter* claims. In *Arial*, the widow of a veteran sought judicial review of a decision of the Veterans Review and Appeal Board of Canada which denied an application for reconsideration regarding retroactive entitlement to a pension for a health issue. It was not a claim for a *Charter* remedy or a claim for damages for negligence or misfeasance. It was a judicial review of a decision of a tribunal which judicial review was allowed by the Court. The matter was sent back for re-determination. In his decision, the Honourable Mr. Justice Michel Shore made several observations regarding the errors in fact and law made by the tribunal and the need to recognize in the pension scheme the role played by Veterans and the purposes of providing pensions to Veterans and their spouses. No one can take issue with the pronouncements of Justice Shore in his descriptions of "human dignity" as it relates to Veterans

and their treatment by the tribunal [see, particularly, paras. 68 – 76]. However, the case does not stand for the proposition that veterans have an entitlement to pursue claims through alleged *Charter* abuses or otherwise. It does stand for the proposition that the Veterans Review and Appeal Board is required to consider the human dignity factor as part of its deliberations and follow the spirit of the law not just the letter of the law [para. 73].

[61] Thus, in light of the jurisprudence from the Supreme Court of Canada, the s. 24 Claim has no chance of success given the facts and claims as pleaded.

[62] Even if the allegations relating to negligence, misfeasance, fiduciary duty/honour of the Crown and *Charter* breaches had a glimmer of hope and allowed to proceed, in my view, there is another insurmountable hurdle for this case. This hurdle is found in statute.

VIII. ***Crown Liability and Proceedings Act***

[63] The Crown argues that the Claim is, in any event, barred by operation of law and relies upon sections 8 and 9 of the *Crown Liability and Proceedings Act*, RSC 1970, c C-38. Those sections provide as follows:

> Saving in respect of prerogative and statutory powers
>
> 8. Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for

> the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces. R.S., c. C-38, s. 3.
>
> **Special Provisions respecting Liability**
>
> No proceedings lie where pension payable
>
> 9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made. R.S., 1985, c. C-50, s. 9; 2001, c. 4, s. 39(F).

[64] This Claim, at its heart, is about an injury sustained by the Veteran in the fulfillment of his duties as a member of the Armed Forces. The injuries were suffered during a training exercise and all that flowed from that event informs the Claim. The applications for a pension, the appeals, the tribunal hearings all stem from that one incident. There are no independent claims. They are all derivative.

[65] Thus, section 8 on its face and giving it its plain and ordinary meaning, provides immunity to the Crown. Notably, the section specifically includes the phrase "whether in peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces" [emphasis added]. These words in their ordinary meaning capture the circumstances of this case and the Claim is barred as against the Crown.

[66] As for section 9, if my reading of section 8 is incorrect, then section 9 provides a bar to the Claim. This case is in respect of conduct which it is alleged prevented a proper pension being paid to the veteran and his spouse. In the words of the section, it is an action respecting a "pension or compensation" which "has been paid or is payable out of the Consolidated Revenue

Fund or out of any funds administered by an agency of the Crown" for, *inter alia*, injury. The DVA determines the payment of pensions. One was granted although there were issues surrounding the correct amount and the correct time frame. Nonetheless, one must give effect to the words of the statute and on their face, the Claim is barred.

[67] There is jurisprudence from the Supreme Court of Canada which supports this interpretation. In *Sarvanis v Canada*, 2002 SCC 28, an inmate received serious personal injuries some of which were permanent. As a result he received a disability pension under the Canada Pension Plan. He sued the Crown in tort for his injuries and the Crown moved to strike the claim. The Supreme Court of Canada allowed the claim to proceed. Justice Iacobucci, on behalf of the Court, stated in respect of section 9 as follows:

> 28. 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. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.
>
> 29. This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.

[68] In essence, section 9 ensures that there is no double recovery and the section is to be given a broad reading. The Supreme Court determined that the CPP pension was not caught by section 9 because the pension was one to which the inmate had contributed and was not a pension arising from the facts of the case but was contingent on a disability. Thus, the Supreme Court concluded that disability benefits did not constitute a pension or compensation for purposes of section 9. The section requires that eligibility for pension or compensation arise or "be in respect of" specific events and be the result of the fact of "death, injury, damage or loss". In this case, the core of the claim is a pension based on the fact of injury arising while the Veteran was in training. Thus, section 9 applies.

[69] Further support fore this conclusion can be found in *Sherbanowski v Canada*, 2011 ONSC 177. In that case a veteran had received a pension under the New Veterans Charter and then brought a claim against the Crown seeking damages including claims under the *Charter*. The Court struck the claim primarily on the basis of the effect of section 9.

[70] Thus, section 9 provides another avenue of immunity for the Crown based on the facts of this case.

IX. **Prejudice to the Crown**

[71] The Crown argued that if the Claim were allowed to proceed the Crown would be severely prejudiced. The Crown lists a number of factors which it argues militate against allowing the Claim to precede. These factors include such matters as insufficient particularity; the very strong likelihood that there are few if any witnesses who can attest to what happened at

DVA; the Plaintiffs appear to be impecunious; limitation periods have expired; and it is not clear in what capacity the Plaintiffs assert the Claim.

[72] In all, while some of these points are valid, the outcome of this motion does not turn on prejudice.

X. **Collateral Attack**

[73] The Crown argues that this Claim is a collateral attack on a decision of the tribunal such that the Claim is an abuse of process. The decisions of the tribunal regarding the length of time for the pension and the amount were not subjected to judicial review. That avenue of relief was available to the Veteran but not pursued as it was in *Arial, supra*. As noted, *Arial* resulted in the case being referred back to the tribunal to be reconsidered in light of the reasons for decision on the judicial review.

[74] The rule against collateral attack protects judicial decisions properly made within the competence of the Court or tribunal from being overturned in other proceedings. The Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v British Columbia (Human Rights Tribunal),* 2011 SCC 52 as follows:

> The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney*

> *General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.

[75] Decisions of courts and tribunals are final and binding unless overturned on appeal or otherwise varied by the court or tribunal which made the decision. Decisions made within the jurisdiction of a court or tribunal cannot be overturned in other proceedings. The Crown argues that by bringing this Claim the Plaintiffs are effectively seeking to overturn the decisions of the tribunal. Such an attack on those decisions is an abuse of process and offends the rule against collateral attack.

[76] The Plaintiffs argue, in essence, that the Claim is a stand-alone action outside of the realm of the decisions of the tribunal. The causes of action do not represent an appeal of those decisions nor do they seek to set them aside. In my view of the Claim, however, they seek to do that in part by obtaining compensation for periods when they argue a pension should have been paid.

[77] The collateral attack argument provides further support as to why this Claim cannot proceed.

[78] Finally, there was some argument regarding the status or standing of these Plaintiffs and whether there was an "estate" properly established by probate or otherwise and whether these Plaintiffs represented the estate of the Veteran and his spouse. At the outset of the hearing an affidavit was provided to the Court sworn by Karl Hardy which affidavit set out who the various Hardy siblings were and what roles they played in each estate. It also set out that Karl Hardy

was authorized by all his siblings to give instructions on this matter. In all, while there is confusion as to the status of the estates and the right of Karl Hardy or other of his siblings to represent those estates, this motion does not ultimately turn on that issue. As with the prejudice issue, while there is some merit to the position that the estates are not properly represented, the motion fails for many other more compelling reasons as described above.

XI. **Conclusion**

[79] There is no doubt the Plaintiffs, and particularly Karl Hardy, are upset and angry over the treatment meted out to their parents by DVA in their parents efforts to obtain a proper pension. That upset and anger is not misplaced. However, the law as it stands does not offer them a remedy. There were remedies available which were not pursued when they could have been and it is now far too late.

[80] The motion to commence the action is dismissed, but in all of the circumstances, without costs.

[81] I am grateful to both counsel for their useful written representations and able arguments in this difficult case. I have considered all of those submissions including the many authorities cited by both sides. In particular, I am especially grateful for the participation of Margaret Keelaghan of Calgary Legal Guidance on behalf of the Plaintiffs.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed.

2. There shall be no costs.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1300-11
STYLE OF CAUSE:	THE ESTATE OF MORDRED HARDY, VETERAN, HELENA HARDY, KARL HARDY, BARTON HARDY, SANDRA HARDY (MAHON) AND DAVID HARDY
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 5, 2015
ORDER AND REASONS:	AALTO P.
DATED:	OCTOBER 8, 2015

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Deborah Babiuk-Gibson	FOR THE DEFENDANT

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The Attorney General of Canada Department of Justice Edmonton Regional Office	FOR THE DEFENDANT