Federal Court  Cour fédérale

Date: 20220616

Docket: T-1656-21

Citation: 2022 FC 908

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MARTINE PATRIARCKI

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] This is a motion to strike the plaintiff's action, made in writing under section 369 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. In my opinion, even on a generous reading of the Statement of Claim, the facts alleged by the plaintiff in this case disclose no cause of action against the Crown.

I. Overview

[2] The plaintiff is not represented by counsel. She alleges that she was a civilian claimant in the "Merlo/Davidson" class action against the Royal Canadian Mounted Police [RCMP], and the associated settlement. The settlement agreement was reached in 2016 between the Crown and Janet Merlo and Linda Gillis Davidson, the two representative plaintiffs, who had each brought an action against the Crown, in the Supreme Court of British Columbia and the Superior Court of Ontario, respectively.

A. *Facts and proceedings in the Merlo/Davidson class action*

[3] Both actions raised allegations of intimidation, discrimination and harassment based on gender and sexual orientation of women who had served in the RCMP, affecting their careers in the RCMP and causing them physical and psychological injury.

[4] The actions were consolidated through a new statement of claim in the Federal Court and certified as a class action in January 2017 (*Merlo v Canada*, 2017 FC 51 [Merlo Certification FC]). The primary class was defined as all women who were alive and who were current or former regular members, civilian members or public service employees of the RCMP in 1974 or later.

[5] In May 2017, the Federal Court approved the settlement of the action, as described in the settlement agreement (the settlement). The Honourable Michel Bastarache was appointed Independent Assessor (the Assessor) to administer the settlement, including the claims process,

that is, "to administer the settlement and determine which claimants are eligible for compensation pursuant to the terms of the Settlement Agreement" (*Merlo v Canada*, 2017 FC 533 at para 60 [Merlo Agreement FC]; *Final Report on the Implementation of the Merlo Davidson Settlement Agreement* (November 11, 2020) (Final Report) at 10). Article 6.01 states:

> 6.01 Appointment of Assessor
>
> Subject to the approval of the Court and as agreed upon by the Parties, the Honourable Michel Bastarache, C.C., Q.C. will be appointed the Assessor to administer the Claims Process and to assess the Claims made by Class Members for compensation, with such powers, rights, duties and responsibilities as agreed to by the Parties and approved by the Court. The Assessor is not an agent, servant, or employee of Canada or a government institution for the purposes of the *Access to Information Act*, R.S.C., 1985, c. A-1, the *Privacy Act*, R.S.C., 1985, c. P-21 and the *Library and Archives of Canada Act*, S.C. 2004, c. 11, and acts solely on his own behalf as agreed to jointly by the Parties in the Agreement and authorized by the Court in the Approval Order.

[6] In the Final Report, the Assessor noted the following at pages 6, 7, and 40:

> Following the public announcement of the Settlement Agreement made on October 6, 2016, and the signing of a contractual agreement with Public Works regarding the operational budget and management of the Office of the Independent Assessor (hereinafter referred to as "the Office"), my first priority was ensuring the creation of an effective and secure communication link with the claimants. The parties had agreed that I would be responsible for giving notices to class members throughout the Federal Court proceedings.
>
> …
>
> The RCMP provided the Office with mailing addresses for approximately 31,000 women who had worked for the RCMP between 1974 and 2017. In January 2017, using the addresses provided by the RCMP, a mail out from the Office of the Independent Assessor was sent to each of these women containing the Notice of Certification and Settlement Approval Hearing, a letter from the Independent Assessor advising the recipient that she had been identified as a possible class member and providing

> information regarding the next steps in the settlement approval process.
>
> …
>
> It is important to stress that an Assessor reviewed each file as well as the supporting documents provided. All decisions are those of myself as the Assessor (or of an Additional Assessor). The decisions of the Assessor in relation to the claim were recorded in a Final Assessment tab. Other decisions such as requests for reconsideration or extensions were recorded under the relevant tab. The system also allowed for staff to write notes to claimants and for claimants to reply to them via a secured portal.
>
> [References omitted.]

B. *This action*

[7] In the Statement of Claim, which the defendant believes should be struck without leave to amend, the plaintiff alleges that she was a civilian claimant in the class action and that, after attending a meeting at the Assessor's office on September 17, 2019, she did not receive a decision on her claim pursuant to the settlement.

[8] The allegations and arguments in the Statement of Claim can be summarized as follows:

- Her case was assigned to lawyer Marion Sandilands at Power Law in Ottawa, which was also the Assessor's office;
- She visited the Assessor's office on September 17, 2019;
- A person at the Office told her that there would be a delay;
- Shortly thereafter, the Office closed for the pandemic;
- The Office informed her that a number of cheques were returned during the pandemic but that [TRANSLATION] "everything had been destroyed", and all subsequent communication was cut off;

- She received correspondence from other claimants at her home;
- There was no quality control or professionalism at the Office;
- She did not receive a decision before the Office closed for the pandemic;
- There was a serious breach of confidentiality in a settlement that ought to be highly confidential, which left her disturbed and in a quandary; and
- She is therefore claiming financial compensation, with interest, in an amount to be determined at a later date.

[9] The defendant argues that the claim discloses no cause of action against Her Majesty because the alleged wrongdoing involves the Assessor and his team, who were not acting as servants of the Crown in the performance of their duties, pursuant to paragraph 3(b) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [the Act]. The defendant therefore argues that the Court does not have jurisdiction to hear the action. I accept this argument for the following reasons.

II. Discussion

[10] In *Nevostruyeva v Canada*, 2021 FC 114 at paragraphs 4–5, this Court summarized the test for striking an action:

> On a motion to strike out a pleading under Rule 221, the test to show that there is no reasonable cause of action is whether it is plain and obvious on the facts that the claim cannot succeed. The claim should be read generously with allowance for inadequacies due to drafting deficiencies.
>
> The case law establishes that the Court should exercise its discretion to strike only in the clearest of cases (*Hunt v Carey*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at 976 [*Hunt*]). The general principle that allegations that are capable of being proved must be taken as true does not apply to allegations based on assumptions and speculation, where adduction of evidence would

> not prove the allegation to be true: *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441 at 455.

[11] With these principles in mind, I will explain why it is plain and obvious on the facts that the Statement of Claim in this case discloses no cause of action against Her Majesty.

[12] To show that the Crown is liable, it must first be established that the alleged wrongful acts or omissions were committed by a servant of the Crown. The relevant provisions of the Act read as follows:

Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
…	…
servant includes agent, but does not include any person appointed or employed by or under the authority of a law of the Legislature of Yukon, of the Northwest Territories or for Nunavut. (préposés)	***préposés*** Sont assimilés aux préposés les mandataires. La présente définition exclut les personnes nommées ou engagées sous le régime d'une loi de la Législature du Yukon, de la Législature des Territoires du Nord-Ouest ou de la Législature du Nunavut. (servant)
Liability	**Responsabilité**
3 The Crown is liable for the damages for which, if it were a person, it would be liable	**3** En matière de responsabilité, l'État est assimilé à une personne pour :
(a) in the Province of Quebec, in respect of	**a)** dans la province de Québec :
(i) the damage caused by the fault of a servant of the Crown, or	**(i)** le dommage causé par la faute de ses préposés,

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	**(ii)** le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;
(b) in any other province, in respect of	**b)** dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	**(i)** les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	**(ii)** les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.
…	…
Liability for acts of servants	**Responsabilité quant aux actes de préposés**
10 No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.	**10** L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

[13] I note that the plaintiff's Statement of Claim does not include any allegations against the Crown.

[14] All the plaintiff's allegations clearly arise from an independent settlement process approved by this Court and administered solely by the Assessor. The Assessor acted in an independent capacity, and it is clear from Article 6.01 of the settlement, quoted in paragraph 6 above, as well as from Article 6.05, that he was not acting as a servant of the Crown in the performance of his duties:

> The Assessor will render a Decision in respect of a Claim to a Claimant promptly after the decision is made in accordance with paragraph 33 of Schedule B to this Agreement. A Decision of the Assessor in respect of a Claim will, subject to the limited right of a Claimant assessed at Level 2 to request a reconsideration as set out in the Claims Process in Schedule B of this Agreement, be final and binding upon the Claimant. For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor.
>
> [Emphasis added.]

[15] It also follows from this article that the decisions rendered by the Assessor are final (see also Merlo Agreement FC at paras 31–33, 57) and are not subject to appeal or judicial review, let alone an action in liability against the defendant, for any alleged fault in connection with the administration by the Assessor.

[16] As there is no connection to a Crown servant but merely allegations of acts or omissions by a third party, the defendant's liability cannot be engaged in this case (*Conley v Chippewas of the Thames First Nation Chief*, 2015 ONSC 404 at paras 46–47; *Crowe v Canada (Attorney General)*, 2008 FCA 298 at paras 23–24).

[17] I therefore agree with the defendant that the Statement of Claim discloses no cause of action and that this Court does not have jurisdiction to determine the dispute under

paragraph 221(1)(a) of the Rules. Consequently, the Statement of Claim should be struck out. Moreover, I find that there is no amendment that the plaintiff could make to remedy this defect that would disclose a cause of action against the Crown.

[18] Lastly, the Statement of Claim is also flawed with respect to the relief sought: the plaintiff is seeking [TRANSLATION] "financial compensation, with interest, in an amount to be determined at a later date". However, section 182 of the Rules reads as follows:

182 Every statement of claim, counterclaim and third party claim shall specify	**182** La déclaration, la demande reconventionnelle et la mise en cause contiennent les renseignements suivants :
(a) the nature of any damages claimed;	**a)** la nature des dommages-intérêts demandés;
(b) where monetary relief is claimed, whether the amount claimed, exclusive of interest and costs, exceeds $50,000;	**b)** lorsqu'une réparation pécuniaire est réclamée, une mention indiquant si le montant demandé excède 50 000 $, intérêts et dépens non compris;
(c) the value of any property sought to be recovered;	**c)** la valeur des biens réclamés;
(d) any other specific relief being claimed, other than costs; and	**d)** toute autre réparation demandée, à l'exclusion des dépens;
(e) whether the action is being proceeded with as a simplified action.	**e)** le cas échéant, une mention portant que l'action est poursuivie en tant qu'action simplifiée.

[19] Again, this claim is flawed.

[20] Even if a remedy were available to the plaintiff for the wrongdoing she alleges, it cannot be in the form of a new action against the Crown; rather, she must rely on the process set out in the settlement agreement itself, which is narrow in scope, and the Court's supervisory authority in that regard, which is also very narrow. As Justice Phelan noted in *McLean v Canada (Attorney General)*, 2021 FC 987 at paragraphs 49–50:

> In *JW v Canada (Attorney General)*, 2019 SCC 20 [*JW*], the Supreme Court of Canada reiterated both the obligation on courts to supervise class action settlements and the limitations on such court supervision. A court may only intervene in very limited circumstances – where relevant negotiated terms are not applied or where there is a gap in the agreement.
>
> In *JW*, Justice Abella recognized that finality and expediency are important goals, but concluded that it is paramount for the agreed-upon terms to be applied and implemented (para 34). Justice Côté likewise emphasized that the court's supervisory role is "limited and shaped by the terms of the agreement, once it is approved and determined to be fair, reasonable and in the best interests of the class" (para 120).
>
> [Emphasis added.]

[21] Finally, I note that, in *Merlo v Canada*, 2020 FC 1005, when a class member submitted a request for reconsideration of the class member's claim on the basis of unique facts under this narrow supervisory authority, Justice McDonald stated the following at paragraphs 25–27:

> The Settlement Agreement is intended to be a complete code detailing the terms, conditions and limitations on claims coming within its ambit. Class members, like the Claimant, have relinquished their right to have their claim resolved by the courts in favour of a non-adversarial, efficient and final claims process. Article 6.05 of the Settlement Agreement states: "For further clarity, there is no right of appeal or judicial review from any Decision of the Assessor."
>
> Notwithstanding that the parties disagree on the applicable test that emerges from *J.W.*, in my view, the Court in *J.W.* was clear that

> judicial intervention in a Settlement Agreement is restricted to very limited circumstances.
>
> I am not satisfied that the facts here fall within the "limited circumstances" category which would justify the intervention of the Court in the claims process. Accordingly, I conclude that the Court does not have jurisdiction to order the reassessment of a claim that has been denied by the Assessor.
>
> [Emphasis added.]

III. Conclusion

[22] The plaintiff has raised no valid cause of action against the Crown on the alleged facts. Accordingly, the plaintiff's Statement of Claim is struck out because it discloses no valid cause of action against the Crown.

JUDGMENT in T-1656-21

THE COURT ORDERS as follows:

1. The defendant's motion is granted.
2. The plaintiff's Statement of Claim is struck without leave to amend.
3. No costs are awarded.

"Alan S. Diner"
Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1656-21
STYLE OF CAUSE:	MARTINE PATRIARCKI v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO SECTION 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS BY:	DINER J.
DATED:	JUNE 16, 2022

WRITTEN REPRESENTATIONS BY:

Martine Patriarcki	FOR THE PLAINTIFF
Janan Arafa	FOR THE DEFENDANT

SOLICITORS OF RECORD:

None	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT