Date: 20060317

Docket: T-600-02

Citation: 2006 FC 355

Ottawa, Ontario, the 17th day of March 2006

Present: Prothonotary Mireille Tabib

BETWEEN:

JEAN-CLAUDE DROLET

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-601-02

BETWEEN:

GEORGES DUMONT

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is the defendant's second attempt to have the plaintiffs' actions summarily dismissed pursuant to Rule 221 of the *Federal Court Rules*.

[2] In a judgment dated December 15, 2003 (*Dumont v. Canada* (F.C.A.), [2004] 3 F.C. 338, 2003 FCA 475, hereinafter *Dumont*), the Federal Court of Appeal ruled on an initial motion by the defendant in which it sought to have the actions struck out pursuant to section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the *Crown Liability Act*), or alternatively, to have the proceedings stayed until the conditions in subsection 111(2) of the *Pension Act*, R.S.C. 1985, c. P-6, have been met. In its judgment the Court of Appeal allowed the defendant's motion in part and struck out the actions in the two cases, except with regard to the portion of the actions based on section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). On that part of the actions, the Court granted the plaintiffs the right to amend their actions to specify how section 7 of the *Charter* had been infringed, and stayed the actions until the conditions laid down by section 111(2) of the *Pension Act* have been met.

[3] Following the Federal Court of Appeal's judgment, the actions were amended, and further particulars provided; the plaintiffs also stated that the requirements of subsection 111(2) of the *Pension Act* had been met.

[4] This is the background against which the defendant filed its second motion to strike, on the grounds that the re-amended statements of claim did not comply with the Court of Appeal's order, that the facts as alleged disclosed no reasonable cause of action under section 7 of the *Charter*, that the actions as re-amended were still excluded by section 9 of the *Crown Liability Act* and that the appropriate remedy in the case at bar would have been judicial review of the decisions granting the plaintiffs a pension.

FACTS AND PROCEEDINGS

[5] It will be recalled that the plaintiffs are former members of the Canadian Armed Forces. In their initial actions, they sought a pecuniary award against Her Majesty the Queen as compensation for the loss and harm suffered on account of illness, primarily post-traumatic stress syndrome, sustained and aggravated during their military service. As a cause of action, the initial statements of claim cited the civil liability resulting from the negligence of the defendant's employees, officials or agents, the abuse of authority on the part of the plaintiffs' superiors, a failure to perform their fiduciary and legal obligations and a breach of section 7 of the *Charter*.

[6] The facts alleged in the initial statements of claim, which for the purposes of its judgment the Court of Appeal assumed to be as proven, were as follows.

[7] The plaintiffs became members of the Armed Forces in 1981 and were discharged on medical grounds in 2001. At different times, both were assigned to various peace-keeping missions abroad, for example in Cyprus, Croatia, Yugoslavia, Somalia, Haiti and East Timor. It was alleged that there were traumatizing aspects in these missions which were well known to their superiors, but that, nevertheless, no medical treatment or follow-up was provided to them upon their return. Moreover, they were subjected to additional duties and responsibilities for which they were not qualified, thereby increasing the stress suffered and worsening their condition. They accordingly alleged that the defendant has not established any system destined to provide psychological services to persons returning from traumatizing missions or to prevent abuses of authority and the imposition of a workload which, in the circumstances, was excessive.

[8] In its decision, the Court of Appeal noted that all the damages claimed related to illnesses or ailments suffered during military service, for which the plaintiffs could apply for a pension.

[9] Accordingly, it concluded that the civil liability actions were precluded by section 9 of the *Crown Liability Act*. As to the fiduciary relationship relied on by the plaintiffs in support of their actions, the Court concluded that this allegation did not alter the nature of the actions as actions in civil liability. The Court of Appeal therefore held that the actions should be dismissed, except with regard to the alleged infringement of the rights guaranteed by the *Charter*.

[10] As to this aspect of the actions, the Court of Appeal noted the following:

> [78] The appellants did not explain in any way how section 7 of the *Charter* has been infringed. However, in the event that the defendant has breached the appellant's rights that are guaranteed by this section, it is far from certain that section 9 of the Act can be relied upon to exclude a fair and appropriate remedy in keeping with the circumstances. It is up to the judge responsible for applying subsection 24(1) of the *Charter* to assess whether the pension that might be awarded is appropriate and fair in regard to the circumstances, or if it would be appropriate to add further compensation.

[11] However, since subsection 111(2) of the *Pension Act* lays down as a prerequisite to the bringing of an action not precluded by section 9 of the *Crown Liability Act* that the plaintiff has made and is pursuing a pension application until a decision has been made that no pension may be paid, the Court of Appeal accordingly stayed the actions until that condition had been met. It also allowed the plaintiffs to amend their actions in consequence of the judgment.

[12] Although this was not apparent from the appeal file, the plaintiffs had filed pension applications well before the hearing of the appeal on account of the ailments described in the statements of claim, and the pension applications had been allowed. In fact, contrary to the strict provision of subsection 111(2) of the *Pension Act*, which states that actions shall be stayed "until a decision . . . that no pension may be paid . . . has been confirmed", the plaintiffs maintained that they had met the conditions laid down by the Federal Court of Appeal; more specifically, they made the following statement in their amended and expanded statements of claim:

> [TRANSLATION] Pension applications were made pursuant to the *Pension Act* for all the injuries or illnesses listed in paragraph 61, the ailments related to the symptoms described in the paragraph, and any aggravation thereof. All the applications so made have been acknowledged as entitling the plaintiffs to a pension. Non-entitlement to the pension has not been recognized for any of these injuries, illnesses, ailments or symptoms.

(Emphasis added.)

[13] As to other amendments to the statements of claim, the plaintiffs deleted virtually nothing from the initial statements of claim, but first undertook to re-word certain allegations, now qualifying as breaches of the *Charter* certain acts which had already been alleged as breaches of fiduciary obligations or negligence. They then added further allegations:

a. the Armed Forces imposed a system of guardianship and total obedience governing all aspects of soldiers' lives, including access to medical care;
b. illness among members – especially mental or psychological illness – is systematically ignored by the Armed Forces;
c. the Armed Forces failed in their duty to analyze and make preparations for foreign missions so as to avoid threatening the lives or health of soldiers;
d. the Armed Forces knew or should have known that this mission threatened the lives and physical safety of the plaintiffs;
e. the Armed Forces failed to adequately prepare the plaintiffs for the exceptional, but well known, risks of the missions.

[14] Accordingly, the effect of the amendments was chiefly to add, in respect of the actions, allegations of systemic conduct by the Armed Forces and deficiencies prior to the missions, whereas the initial actions placed greater emphasis on the conduct of certain government officials and were

limited to deficiencies subsequent to the missions, that is, to acts aggravating a state of health the cause of which was not otherwise raised.

DEFENDANT'S ARGUMENTS

[15] The defendant made a manifold argument. First, she submitted that the actions should be struck out – in their entirety – on the ground of abuse of process, because the amended statements of claim failed to abide by the requirements of the Court of Appeal judgment in two separate respects. The first of these had to do with the causes of action which were the basis for the action: the defendant submitted that, contrary to the Court of Appeal judgment striking out the actions based on civil liability and a fiduciary relationship, the plaintiffs did not eliminate any allegations of facts giving rise to civil liability, but instead proceeded to re-word or dress up facts already alleged, to suggest a remedy based on the *Charter*, although the nature of the action remained unchanged. The defendant argued that the second ground for which this was an abuse of process was that the plaintiffs did not meet the conditions laid down by subsection 111(2) of the *Pension Act*, as directed by the Court of Appeal, since none of the pension applications made by the plaintiffs resulted in a decision that they were not entitled to pensions. On the contrary, all the applications were allowed and the plaintiffs said they were satisfied with this.

[16] In addition to abuse of process, the defendant argued that, as amended, the statements of claim still disclosed no reasonable cause of action. In this regard, the defendant maintained that the facts alleged established no infringement of section 7 of the *Charter* and that since the losses alleged

were compensated under a statutory compensation plan, the purpose of the plaintiffs' action was to obtain double compensation for the same loss. She argued that such double compensation is not allowed by section 24 of the *Charter* and, moreover, is precluded by section 9 of the *Crown Liability Act.* Finally, the defendant submitted that the plaintiffs' only avenue, if they were not satisfied with the benefits received or the limits imposed by section 9 of the *Crown Liability Act*, was to challenge the quantum of the pension awarded by way of administrative and judicial review or to challenge the constitutional validity of section 9 of the *Crown Liability Act*.

[17] As an alternative relief, should the Court decline to strike out the actions in their entirety, the defendant asked the Court to strike the paragraphs which were the basis for the actions in civil liability or resulting from a fiduciary obligation, both to give effect to the Court of Appeal judgment and to comply with section 9 of the *Crown Liability Act*.

ANALYSIS

Abuse of process

Preliminary remarks

[18] It is important to point out here that what the defendant is seeking by this application is not the partial striking out of the statements of claim or the staying of actions pursuant to the Court of Appeal's judgment, but the entire dismissal of the actions on the ground of abuse of process. In

order to grant the relief sought by the defendant, therefore, the Court would have to hold not only that the amendments did not comply with the clear wording, or spirit, of the holding of the Court of Appeal, but that the failure to comply with that judgment was such that the plaintiffs should be penalized by the complete dismissal of the actions rather than simply by an order requiring or allowing the plaintiffs to comply with the Court of Appeal judgment.

[19] The Court notes that in *Burberry Ltd. v. Colton*, [2003] F.C.J. No. 149, the only authority cited by the defendant in support of this proposition, the Court merely struck out an amended defence which circumvented a series of orders by the Court, but did not go so far as to dismiss the prior defence. I gather, as the Court in fact noted in *Burberry*, that the Court has the power to strike pleadings which do not comply with an order of the Court, and that this power may even lead to the dismissal of the action or the underlying defence. However, this power – and more specifically, the power to dismiss not only the pleading but the action itself – should only be exercised in cases where the abuse is obvious and the interests of justice require it. In the case at bar, for the reasons set out below, I am not persuaded that the amended statements of claim clearly contravene the Court of Appeal judgment. Moreover, even if such were the case, they would not justify either the striking out of the amended statements of claim or the dismissal of the actions.

Amendments relating to causes of action

[20] The defendant objected that the plaintiffs had not eliminated from their statements of claim allegations giving rise to an action in civil liability or based on a fiduciary obligation. However, it

should be borne in mind that the Court of Appeal judgment did not mention the striking of specific paragraphs from the statements of claim, but indicated for each case that "the action is struck with the exception of the part that is based on section 7 of the *Charter* . . . The appellant shall . . . amend his statement of claim so that it complies with the reasons for judgment". *Prima facie*, therefore, the plaintiffs had no duty to eliminate or delete any paragraph or allegation whatever from their statements of claim, except in so far as this was necessary to make the statements of claim "[comply] with the reasons for judgment". The reasons for judgment, for their part, identified no paragraph or allegation which should necessarily be deleted because a part of the actions had been dismissed. Since the judgment does not clearly state that some allegations should be struck out, this Court would have to find that, in its reasons, the Court of Appeal held that some of the facts alleged in the initial statements of claim could not be used to support an action based on section 7 of the *Charter*, or even be relevant thereto, and should therefore be eliminated. Clearly, this Court cannot so find. What is more, the defendant's argument seems to be based on the premise which, in my view, is wrong, that facts giving rise to a recognized cause of action could not give rise to a different cause of action <u>in light of additional facts</u>.

[21] In my opinion, the same argument applies to the defendant's objection that the plaintiffs' amended statements of claim merely underwent cosmetic changes designed to give a different legal complexion to the same facts. Indeed, and the case law cited by the defendant makes this clear, mere re-wording or qualification of identical facts cannot suffice to alter the gist of an action. However, what the defendant's argument assumes – and this is where the Court does not share her opinion – is that the amendments were limited to re-wording and added nothing new.

[22] Indeed, in his argument, counsel for the defendant undertook a detailed comparative discussion of the initial and the amended statements of claim, identifying material that was deleted, re-worded and added. As to additions, counsel for the defendant submitted that, apart from certain general allegations and factual conclusions devoid of any factual basis, the amended statements of claim contained no fact that was not already known and taken into account by the Court of Appeal when the latter concluded that the plaintiffs did "not explain in any way how section 7 of the *Charter* has been infringed".

[23] If that were the case, I might perhaps have agreed with the defendant and found that the plaintiffs had in fact made a skilful attempt to evade the result of the Court of Appeal's judgment.

[24] However, the defendant's submission that the amended statements of claim put forward no new facts rests on premisses which I do not accept. I have already listed above (in paragraphs 13 and 14 of these reasons) the additional allegations which the plaintiffs inserted in their amendments. With respect for the defendant's position, I cannot consider that the allegations regarding a failure to make adequate preparation for peace missions and a failure to train and prepare the plaintiffs to face the risks of such missions are so vague and lacking in detail that they should be regarded as gratuitous conclusions with no factual basis. Moreover, the defendant in fact filed a motion for particulars relating to the amended statements of claim, as part of which it could have asked that additional details on these allegations be provided: it did not do so and is now hardly in a position to say that the allegations should be ignored because they are too vague. The allegations relating to the

systemic refusal by the Armed Forces to recognize and treat post-traumatic stress syndrome among its members were clearly not part of the initial statements of claim. If these facts have come to the attention of the Court of Appeal, it was, as appears from paragraph [32] of the reasons for judgment, through the joint book of authorities filed by the parties at the hearing. If the Court of Appeal noted these facts, it was as [TRANSLATION] "background", not as facts alleged or to be alleged in these actions. There is nothing in the Court of Appeal's reasons from which it can be inferred with certainty that the Court considered these facts as allegations when it found that the statements of claim did not adequately explain how section 7 of the *Charter* had been infringed.

[25] Accordingly, I find that the defendant has not shown that the plaintiffs contravened the letter or the spirit of the Court of Appeal's judgment in making their amendments involving facts giving rise to the right of action. The Court of Appeal's decision did not necessarily require the plaintiffs to delete all or part of their allegations of fact: it only required them to explain how section 7 of the *Charter* had been infringed. If, in order to comply with this order, the plaintiffs felt they had to maintain all their allegations of fact, adding additional facts which established an infringement of the *Charter*, they were free to do so. The only thing they were not reasonably allowed to do – and which moreover they did not try to do – was to just re-word the same facts so as to give them a different legal complexion.

[26] The question whether the additional facts alleged suffice to support an action under the *Charter* does not have to be decided in dealing with the argument based on abuse of process: it

should instead be discussed as a separate question; as amended, did the statements of claim disclose a reasonable cause of action?

Subsection 111(2) of the *Pension Act*

[27] The ruling of the Court of Appeal stated as follows:

> . . . the action is stayed until the requirements of subsection 111(2) of the *Pension Act* have been satisfied.
>
> The appellant shall, within 60 days of the date of this judgment, amend his statement of claim so that it complies with the reasons for judgment.

[28] It will be recalled that subsection 111(2) of the *Pension Act* provides that:

111(2) An action that is not barred by virtue of section 9 of the *Crown Liability and Proceedings Act* shall, on application, be stayed until (*a*) an application for a pension in respect of the same disability or death has been made and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought; and (*b*) a decision to the effect that no pension may be paid to or in respect of that person in respect of the same disability or death has been confirmed by an appeal panel of the Veterans Review and Appeal Board in accordance with the *Veterans Review and Appeal Board Act.*	111(2) L'action non visée par l'article 9 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* fait, sur demande, l'objet d'une suspension jusqu'à ce que le demandeur, ou celui qui agit pour lui, fasse, de bonne foi, une demande de pension pour l'invalidité ou le décès en cause, et jusqu'à ce que l'inexistence du droit à la pension ait été constatée en dernier recours au titre de la *Loi sur le Tribunal des anciens combattants (révision et appel).*

[29] Clearly, the conditions laid down in subsection 111(2) of the *Pension Act* have not been met. The plaintiffs did, in good faith, make pension applications for all the disabilities in issue, but there was no decision that a pension might not be paid, as the applications were all allowed without even the need for an appeal.

[30] Despite this, the plaintiffs amended their statements of claim within the deadlines set by the Court of Appeal to specifically mention that pensions were awarded for the disabilities in question. Any doubts as to the nature and extent of the disabilities, ailments or aggravations in respect of which these pensions were sought and awarded were subsequently resolved by particulars. Does this amount to a contravention of the Court of Appeal's judgment? If so, does the contravention amount to an abuse of process which justifies the dismissal of the action?

[31] It is true that the conditions laid down in subsection 111(2) of the *Pension Act* were not met, since that subsection requires not only that an application be made in good faith (with which the plaintiffs complied) but that the application have been dismissed – which was not the case. Assuming that the judgment is clear and not open to interpretation, failure to comply with that part of the judgment does not in any way result from the plaintiffs' actions or intentions. What is more, if the fact that the plaintiffs could not in good faith meet the second condition laid down in subsection 111(2) of the *Pension Act* must entail the award of relief, that relief cannot be the dismissal of the action, but a continuance of the stay of the action ordered by the Court of Appeal.

If necessary, this Court would have no choice but to recognize that the stay ordered by the Court of Appeal continues to apply and the only possible remedy available to the parties would be an application to the Court of Appeal for the stay to be lifted.

[32] The other aspect to be considered here is the part of the Court of Appeal's judgment which authorizes amendment of the statement of claim "so that it complies with the reasons for judgment" (emphasis added). The option of amending mentioned in the judgment is not subject to the stay, the time allowed being 60 days from the date of the judgment, not from the lifting of the stay. Accordingly, the fact that the plaintiffs amended their actions despite the stay does not go against the judgment. What is more, the judgment specifically authorizes an amendment to make the statements of claim comply with the reasons for judgment. In my view, the reasons for judgment clearly indicate that the Court of Appeal expected the part of the actions based on infringement of section 7 of the *Charter* to proceed once entitlement to the pension was determined and its amount set:

> [78] The appellants did not explain in any way how section 7 of the *Charter* has been infringed. However, in the event that the defendant has breached the appellant's rights that are guaranteed by this section, it is far from certain that section 9 of the *Act* can be relied upon to exclude a fair and appropriate remedy in keeping with the circumstances. It is up to the judge responsible for applying subsection 24(1) of the *Charter* to assess whether the pension that might be awarded is appropriate and fair in regard to the circumstances, or if it would be appropriate to add further compensation.
>
> [Emphasis added.]

[33] Moreover, this is the interpretation accepted by the Court of Appeal itself in the recent case of *Canada v. Prentice*, 2005 FCA 395, where it wrote at paragraph 68:

> However, the Court also held that if the Trial Judge concluded that there had been a violation of section 7 of the *Charter* and that the Crown could not set up its immunity against that violation, the only appropriate and just remedy that the Trial Judge could grant in the circumstances, under section 24 of the *Charter*, would be the difference between the value of the harm actually suffered and the value of the compensation that the plaintiffs had received or would receive once the administrative process had concluded.

[34] It was thus entirely permissible for the plaintiffs to amend their action the way they did, namely to refer to the pensions sought and awarded for the disabilities in question and to argue, as contemplated by the Court of Appeal that, in view of the circumstances and the alleged infringement of the guaranteed rights, subsection 24(1) of the *Charter* allowed additional pecuniary compensation to be awarded despite section 9 of the *Crown Liability Act*.

[35] Moreover, if my reading of the Court of Appeal judgment is wrong, I still would hold that the failure to meet the strict conditions of subsection 111(2) of the *Pension Act* did not go against the Court of Appeal judgment or was not an abuse of process, but was only a ground to continue the stay requiring the intervention of the Court of Appeal.

Cause of action based on section 7 of *Charter*

[36] The defendant submitted that, as amended, the statements of claim disclosed no reasonable cause of action based on an infringement of section 7 of the *Charter*. The defendant maintained,

first, that the Court of Appeal had held that the facts initially put forward were insufficient to establish an infringement of a right guaranteed by section 7, and that the new allegations added nothing relevant that had not already been examined by the Court of Appeal. I have already found earlier in these reasons that the amendments did contain new facts. As the Court of Appeal said nothing about the nature of the facts that would be necessary to establish an infringement of section 7 of the *Charter*, it seems to this Court that it would be a pointless exercise to insist on identifying what the amendments add to the statements of claim and then trying to assess whether the nature and relevance of the additions were [TRANSLATION] "substantial" enough to outweigh the Court of Appeal's judgment. Rather, in my opinion, the Court should consider the amended statements of claim as entirely separate documents and determine whether, as a whole, the facts alleged reasonably suggest an infringement of section 7 of the *Charter*. Based on that analysis, I will consider the defendant's second argument on this point, namely a failure by the plaintiffs to identify or put forward the rule or rules of fundamental justice according to which the infringement of fundamental rights must be judged.

[37] The parties were agreed on the principle that a finding that section 7 of the *Charter* has been infringed requires more than showing that the government has infringed the life, liberty and security of the plaintiffs. It must also be shown that such infringement is not consistent with the rules of fundamental justice (section 7 of *Charter*; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571).

[38] While the defendant concedes, for the purposes of the motion at bar, that the infringements alleged by the plaintiffs in their pleadings (including post-traumatic stress) may reasonably be considered to amount to infringements of the lives and security of the person of the plaintiffs, she argues that none of the allegations in the amended statements of claim discloses what rule of fundamental justice applies and the nature of the alleged infringement.

[39] It is worth recalling here a few general rules of law applicable in the case at bar. To begin with, on a motion to dismiss, it is not for the plaintiff to establish the validity of his action. The burden of proof rests entirely on the defendant. He bears the very heavy burden of satisfying the Court that the facts, as alleged, can in no wise provide a reasonable cause of action. The applicable standard is the complete absence of a cause of action. Even the merest chance of success will entail the rejection of such a motion. The pleading must be examined as a whole and interpreted in a liberal or generous way in its context (*Martel v. Samson Indian Band*, [1999] F.C.J. No. 374). Finally, the pleadings may, but in general do not have to, set out the applicable law (Rules 174 and 175; *Conohan v. Cooperators*, [2002] 3 F.C. 421).

[40] As a consequence, the plaintiffs' failure to define in their statements of claim the rule or rules of fundamental justice allegedly contravened is not fatal. It would undoubtedly have been desirable for the plaintiffs to set out the principles relied on, if not in their statements of claim, at least in their written submissions on this motion. It would probably even be useful for the pleadings to eventually clarify this aspect so as to ensure that the factual and legal bases are adequately

defined for the purposes of an effective trial. However, doubts as to the legal foundation of an action are not sufficient to strike out a statement of claim.

[41] As to the sufficiency of the facts alleged, I do not intend to review the defendant's many arguments here one by one. Suffice it to say that, however persuasive they may be, their common defect is that the various points of fact alleged as raised in isolation by the defendant, who thus submits that either none of the faults or actions alleged against the defendant caused the item or items of damage suffered by the plaintiffs or that the acts or decisions which directly affected the plaintiffs involve no rule of fundamental justice.

[42] On a generous reading of the statements of claim as a whole and in their context, as is required, and ignoring their unfortunate tendency to use the language of civil liability and fiduciary duty, the following factual propositions may be obtained: the defendant, in a systemic and unjustified manner, ignored or refused to recognize a risk factor peculiar to the health and safety of its soldiers, namely, to the preservation of their mental health. The various facts and circumstances put forward could serve to illustrate or establish the existence of this systemic failure to consider, deal with, and treat this particular type of injury or ailment. During oral argument, counsel for the plaintiffs submitted at the hearing that these actions by the defendant contravened the rules of fundamental justice regarding discrimination, equality under the law, protection against arbitrary action and the duty of a person in a position to require another person to do work to limit the risks inherent in such work.

[43] The legal rules which may make up a rule of fundamental justice are not predetermined (*Reference Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486). It appears to me to be impossible to hold, on a preliminary motion to dismiss, that it was apparent that the legal rules relied on by the plaintiffs in their oral argument were not rules of fundamental justice, that the systemic conduct alleged against the defendant did not contravene such rules or that the conduct did not cause or contribute to the infringements complained of by the plaintiffs.

[44] For these reasons, the Court rejects the defendant's argument that the allegations in the statement of claim disclose no reasonable cause of action based on section 7 of the *Charter*.

Double compensation and section 9 of *Crown Liability Act*

[45] In support of its argument on this point, the defendant noted the following facts and principles:

- the Court of Appeal found that the damages claimed by the plaintiffs in their initial actions were all related to military service and the basis for a pension;

- the plaintiffs are now receiving pensions in respect of all these damages, pensions awarded to them pursuant to the *Pension Act* which are thus statutory compensation for all injuries and losses sustained;

- by their amendments, the plaintiffs are claiming no new heads of damage for which a pension has not already been awarded.

[46] Accordingly, the defendant submitted that the plaintiffs' actions amount to a claim for double compensation for the same damage, a notion in conflict with the purposes of sections 7 and 24 of the *Charter*.

[47] On that basis, the defendant submitted that section 9 of the *Crown Liability Act* precludes a suit in the case at bar, and that, to avoid the obstacle set by section 9, the plaintiffs had no choice but to challenge the constitutional validity thereof, something they did not do.

[48] Finally, the defendant argued that the Federal Court of Appeal did not rule on these arguments in its prior decision, due to the absence of allegations sufficient to establish a cause of action based on an infringement of a right guaranteed by the *Charter*.

[49] It seems clear to this Court that the Court of Appeal expressly held that this argument could not be accepted at the stage of a motion to dismiss the action. Indeed, the Court of Appeal reiterated this conclusion in *Canada v. Prentice, supra,* interpreting the decision as follows:

> [68] What I understand from this is that absent specific allegations from which the Court could determine that there had been a violation of section 7 of the *Charter*, the Court allowed the plaintiffs to amend their statements of claim and left it to the Trial Judge to determine whether the conditions for section 7 of the *Charter* to apply had been met. The Court also stated its opinion that it was not plain and obvious, at the motion to strike stage, that the Crown's immunity was a bar to the

> exercise of a remedy based on section 7 of the *Charter*, thus again leaving the ultimate decision to the Trial Judge. However, the Court also held that if the Trial Judge concluded that there had been a violation of section 7 of the *Charter* and that the Crown could not set up its immunity against that violation, the only appropriate and just remedy that the Trial Judge could grant in the circumstances, under section 24 of the *Charter*, would be the difference between the value of the harm actually suffered and the value of the compensation that the plaintiffs had received or would receive once the administrative process had concluded.
>
> [Emphasis added.]

[50] This argument of the defendant is accordingly rejected.

Alternative administrative remedy

[51] The defendant submitted that, before going to this Court, the plaintiff should have challenged the pension awarded to him as inappropriate and unjust in the administrative tribunals which determine such benefits.

[52] Not only is this argument in conflict with the reasons and import of the Court of Appeal decision, but it is also clearly without foundation in that it assumes that the administrative tribunals responsible for determining the amounts of pensions payable under the *Pension Act* have the authority necessary to go beyond the limits set by the Act and Regulations and award any pension they consider appropriate and just in the circumstances. Not only do the provisions of the *Pension Act* seem to clearly exclude such discretion, the defendant submitted no argument in support of that theory. Accordingly, the defendant has not established that a challenge of the pension awarded in the administrative courts responsible for deciding on the amounts of pensions payable under the

Pension Act was in fact an adequate administrative remedy which deprived this Court of jurisdiction.

[53] In addition, it should be noted that, on request made before the hearing of this motion and with the plaintiffs' consent, the Court reserved the defendant's right, in another application to strike, to argue a want of jurisdiction of this Court based on the plaintiffs' failure to use the grievance procedure set out in section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5. That argument, which the defendant did not initially include as a basis for the motion at bar, was made and will be argued in some 25 related cases. In the event that a subsequent determination in those other cases is relevant to the facts of the case at bar, the defendant will thus have an opportunity to present arguments to that effect in this case. This Court's want of jurisdiction on account of the existence of this other administrative remedy will thus not be addressed in these reasons.

Striking out in part

[54] Alternatively, the defendant prayed the Court, if it came to the conclusion that the plaintiffs' action should not be struck out in its entirety, to strike out the facts and events alleged in the initial statement of claim in support of remedies based on civil liability or arising out of a fiduciary duty.

[55] As mentioned earlier, the fact that the Court of Appeal recognized that causes of action based on civil liability and a fiduciary duty were precluded by section 9 of the *Crown Liability Act* does not mean that the facts alleged as a basis for such remedies may not, in light of additional facts,

also give rise to an action based on a breach of the *Charter* and should accordingly be struck out. To accept this argument, the Court would have to examine each factual allegation in the statement of claim to determine whether it is clear and obvious that the allegation cannot be relevant to establishing a breach of section 7 of the *Charter* involving the plaintiffs. The defendant did not herself attempt to engage in such an exercise or to point out to the Court which allegation or paragraph it viewed as lacking in relevance and deserving of being struck out. In any event, since the plaintiffs' action is based on the allegation of systemic conduct by the defendant, which the facts and circumstances specifically put forward may eventually illustrate or demonstrate, it is impossible for this Court to find in respect of any fact or allegation, that it is clearly and obviously devoid of any relevance to the cause of action.

Subsidiary conclusions and dispositions

[56] The defendant's motion is accordingly dismissed, with costs to the plaintiffs. As I did in *Bernath v. Her Majesty The Queen*, 2005 FC 1232, the deadlines in the case at bar, including the deadlines mentioned in Rule 51 for appealing this decision, are stayed until further order of this Court. This stay is intended to ensure that any appeals which may be filed against various decisions made or to be made on motions to dismiss the action by the defendant in these cases, and some 25 others, will be managed in the manner most effective for the parties and this Court.

[57] Additionally, the procedures and deadlines for filing another motion to dismiss by the defendant, this time based on the failure to seek a remedy under section 29 of the *National Defence Act* will, if necessary, be determined in a management conference to be arranged.

ORDER

THIS COURT ORDERS THAT:

1. The defendant's motions are dismissed, with costs to the plaintiffs;

2. The deadlines for the next stages in this case, including deadlines required by Rule 51 of the *Federal Court Rules* for appealing this order, are stayed until further order of this Court.

"Mireille Tabib"
Prothonotary

Certified true translation
François Brunet, LL.B., B.C.L.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-600-02
STYLE OF CAUSE:	JEAN-CLAUDE DROLET v. HER MAJESTY THE QUEEN
DOCKET:	T-601-02
STYLE OF CAUSE:	GEORGES DUMONT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Quebec City, Quebec
DATE OF HEARING:	September 20 and 21, 2005
REASONS FOR ORDER BY:	Prothonotary Tabib
DATED:	March 17, 2006

APPEARANCES:

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