Federal Court  Cour fédérale

Date: 20110919

Docket: T-809-10

Citation: 2011 FC 1075

Ottawa, Ontario, September 19, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

TERRY LYNN LEBRASSEUR AND JOSEPH ALAIN LEBRASSEUR

Plaintiffs

and

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] The issue is whether the present action should be struck out because it discloses no reasonable cause of action, or is otherwise an abuse of process, on the grounds that the claims therein are barred by section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 (the CLPA), that the plaintiffs have not exhausted all available avenues of redress under Part III of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (the RCMP Act), and that the plaintiffs' prior action largely based on the same set of facts was dismissed by the Court.

[2] This is the second occasion a motion to strike pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 (the Rules) is presented by the Crown in respect of relief sought by the plaintiffs. Effectively, their prior action seeking similar relief against the defendant was struck out in 2006 by the Court, without leave to amend, and this judgment was upheld in 2007 by the Federal Court of Appeal: *Lebrasseur v Canada*, 2006 FC 852 and 2007 FCA 330.

[3] The "plain and obvious" test establishes the standard for striking out a pleading because it discloses no reasonable cause of action, notably where a "radical defect" is present. The onus rests on the moving party and the threshold is rather high, whether or not it includes an allegation that the pleading is abusive in itself. See *Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15; *Sweet v Canada*, [1999] FCJ No 1539 at para 6. What constitutes a "radical defect" will depend on the facts of each case. See *Tyhy v Schulte Industries Ltd*, 2004 FC 1421 at para 5.

[4] Where the moving party alleges that the claim discloses no reasonable cause of action, the facts are taken as pleaded. However, when the motion is based upon a want of jurisdiction, just as when pleadings are alleged to be frivolous or vexatious, the Court can make use of all available and relevant evidence in order to decide same: *MIL Davie Inc v Hibernia Management and Development Co*, [1998] FCJ No 614 at paras 7-8; *Lebrasseur v Canada*, 2006 FC 852 at para 15.

[5] Ms. Terry Lynn Lebrasseur (Constable Lebrasseur) is a member of the Royal Canadian Mounted Police (RCMP) who was hired in 1993 and had been working since 1998 as a bodyguard

for the Prime Minister of Canada and his wife. Despite being on sick leave since September 21, 2001 and receiving a disability pension effective as of March 3, 2004, she is still employed by the RCMP.

[6] On May 1st, 2001, Constable Lebrasseur was provided with a written reprimand (the 1004 reprimand) and advised that it would not be part of her permanent record, provided she voluntarily left the Prime Minister Protective Detail (PMPD) and transferred to another unit. This was followed by various negative changes in her working conditions and assigned duties. During service, Constable Lebrasseur developed a major depressive disorder with mixed features and subsequently received medical leave from her position on September 21st, 2001.

[7] Constable Lebrasseur has continuously asserted that the actions of the RCMP amounted to a constructive dismissal. She has also alleged in numerous proceedings and documents, including the present statement of claim that she was intimidated, harassed and humiliated by fellow members and superiors of the RCMP, causing her serious psychological injuries from which she continues to suffer. Constable Lebrasseur's allegations of harassment and unfair treatment by the RCMP raise quintessential work place issues relating to performance assessments, allocation and reassignment of human resources, worker supervision, discipline, discharge on medical grounds and conflict resolution of these matters.

[8] Since 2001, Constable Lebrasseur has filed some twenty six grievances, seventeen of which are either not referable to the External Review Committee (ERC) of the RCMP, have been denied, or are still awaiting a decision. Among the nine ERC-referable grievances, five have resulted in

recommendations that the RCMP apologize to the plaintiff, although the RCMP Commissioner has not responded to those recommendations.

[9] Sometime in late 2004 or earlier 2005, Sgt. Desrochers (the investigator) was appointed by the Assistant Commissioner McCallum to investigate Constable Lebrasseur's allegations of harassment, but it turned out that the appointment itself was challenged on the ground that the investigation would not be conducted in a fair manner; the latter grievance was denied on January 20, 2005 (levels I and II adjudications). Constable Lebrasseur subsequently failed to participate in the investigation apparently for medical reasons.

[10] On March 3, 2005, Assistant Commissioner McCallum issued a brief report dismissing the allegations of harassment. In April 2005, Constable Lebrasseur asked that this decision be reviewed by the employer on a number of grounds, including conflict of interest and appearance of bias. No application has ever been made to the Federal Court challenging the legality of the appointment of the investigator and the ensuing decision of Assistant Commissioner McCallum, or seeking to obtain a final decision from the Commissioner in the matter of the allegations of harassment.

[11] In March 2004, Constable Lebrasseur applied for a disability pension pursuant to section 32 of the *Royal Canadian Mounted Police Superannuation Act*, RSC 1985, c R-11. She alleged that as a result of the RCMP failing to provide her with a safe and proper working environment, she had suffered damages since May 2001. In 2005, the Veterans Review and Appeal Board initially withheld two-fifths of the claim, while recognizing that the handling of events by the RCMP had

contributed in a major proportion to the development of her disability. In 2006, full pension was granted upon further review.

[12] That said, earlier steps taken in 2005 and 2006 by the employer to discharge Constable Lebrasseur on medical grounds have resulted in a number of grievances filed by Constable Lebrasseur. In the most recent grievance filed on February 11, 2011, Constable Lebrasseur, who has sought reasonable accommodation, is challenging the employer's November 2010 decision to appoint a medical board to review the degree of her disability and to send a notice of its intention to discharge her on medical grounds pursuant to subsections 20(1) and 28(1) of the *Royal Canadian Mounted Police Regulations*, 1988 SOR/88-361 (the RCMP Regulations). Apparently, the grievance is still at the early resolution phase (pre-Level I).

[13] In the meantime, in August 2003, Constable Lebrasseur and her husband, Mr. Joseph Alain Lebrasseur, commenced an action, as amended in December 2005, making a claim in damages against the Crown based upon allegations of negligent acts or omissions, constructive dismissal, breach of fiduciary duty, and tort, including the intentional infliction of mental distress, significant changes in her assigned duties and working conditions, and disdainful and belittling treatment by the RMCP. Mr. Lebrasseur's derivative claim is based upon the provisions of the Ontario *Family Law Act*, RSO 1990, c F 3.

[14] In June 2006, the defendant sought from the Court an order staying this action on the basis of section 111 of the *Pension Act*, RSC 1985, c P-6. In the alternative, the defendant moved to strike out the plaintiffs' amended statement of claim as disclosing no reasonable cause of action because it

was barred by section 9 of the CLPA. In the further alternative, the defendant asked that this Court to defer to the grievance process available to Constable Lebrasseur under Part III of the RCMP Act.

[15] A stay under subsection 111(2) of the *Pension Act* is only available in relation to actions that are not barred by virtue of section 9 of the CLPA. The latter provision sets out to prevent double recovery in cases of Crown liability notably under ancillary heads of damages for an event that has already been compensated. This requires a determination whether the pension or compensation is paid "in respect of ... injury, damage or loss in respect of which the claim is made". In the context of a motion to strike pursuant to Rule 221(1) of the Rules, the question to be asked is whether it is plain and obvious that the *factual basis* for the pension and the claims in the civil action is the same. If the answer is affirmative, the action cannot continue. See *Sarvanis v Canada*, 2002 SCC 28 [*Sarvanis*].

[16] On July 6, 2006, the Federal Court granted the Crown's motion to strike and dismissed the action, concluding that all of the claims as identified in the statement of claim were based substantially on the same factual allegations as those on the basis of which Constable Lebrasseur was in receipt of a pension (2006 FC 852). The action for damages was thus barred by function of section 9 of the CLPA. Justice Mactavish, who was seized of the matter, also refused to exercise her judicial discretion to hear the claim for damages due to the fact that Constable Lebrasseur could not bring a civil action against the Crown before having exercised the remedies that were made available to her under Part III of the RCMP Act, which creates a comprehensive scheme for the resolution of workplace disputes.

[17] On October 18, 2007, the Federal Court of Appeal dismissed the plaintiffs' appeal against this judgment, without prejudice to the plaintiffs' right to file a new statement of claim containing independent claims that would not be barred by section 9 of the CLPA, because they are not based on the same facts as the ones which gave rise to disability pension award (2007 FCA 330). Hence the plaintiffs commenced the present action in May 2010.

[18] Today, the defendant asserts that the present claim should be struck on the basis that it is an abuse of process, as it raises issues that have been already finally determined by the Federal Court and the Federal Court of Appeal. As such, any additional allegations found in the claim are simply a continuation of the same conduct on the strength of which the disability pension award was based.

[19] In the alternative, the defendant submits that to the extent that any of the plaintiffs' allegations against the unlawful conduct of RCMP members and the RCMP itself do not constitute an abuse of process, they constitute workplace disputes, any remedy for which lies in the grievance process as set out in Part III of the RCMP Act and with regards to which the Court should decline jurisdiction. In the further alternative, the defendant submits that the additional allegations made by Constable Lebrasseur do not disclose a reasonable cause of action.

[20] In the case at bar, the plaintiffs submit that since May 2001, and in particular since March 2004, Constable Lebrasseur has suffered losses which result from other events that amount to torts and which are distinct and independent from those for which Constable Lebrasseur has been compensated by way of the pension: intentional infliction of nervous shock and/or negligence causing nervous shock, intentional tortuous conduct with respect to the tort of public misfeasance

and breach of statutory duty, bad faith and breach of duty of fairness owed to the plaintiff, and breach of fiduciary duty.

[21] The plaintiffs agree that the alleged wrongful acts of the senior RCMP officers constitute the proper subject of grievances under Part III of the RCMP Act, however, they also submit that despite the grievances made since 2001, Constable Lebrasseur has been unable to obtain meaningful recourse or any remedy for her injuries through the RCMP's grievance process. Accordingly, the plaintiffs generally submit that the grievance process is inherently flawed, biased, wrought with delay and unable to provide Constable Lebrasseur with effective and independent redress.

[22] More precisely, the plaintiffs take issue with the impartiality of the grievance process, stating that all of the decision-makers under the RCMP grievance procedure are subject to the full control and direction of the RCMP Commissioner (with the exception of the ERC). Furthermore, the plaintiffs argue that only some grievances are referable to the ERC, which can only make recommendations to the Commissioner of the RCMP, and the grievance process does not include any other binding adjudication of disputes by an independent third party or by way of arbitration.

[23] Having closely examined the allegations in both the prior and present actions, reviewed the evidence on record and considered the representations of the parties in light of the relevant case law, I have decided to allow the present motion.

[24] Section 9 of the CLPA prescribes:

No proceedings lie against the Crown or a servant of the	Ni l'État ni ses préposés ne sont susceptibles de poursuites pour

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.	toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[25] The leading case on the interpretation of section 9 of the CLPA is *Sarvanis* (see paras 19-30). The comments made by Justice Iacobucci at paras 26-29 are particularly enlightening with respect to the interpretation and effect of the words used in section 9 of the CLPA:

> This example is consistent with a reading of the words "in respect of" in the context of the clause in which they appear. The fact that a pension must be in respect of some event of "death, injury, damage or loss" gives us a fuller understanding of the import of the words. What this broad, yet in itself imprecise, phrase means, can be understood by asking what kind of a thing the pension must be in respect of. We will have a different view of the precise scope of the phrase in this context from, for example, the context of the clause which follows in s. 9. The latter clause refers to "death, injury, damage or loss in respect of which the claim is made". The breadth of the words "in respect of" when attached to the concept of a "claim" may be different from the breadth of the same words when attached to a series of events.
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> This interpretation is also consistent with the French version of the section. Actions that are barred are actions "pour toute perte", or "for any loss", "notamment décès, blessures ou dommages," that is, "in particular, for death, injury or damage" where such a loss also gives rise to ("ouvrant droit") the payment of a pension or compensation. In both the French and English versions of the statute, the key is to recognize that the loss the recovery of which is barred by the statute must be the same loss that creates an entitlement to the relevant pension or compensation. The enumeration of events as clearly explicates the meaning of "perte" in the French text as it does the meaning of "in respect of" in English.

> 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.
>
> 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.
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> [Emphasis in the original]

[26] In the case above, as noted by Justice Sharlow of the Federal Court of Appeal in *Lebrasseur* at para 11, Mr. Sarvanis had suffered a disabling injury while he was a prison inmate. His disability entitled him to a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8. Mr. Sarvanis had also filed a statement of claim seeking damages from the Crown on the basis that his injury was caused by the negligence of prison officials. The Supreme Court of Canada found that his claim for damages was not barred by section 9 of the CLPA because his entitlement to a disability pension was based jointly on his past contributions and his disability. The acts of the prison officials that formed the basis of his tort claim were not relevant to his pension entitlement.

[27] On the other hand, Justice Sharlow noted in *Lebrasseur* at para 12, that the plaintiffs' action which was struck out by the Court in 2006 was quite different:

> …Here, the wrongful acts of senior RCMP officers caused the disabling illness that entitled Constable Lebrasseur to a pension, and she is claiming damages based substantially on the same acts. As I read *Sarvanis*, particularly the last sentence of paragraph 29, section 9 of the *Crown Liability and Proceedings Act* asks whether the factual basis of Constable Lebrasseur's pension award and the factual basis of the claims for damages in the amended statement of claim are the same. If the answer is yes, the claim for damages is barred.

[28] In the case at bar, a review of the allegations as recited by the plaintiffs in their new action instituted in 2010, reveals that the plaintiffs' claims are again largely based on the same factual foundation for which a disability pension was granted in 2005. I find that the new allegations simply constitute a repackaging of allegations formerly made by the plaintiffs. The factual background leading to the damages incurred as a result of the 1004 reprimand, failure to enquire, harassment and constructive dismissal complained of by Constable Lebrasseur, is noticeably the same as in the former claim.

[29] Only a limited number of new facts have been added up, put into context, or further detailed by the plaintiffs. Such allegations are either a continuation of the same event or set of events (e.g. paras 16-36 of the statement of claim) or are totally unrelated to losses suffered by Constable Lebrasseur (e.g. paras 37-38 of the statement of claim), and should be struck out. There is no need to repeat here the fastidious exercise performed by defendant's counsel in her written representations having decided to wholly endorse in these reasons the analysis of defendant's counsel in Table 1. I will nevertheless provide the following additional observations to make my reasoning and conclusion clear.

[30] In their earlier action, the plaintiffs were already alleging that Constable Lebrasseur had been subjected to a Code of Conduct investigation for sexual misconduct which had aggravated her mental condition since it was commenced more than five years after the alleged incidents (para 17 p) of the 2005 statement of claim). The plaintiffs now allege in their new action that on June 28, 2005, two RCMP officers approached Constable Lebrasseur at a post office near her residence to hand her documents related to her own Code of Conduct investigation; Constable Lebrasseur allegedly suffered a panic attack and anxiety as a result of this incident (para 41 of the 2010 statement of claim).

[31] Moreover, the plaintiffs were already further alleging that the Code of Conduct investigation above had occurred "in an effort to intimidate and embarrass Terry Lebrasseur and retaliate against her for the exercise of her legal rights and "whistleblowing" conduct" (para 17 p) of the 2005 statement of claim). Among the additional details about "whistleblowing" now provided by the plaintiffs in support of their action in damages in 2010 are the new allegations that in January and March 2005, Constable Lebrasseur disclosed to Assistant Commissioner McCallum incidents of serious concern with respect to unlawful conduct in 1999 by fellow RCMP members (paras 37 and 38 of the 2010 statement of claim).

[32] The plaintiffs also now make it clear that the Code of Conduct investigation against Constable Lebrasseur, already evoked in their earlier action in damages, had effectively started in 2004 (para 39 of the 2010 statement of claim). Thus, if the allegation is assumed to be true, the

Code of Conduct investigation was commenced prior to the disclosure to Assistant Commissioner McCallum of the alleged wrongdoings.

[33] The plaintiffs were already alleging in the prior action that Constable Lebrasseur had been subjected to constructive dismissal (paras 10-14 of the 2003 and 2005 statements of claim). The allegation of constructive dismissal is repeated in their new action only with further clarification (paras 53-56 of the 2010 statement of claim). For example the plaintiffs now allege that between 2001 and 2009, members of the RCMP would drive past their residence and slow down; this happened approximately once every three months and caused Constable Lebrasseur intimidation and distress (paras 31 and 53 b) of the 2010 statement of claim).

[34] Again, the vast majority of the lengthy and detailed allegations in the present statement of claim are very similar to allegations previously considered and dismissed by the Federal Court and by the Federal Court of Appeal, which clearly amounts to an abuse of process. The overlaps between the present and the former statements of claim are so significant that I am unable to conclude that we are in the presence of any considerable events that would be distinct and independent – and thus independently compensable – from the factual basis on which pension was granted.

[35] In the present statement of claim, there are clearly insufficient material facts and particulars to support the alleged intentional torts or breach of fiduciary duty. In other words, the new allegations are so intimately connected to former allegations that I am unable to conclude that they can form the basis of an independent cause of action in tort against the Crown for the loss and

injuries suffered by Constable Lebrasseur and her husband. I do not see how a few isolated facts, which are posterior to 2004, can create a factual basis different from the one that supported her disability pension. Moreover, it is unclear why the plaintiffs chose not to include such detailed events in their previous statement of claim which could have been further amended prior to the presentation of the first motion to strike heard by the Court in June 2006.

[36] Accordingly, I agree with the defendant that the plaintiffs are barred under section 9 of the CLPA from bringing a claim for damages, as Constable Lebrasseur is already receiving such compensation through her disability pension, and that the present proceeding otherwise constitutes an abuse of the process of the Court since it is based on facts that fall within the same factual framework as the previous dismissed action. This now brings me to address the issue of other available recourses under Part III of the RCMP Act.

[37] In *Lebrasseur* at paras 18-19, the Federal Court of Appeal held that the record did not provide an evidentiary foundation for determining whether there was room for the exercise of the judiciary residual discretion to hear Constable Lebrasseur's civil claim. The plaintiffs now submit that Constable Lebrasseur has made numerous unsuccessful attempts to make use of the RCMP grievance process. They also argue that since the RCMP grievance process is systematically biased, wrought with delay, lacks procedural fairness and does not ensure effective and independent redress, this Court's jurisdiction should not be ousted simply because the claim arises out of the workplace.

[38] In my opinion, the grounds raised by the plaintiffs for the exercise of any residual discretion are also unfounded. As for any remaining independent cause of action in damages against her employer – perhaps the alleged loss of economic opportunity and loss of pension – this is essentially a labour dispute at the workplace. Clearly, the matter is premature. Constable Lebrasseur is still an employee of the RMCP and has been on sick leave since 2001. Normally, the proper forum for addressing any unresolved claim, including questions of employment, benefits or work-related losses, should be through the grievance process under Part III of the RCMP Act rather than a civil action in tort against the Crown. This is actually what Constable Lebrasseur has done in challenging all employers' attempts to discharge her on medical grounds.

[39] Subsection 31(1) of the RCMP Act provides:

(1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.	(1) Sous réserve des paragraphes (2) et (3), un membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.

[40] As a general rule, courts are required to grant deference to comprehensive administrative schemes for resolving employment disputes where an employee seeks to achieve indirectly what he cannot do directly. However, since there is no express provision in the legislation that states that the

RCMP grievance process is to be the exclusive forum for adjudication of employment disputes, a number of factors need to be considered: *Pleau v Canada (Attorney General)*, 1999 NSCA 159, 182 DLR (4th) 373 [*Pleau*]; *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*]; and *Lebrasseur*.

[41] In *Pleau* at pages 381-82, Justice Cromwell for the Nova Scotia of Appeal Court summarized the principles derived from Supreme Court of Canada decisions in *St Anne Nackowic Pulp & Paper Co Ltd v Canadian Paper Workers Union, Local 219*, [1986] 1 SCR 704, *Gendron v Supply and Services Union of the Public Service Alliance of Canada*, [1990] 1 SCR 1298, *Weber, and New Brunswick v O'Leary*, [1995] 2 SCR 967. That said, the plaintiff in *Pleau* alleged that he suffered harassment because he reported "what he believed to be evidence of misconduct in the operation of a government facility" (page 380). Reprisal for whistleblowing was at the heart of his claim against the employer.

[42] In *Vaughan*, speaking for the majority of the Supreme Court of Canada, Justice Binnie did not criticize Justice Cromwell's analysis in *Pleau* of the factors governing the exercise of a court's residual jurisdiction in labour matters (paras 19-25). Moreover, in his dissenting opinion, Justice Bastarache acknowledged that Justice Cromwell had "properly stated" the question to be asked: have the legislature and parties shown a strong preference for a particular dispute resolution process other than the court process? If the legislation is unclear, certain policy considerations should be taken into account, such as, among other things, the desire for the establishment of an inexpensive, efficient and definitive mechanism for the resolution of labour disputes. This will manifest itself essentially in a finding with regard to the comprehensiveness of the labour-related dispute resolution scheme (para 60).

[43] While the Supreme Court of Canada decided in *Vaughan* that the appellant ought to have proceeded with the remedies granted by Parliament under the *Public Service Staff Relations Act*, RSC 1985 c P-35, it suggested that the residual jurisdiction of the Court may not be ousted in some "whistleblower" cases. Where the final decision rests in the hands of the person heading department under attack, namely the Deputy Minister, this may create a situation of conflict of interest or apparent bias. However, the Supreme Court of Canada did not consider the matter of whistleblowing in the perspective of the special regime established under the RCMP Act and the RCMP Regulations.

[44] In the case at bar, the policy considerations for a special regime at the RCMP are self evident. The RCMP Act is in itself a comprehensive piece of legislation. Part I provides for the creation and constitution of the RCMP (the Force). Part II establishes the Royal Canadian Mounted Police External Review Committee (ERC). Part III specifically deals with grievances. Parts IV and V respectively deal with discipline and discharge and demotion, while Parts VI and VII respectively establishes the Royal Canadian Mounted Police Public Complaints Commission and the regime of public complaints. Finally, Part VIII comprises general provisions.

[45] Parliament further chose to make the Commissioner the final level in the grievance process and chose to enable the Commissioner to make rules governing the presentation and consideration of grievances under Part III of the RMCP Act. In enacting a particular regime of resolution of grievances at the workplace, Parliament has clearly shown a strong preference in favour of the mechanisms found in sections 31 to 36 of the RCMP Act (Part III). Not surprisingly, the RCMP Act

also provides that the members of the RCMP will be subject to a Code of Conduct and also establishes a special regime in case of discipline (Part IV). Discharge or demotion on grounds of unsuitability are also specially regulated (Part V).

[46] Indeed, subsection 19.1(5) of the *Public Servants Disclosure Protection Act*, SC 2005 c 46, which now establishes a special protection regime in cases of whistleblowing in the public federal sector requires the member or former member of the RCMP to exhaust every procedure available under the RCMP Act and the RCMP Regulations before making a complaint of reprisal to the Public Sector Integrity Commissioner. Thus, existing legal mechanisms applicable to investigations conducted under Parts IV and V of the RCMP Act must be first exhausted.

[47] According to jurisprudence subsequent to *Vaughan,* determining whether effective redress exists, calls for assessing whether administrative grievance scheme is capable of providing a solution to the employment dispute at hand, even though it may not be the same one which a court would provide. See *Adams v Cusack*, 2006 NSCA 9 at paras 32-33. Plaintiffs' counsel notably refers to the British Columbia Court of Appeal's judgment in *Sulz v British Columbia (Minister of Public Safety and Solicitor General),* 2006 BCCA 582, upholding the judgment of the Supreme Court of British Columbia to entertain an action in tort against the Province. Ms. Sulz was a former RCMP officer who alleged that she had been sexually harassed by her RMCP Commander. However, the appeal did not turn on the applicability of section 9 of the CLPA.

[48] The British Columbia Court of Appeal clearly indicated in *Sulz* that the statutory bars in section 9 of the CLPA and section 111 of the *Pension Act* precluded Ms. Sulz from bringing in

action against the federal Crown because she received the Veterans Affairs pension on her medical discharge from the RMCP (paras 41-42). As far as the vicarious liability of the Provincial Crown was concerned, the British Columbia Court of Appeal accepted that the Supreme Court should have residual jurisdiction. After all, Ms. Sulz's loss of income had occurred after she was discharged, when she was no longer governed by, or could claim any benefit from, the grievance process under Part III of the RCMP Act. The internal process was spent: there was nothing more to grieve. As can be seen, the facts of the present case are fairly different. Constable Lebrasseur is still a member of the RCMP and she has a number of outstanding grievances pending.

[49] The internal resolution grievance process established by the Commissioner under Part III of the RCMP Act includes a first level of grievance review, a second level of grievance review, in some cases by the ERC which is a body independent from the RCMP, and a final internal review of the grievance by the Commissioner (level II). In some instances, an adjudicator can make a decision (level II). It allows the decision maker to take "what corrective action is appropriate in the circumstances" if the grievance is upheld. The legality of decisions rendered at level II may be examined by the Federal Court. See *Commissioner's Standing Orders (Grievances)* SOR/2003-181; and Exhibit "B" of Sgt. Maxime Boutin's affidavit dated April 21, 2011.

[50] The type of grievances that are to be referred to the ERC relate to:

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of the Act;

(c) the Forces' interpretation and application of the Isolated Posts Directive;

(d) the Force's interpretation and application of the RCMP Relocation Directive;

(e) administrative discharge for grounds specified in paragraph 19(a), (f) or (i) of the policy; and

(f) others, as referred by the Commissioner.

[51] The rules in the RCMP Act and the RCMP Regulations are clear and comprehensive. They provide appropriate remedy in cases of well founded grievances. Despite the general reproaches made by the plaintiffs, there is simply not enough evidence to allow me today to conclude that the legislative and regulatory scheme of resolution of grievances at the RCMP is invalid, inapplicable or inoperable because it raises some kind of institutional bias or lack of institutional independence. The validity of the present legislation scheme must be upheld until such time it is declared contrary to the Constitution or a quasi-constitutional Act.

[52] Having reviewed the additional evidence and material submitted by the plaintiffs in this motion, I find that this is not a proper case for the exercise of the Court's discretion. As stated by Justice Sharlow in *Lebrasseur* at para 18, "[a]lthough the courts retain the discretion to hear such claims, they should exercise that discretion only in exceptional cases." I do not think that this action comes within the ambit of any exception recognized by the jurisprudence. Be that as it may, the plaintiffs have consistently failed to bring conclusive evidence to support their opinion that the integrity of the grievance procedure would be somewhat compromised.

[53] The general allegations made by the plaintiffs in their statement of claim, as well as the scarce and fragmentary material submitted with the affidavit of Mr. Lebrasseur, are clearly insufficient to assume or judicially declare that the grievance process as set out in Part III of the RCMP Act is flawed or useless. As Justice Sharlow mentioned in *Lebrasseur* the onus of establishing that the integrity of the grievance procedure is compromised rests on the plaintiffs, not the Crown.

[54] It is clear from the Supreme Court of Canada's decision in *Vaughan* that the fact that the scheme does not provide for adjudication by a third party is not of itself a sufficient reason for the courts to get involved (para 17). Moreover, there is nothing objectionable to limit the type of grievances which can be referred to the ERC. As observed again by Justice Binnie, "in the usual labour relations context, many issues are reserved to the discretion of management. Not every dispute is necessarily grievable, much less arbitrable" (para 26).

[55] With respect to allegations, if any, of individual bias or lack of independence of the Commissioner or RCMP officers who have been involved in decisions related to particular grievances submitted by Constable Lebrasseur, the final level decisions are subject to judicial review in the Federal Court who has the power to set aside same if there is a reasonable apprehension of bias or lack of independence, as the case may be.

[56] The plaintiffs also complain about delays but there are judicial recourses to force a federal tribunal or office to render a final decision in case of undue delay. Constable Lebrasseur is far from having fully exhausted the remedies of the RCMP grievance process as set out in Part III of the

RCMP Act offers. Despite the allegations made by Constable Lebrasseur in the 2003, 2005 and 2010 statements of claim that she has been constructively dismissed by her employer in 2001, it is apparent that after more than ten years, she is still employed by the RMCP, who has not yet been able to carry its announced intention in 2005, 2006 and 2010 to discharge Constable Lebrasseur on medical grounds.

[57] In conclusion, the present statement of claim should be struck out, without leave to amend, as it does not disclose a reasonable cause of action against the Crown or otherwise constitutes an abuse of process. In the view of the result, costs shall be in favour of the defendant.

ORDER

THIS COURT ORDERS that the defendant's motion to strike the Lebrasseur's statement of claim be granted and the action be dismissed with costs in favour of the defendant.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-809-10
STYLE OF CAUSE:	**TERRY LYNN LEBRASSEUR AND JOSEPH ALAIN LEBRASSEUR AND HER MAJESTY THE QUEEN, IN RIGHT OF CANADA**
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 6, 2011
REASONS FOR ORDER:	MARTINEAU J.
DATED:	September 19, 2011

APPEARANCES:

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