Date: 20060407

Docket: T-1358-03

Citation: 2006 FC 456

Ottawa, Ontario, the 7th day of April, 2006

PRESENT: PROTHONOTARY TABIB

BETWEEN:

GEORGES VILLENEUVE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendent

REASONS FOR ORDER AND ORDER

[1] Cpl. Georges Villeneuve is suing the Crown under section 24 of the *Canadian Charter of Rights and Freedoms* (the Charter) to obtain compensation for damages resulting from illness or injury – in particular, post-traumatic stress syndrome – suffered or aggravated in the course of his

military service and resulting from an infringement of his rights guaranteed by section 7 of the Charter.

[2] The Court has before it a motion by the defendent the primary purpose of which is to strike the plaintiff's action on the ground that it discloses no reasonable cause of action.

[3] The plaintiff's action is part of a series of some 28 similar actions brought by former soldiers which are managed by the undersigned. Following the Court of Appeal's decision in two of those actions (*Dumont v. Canada*, [2004] 3 F.C.R. 338, hereinafter *Dumont-Drolet*), applicable to the actions brought by Georges Dumont and Jean-Claude-Drolet), the actions were amended so as to rely only on the alleged infringement of section 7 of the Charter, as the Court of Appeal held that causes of action in civil liability or for the infringement of a fiduciary duty were precluded by section 9 of the *Crown Liability and Proceedings Act* (R.S.C. 1985, c. C-50: the *Crown Liability Act*). In reply to these amended actions, the defendent raised a large set of grounds for dismissal, most of which were common to all the actions, but the specific application of which might vary with the particular circumstances of each case. To avoid a repetition of what happened in the cases of Messrs. Drolet and Dumont – where the motion to dismiss which was to have been a "test case" relevant to all the cases ultimately merely led to a series of generic amendments and a new round of motions to dismiss – I directed that motions to strike based on all the arguments for striking made by the defendent be filed in each case. Accordingly, while dealing with each case on its particular facts and circumstances, the Court and the parties could still identify common themes and general principles which ideally would form a coherent framework.

[4] Accordingly, this motion flows from the decisions in *Bernath v. Canada*, 2005 FC 1232 (hereinafter *Bernath*), and *Dumont v. Canada*, 2006 FC 355 (hereinafter *Dumont*).

[5] The arguments made by the defendent in the case at bar are as follows:

(a) despite the amendments, the action is still essentially an action in civil liability precluded by section 9 of the *Crown Liability Act*;

(b) the action discloses no cause of action based on sections 7 and 24 of the Charter, in that:

(i) the plaintiff cites no rule of fundamental justice which has been violated;

(ii) the plaintiff's action under section 24 of the Charter is still precluded by section 9 of the *Crown Liability Act* and amounts to a claim for double compensation for a loss that has already been compensated for;

(c) the Court lacks jurisdiction, in view of the plaintiff's failure to exhaust his remedies under the grievance procedure set out in section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5;

(d) the plaintiff's action is barred by the statute of limitations;

(e) alternatively, the defendent is asking the Court to strike nearly 40 paragraphs of the amended statement of claim on the ground that they are vague, general, unsupported by relevant facts, or redundant.

ALLEGATIONS OF STATEMENT OF CLAIM

[6] As in the case of Messrs. Dumont and Drolet, the amended statement of claim contains general allegations to the effect that the defendent in a systemic manner:

- created a system of guardianship and total obedience governing all aspects of the soldiers' lives, including access to medical care;
- failed to recognize the existence of mental illness among its members;
- knowingly failed to carry out its duty to make analyses and preparations for foreign missions so as to avoid threats to the lives and the health of soldiers;
- failed to adequately prepare the plaintiff for the exceptional, but well-known, risks of such missions;
- failed to provide a medical follow-up or a service of therapy or assistance to its members when they returned from missions, despite the fact that the traumatizing aspects of those missions were well known;
- allowed its members to be subject to harassment, abuse of authority and the imposition of an excessive workload.

[7] Those general allegations reflect verbatim the allegations contained in the amended statements of claim of Messrs. Dumont and Drolet. By their very nature, therefore, they are general and lacking in detail, relating to the plaintiff's specific circumstances only by the use of phrases

such as [TRANSLATION] “on account of the aforementioned facts” or “as described above in this statement of claim”.

[8] As to the plaintiff’s specific circumstances, the following allegations have been made:

- the plaintiff became a member of the Armed Forces in 1981 and was discharged on medical grounds in February 2002;
- he took part in four foreign missions, in Cyprus in 1985, in Israel in 1989, in the Persian Gulf in 1991 and in Bosnia in 1995;
- in 1991, while participating in the Gulf War he [TRANSLATION] “was a witness of atrocities associated with the war” and “lived in an unbearable climate of insecurity, stress and fear which caused him to be constantly afraid for his own life”;
- in 1995 the plaintiff completed a form for submission to the Gulf War Clinic at the National Defence Medical Centre in Ottawa;
- at the plaintiff’s insistence, this form, which [TRANSLATION] “had been collecting dust” in the office of Dr. Fortier in Valcartier for a year, was submitted to the Gulf War Clinic;
- the Gulf War Clinic specialists diagnosed the plaintiff as having post-traumatic stress problems in 1996 and his therapy began in February 1997;
- in addition to Dr. Scott, the attending physician in Ottawa, the plaintiff was treated or examined by three Valcartier physicians, namely Drs. Fortier, Pépin and Martineau; in

addition, he was authorized to have ten sessions with a civilian therapist in Ottawa, Ms. Keeler;

- the opinions, treatment and recommendations of the physicians in Valcartier and Ottawa were conflicting;

- the Valcartier physicians harassed the plaintiff and placed unnecessary pressure on him and his wife so he would cease being treated in Ottawa;

- on the recommendations of Valcartier physicians, the plaintiff was given thankless tasks;

- in August 1998 the plaintiff was transferred to Ottawa and remained there until he was discharged. No specific allegation is made in the statement of claim for the period following this transfer.

ANALYSIS

[9] As will be more fully discussed below, I have concluded that the plaintiff's action should be dismissed for want of jurisdiction, in view of the existence of an appropriate remedy under section 29 of the *National Defence Act*. Consequently, it will not be necessary for me to consider the other grounds for dismissal submitted by the defendent. Nevertheless, in view of the possibility of an appeal, it is important to ensure that all the preliminary submissions have been fully considered.

[10] Accordingly, I will analyse each argument made by the respondent in the order in which it was submitted in the motion and listed above.

(a) Applicant's action is still an action in civil liability precluded by section 9 of the *Crown Liability Act*

[11] In addition to the submission that the statement of claim does not identify the rule or rules of fundamental justice allegedly contravened by the defendent's actions, to which I will return below, the defendent submitted that the statement of claim was nothing but a civil liability action in disguise, since it made no further allegations, and claimed no further heads of damages, than those already addressed to the Federal Court of Appeal in *Dumont-Drolet*, when that Court held that the actions as formulated were precluded by section 9 of the *Crown Liability Act*.

[12] That submission has already been made by the respondent in *Canada v. Prentice*, 2005 FCA 395 (on appeal from 2004 FC 1657) and in *Dumont.*

[13] Though *Prentice* involved a member of the R.C.M.P. rather than the Armed Forces, it is relevant since it appears from the Court of Appeal's reasons that the allegations in the amended statement of claim were drafted by the same counsel as in the case at bar, in response to *Dumont-Drolet*. The summary of allegations clearly suggests that the statement of claim in *Prentice* used the same template as the statement of claim in the case at bar. At trial, Blanchard J. held that the defedent had not established beyond all doubt that the statement of claim was without basis. For its part, the Court of Appeal refused to rule on this point, holding that the action should be dismissed on the ground that the plaintiff had not exhausted his administrative remedies, which might have made it possible to determine the [TRANSLATION] "basic" compensation that could be used eventually to determine an additional compensation.

[14] I personally examined the issue in *Dumont, supra* and came to the following conclusion:

> [TRANSLATION]
>
> [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 stated: the defendent in a systemic and unjustified manner ignored or refused to recognize a risk factor peculiar to the health and safety of its soldiers, namely the safety 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. In his oral argument, counsel for the plaintiffs at the hearing submitted these actions by the defendent 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.
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> [43] The legal rules which may amount to rules 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 applicants in their oral argument were not rules of fundamental justice, that the systemic conduct alleged against the defendent did not contravene such rules or that the conduct did not cause or contribute to the infringements complained of by the plaintiffs.

[15] As noted above, the allegations of systemic conduct in the case at bar are exactly the same as in *Dumont*: as it was held that it was not clear such conduct had no chance whatever of being a basis for an action relying on an infringement of section 7 of the Charter, in theory the result should be the same in the case at bar.

[16] However, I note that while the general circumstances alleged are the same, there are significant differences in the specific facts put forward by the plaintiff in the case at bar. Unlike what happened in *Dumont*, the plaintiff in the case at bar did not allege that the refusal to recognize or treat his illness following the Gulf War made his condition worse; what is more, the statement of

claim contained specific allegations which tend to contradict the general allegation that the defendent systematically refused to recognize and treat his illness, at least from 1995 onwards. The plaintiff claims to have been affected by systemic conduct consisting in a refusal to recognize and treat mental illnesses, though he admits his own post-traumatic stress syndrome was identified and diagnosed as a result of action taken by the defendent in 1995, and the specific actions which he is complaining about all had to do with differences of professional opinions amongst his physicians regarding the treatment approved and undertaken for him in 1997.

[17] Those gaps and contradictions in the statement of claim are significant. If I had not held that the action should be dismissed on other grounds, they would have warranted the striking out of at least part of the statement of claim, with an option to amend, but not the dismissal of the action itself. At the very least there would still be, as a possible basis for an action, the allegation of systemic failure to make preparations, which I would have hesitated to dismiss on a preliminary motion to strike.

(b) Sections 7 and 24 of the Charter

[18] These same arguments were submitted to the Court in *Dumont* and were not accepted. The reasons given for dismissing those arguments at the motion to dismiss stage are also applicable in the case at bar.

(c) <u>The Court lacks jurisdiction in view of plaintiff's failure to exhaust his remedies under the grievance procedure set out in section 29 of *National Defence Act*</u>

[19] Section 29 of the *National Defence Act* provides a procedure for filing and resolving grievances. The plaintiff in the case at bar did not make use of this procedure, and filed no grievance respecting the facts, circumstances and causes of action alleged in the statement of claim.

[20] The defendent submitted that the existence of this internal remedy procedure deprives this Court of jurisdiction to hear the case at bar, as the plaintiff is required to make use of the administrative remedy provided for by the Act.

[21] In *Vaughan v. Canada*, [2005] 1 S.C.R. 146, the Supreme Court of Canada has considerably clarified and strengthened the law relating to the jurisdiction of courts in cases where an administrative remedy is provided. It now seems beyond question that, when a dispute falls within the scope of an administrative dispute resolution system, a court must decline jurisdiction in favour of the competent administrative tribunal, unless it is established that the system provided for by statute does not offer the relief sought, or that due to a special and individualized dispute, resort to the administrative tribunal is not appropriate (in particular, in the case of informants).

[22] Accordingly, the issues that are raised by the case at bar are:

- Does this type of dispute fall within the jurisdiction of the grievance body?
- Does the grievance body have the authority to grant the relief sought?

- Is there any reason to conclude that use of the grievance procedure is not appropriate in the circumstances?

Jurisdiction of grievance body over a dispute of that nature

[23] In his written submissions, the plaintiff argued that, on account of the constitutional basis of his claim, there is some doubt as to the jurisdiction of the grievance body, and that, in any case, preference should be given to access to the courts. Those arguments were not emphasized in the oral argument. Moreover, in connection with *Bernath*, I had already expressed the view that the Chief of Staff not only had the necessary jurisdiction to determine whether a violation of the Charter had taken place and, if necessary, grant "fair and appropriate" relief, but that, when hearing a grievance, he was the most readily accessible tribunal for the determination of such matters, and thus the most appropriate one. The Court of Appeal's reasons in *Prentice* are also conclusive and binding on this point:

> [51] It has now been recognized that an arbitrator has jurisdiction to apply the Charter on the same basis as the other laws of the country.
>
> > In applying the law of the land to the disputes before them, be it the common law, statute law or the Charter, arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant in the circumstances. For example, a labour arbitrator can consider the Charter, find laws inoperative for conflict with it, and go on to grant remedies in the exercise of his powers under the Labour Code: . . . . <u>If an arbitrator can find a law violative of the Charter, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the Charter and likewise grant remedies</u>.

> (*Weber*, at para. 61; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 597).
>
> [53] An arbitrator is also a tribunal of competent jurisdiction, if his or her enabling statute authorizes it, to award damages for a Charter violation, "assuming that damages are an appropriate remedy for a *Charter* breach" (*Weber*, at paragraphs 62 and 75; see also *Boucher v. Stelco Inc.*, 2005 SCC 64, at paragraph 29).

[24] In his oral argument, counsel for the plaintiff submitted that the wording of section 29 of the *National Defence Act* limited the scope of the grievance procedure to purely administrative matters, so that the case at bar, having to do with the defendent's constitutional obligation to ensure the safety of its soldiers, would fall outside the grievance system.

[25] Subsection 29(1) of the *National Defence Act* reads as follows:

> Right to grieve
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> 29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.
>
> Droit de déposer des griefs
>
> 29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

[Emphasis added.]

[26] The current wording of that section is the result of a legislative amendment (*Act to Amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35) which came into effect on June 15, 2000. Section 29 formerly read as follows:

> 29. Except in respect of a matter that would properly be the subject of an appeal or petition under part IX, an officer or man who considers that he has suffered any personal oppression, injustice or other ill-treatment or that he has any other cause for grievance, may as a matter of right seek redress from such superior authorities in such manner and under such conditions as shall be prescribed in regulations made by the Governor in Council.
>
> 29. Sauf dans le cas d'une affaire pouvant régulièrement faire l'objet d'un appel ou d'une révision aux termes de la partie IX, l'officier ou l'homme qui s'estime lésé d'une manière ou d'une autre peut, de droit, en demander réparation auprès des autorités supérieures désignées par règlement du gouverneur en conseil, selon les modalités qui y sont fixées.
>
> [Emphasis added.]

[27] It is this earlier version of section 29 which I analyzed in *Bernath* as follows:

> [35] In *Jones v. Canada*, [1994] F.C.J. No. 1742, this Court described the scope of application of the grievance procedure under section 29 of the *National Defence Act* as follows:
>
> > [9] Thus the Statement of Claim in its entirety can be struck on this ground. It is also vulnerable to being struck due [to] the provisions of the *National Defence Act* which provides a specific redress process, as counsel for the defendants points out at p. 24 of the transcript:
> >
> > . . . it's the broadest possible wording [of section 29 of the Act] that accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination, what-not. It covers everything. It leaves nothing out. It's exhaustively comprehensive.
> >
> > We are not dealing with a situation under the *Public Service Employment Act*.
> >
> > [10] Parliament has passed the various sections of the *National Defence Act* and here section 29 clearly is applicable. Counsel for the defendants, at p. 30 of the transcript, stated:
> >
> > That section 29, there is no equivalent provision in any other statute of Canada in terms of the scope of the wrongs, real, alleged, imagined wrongs that a person can get redress for anything. That is the difference between the civilian and the military person.

> [11] Accordingly, the defendants' motion to strike is allowed with costs, without prejudice to the plaintiff to launch a new action or pursue the remedies available under the *National Defence Act*, if permitted by the Act at this time.

[36] Similarly, in *Pilon v. Canada*, [1996] F.C.J. No. 1200, the Court held:

> The *National Defence Act*, R.S.C. 1985, c. N-5, section 29, provides for a redress of grievance procedure wherein members of the military may have any issue adjudicated which deals with "personal oppression, injustice or other ill-treatment" or "any other cause for grievance". This Court has held that where such an expansive resolution mechanism exists the complainant is required to pursue a remedy through this statutory mechanism before turning to the civil courts for relief (*Gallant v. The Queen in Right of Canada* (1978), 91 D.L.R. (3d) 695, and *Jones v. Her Majesty the Queen and Major D.R. Harris*, (23 November 1994), T-236-94, [1994] F.C.J. No. 1742.
>
> [Emphasis added]

[37] So it appears that the grievance procedure under section 29 of the *National Defence Act* is the most comprehensive of all the proceedings, even beyond the procedures under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA).

and further, at paragraph 66 of the same reasons:

> [66] I do not think Mr. Justice Binnie's remarks in *Vaughan* should necessarily be limited to strictly labour relations matters. If the principles laid down in *Vaughan* are articulated in a labour relations context, it is because both the grievance process in section 91 of the PSSRA and the dispute at issue in that case were exclusively concerned with labour relations. However, the scheme under the *National Defence Act* is comprehensive and unrestricted. In that sense, it reflects the very reality on which the plaintiff's Charter arguments are based, that the members of the armed forces are not employees bound by contract but unilaterally enrolled; that the administrative structures, the chain of command, the complex relationships between the members of the armed forces and the command and military life itself are entirely defined by the *National Defence Act* and the Queen's Regulations and Orders (*Jones*, *supra*; *Gallant v. The Queen*, 91 D.L.R. (3d) 695 (F.C.)). The exhaustiveness of the regulation of military life goes hand-in-hand, therefore, with the exhaustiveness of the dispute resolution process. It is the very effectiveness of this overall dispute resolution process under the *National Defence Act* that is impugned if the courts defer to it only in strictly labour relations matters. Curial deference applies with equal force, therefore, to proceedings that pertain to the grievance procedure provided by the *National Defence Act*.

[28] The plaintiff's argument does not relate to the wording of section 29 of the *National Defence Act* prior to June 2000, but to its wording as amended. In my view, there is no doubt, relying on both the wording of section 29 as it read and on the interpretation given to it by the courts, that the plaintiff's remedy in the case at bar falls within the scope of the grievance procedure as then defined. Accordingly, the plaintiff essentially argues that, by the amendment made to section 29 of the *National Defence Act*, Parliament actually narrowed the scope of the grievance procedure to complaints based on decisions, acts or omissions of a purely administrative nature, and so excluded the subject-matter of the instant case. I do not subscribe to that argument.

[29] To begin with, we should note that, even assuming that the introduction of the phrases "in the administration of the affairs" or "dans les affaires" into section 29 was intended to restrict the definition of matters which could be the subject of a grievance, the circumstances giving rise to the plaintiff's action would still fall within the scope of that section. The alleged failures, whether with regard to the quality of training and preparation for missions, the recognition and treatment of medical conditions, the establishment and application of systems of obedience and authority in the Armed Forces or the control of duties, are clearly acts, omissions or decisions pertaining to the administration of the affairs of the Armed Forces. Insofar as a special effect is to be given, in the English version of the legislation, to the phrase "in the administration of the affairs", it is with respect to the decision, act or omission which that effect may cause, not the nature of the impact which the decision may have on the soldiers affected.

[30] What is more, to follow the reasoning of the plaintiff, I would have to conclude that, in adopting the legislative amendments in question, Parliament intended to substantially and significantly narrow the scope of the grievance procedure, something which neither the rules of interpretation nor the legislative background to that section allow me to do.

[31] The administrative summary accompanying the *Act to Amend the National Defence Act and to make consequential amendments to other Acts* clearly indicates that the purpose of revising section 29 of the *National Defence Act* was to create a grievance review committee. The nature and scope of this purpose is accurately reflected by the amendments themselves. There is nothing in the summary or in the amendments made to suggest that any narrowing of the matters and circumstances which might be the basis for a grievance was one of the purposes intended or a necessary consequence of their implementation.

[32] The generally accepted rules of interpretation encourage the courts to assume that where Parliament has not expressed a clear intention, it does not wish to alter established law or limit the rights conferred on its subjects. Significantly, although there are transitional provisions expressly addressing the procedure applicable to current grievances (see section 101 of the *Act to Amend the National Defence Act and to make consequential amendments to other Acts*), there is no transitional provision for grievances which would no longer be possible as a result of the amendments. If Parliament had intended to substantially restrict the subject-matters falling under the scope of the grievance procedure, we must presume it would have done so in a clear and unambiguous way and

would have specified to what extent the right to a grievance which arose before adoption of the allegedly restrictive amendment could or could not be exercised under the new legislation.

[33] It is also relevant to note that, in *Prentice, supra*, the Federal Court of Appeal specifically cited the grievance procedure in section 31 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as one of the administrative procedures which would make it possible to determine a "basic compensation" in similar circumstances. The wording of subsection 31(1) is similar to the one of the paragraph of section 29(1) in its English version with which we are concerned here, and reads as follows:

> 31. (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.
>
> 31. (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.
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> [Emphasis added.]

[34] Finally, whatever interpretation is to be given to section 29 as amended, the right of the plaintiff Villeneuve to file a grievance arose, and should have been exercised, well before June 15, 2000. Even if the effect of the legislative amendment introduced on June 15, 2000 were to restrict the plaintiff's access to the grievance procedure (and I do not so hold), it certainly could not exempt

the plaintiff from his duty to promptly exercise administrative remedies available to him at the relevant time.

Jurisdiction of grievance body to grant relief sought

[35] In *Bernath*, I have already held that the grievance body created pursuant to section 29 of the *National Defence Act* had the necessary jurisdiction to award damages as relief pursuant to section 24 of the Charter:

> [37] So it appears that the grievance procedure under section 29 of the *National Defence Act* is the most comprehensive of all the proceedings, even beyond the procedures under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA). In relation to the latter, two recent judgments of the Federal Court, applying the Supreme Court of Canada decision in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, have ruled unambiguously that grievance officers authorized to apply the PSSRA grievance procedure are also authorized to apply the Charter and to rule on the applicable relief provisions, including the payment of damages and punitive damages under section 24 of the Charter: *Desrosiers v. Canada (A.G.)*, 2004 FC 1601 and *Galarneau v. Canada (A.G.)*, 2005 FC 39.
>
> [38] The grievance mechanism under the *National Defence Act* being, as we have seen, even more complete than the one under the PSSRA, the Chief of Staff obviously must have the requisite authority and jurisdiction to apply the Charter, determine whether Charter rights have been breached, and, where applicable, grant monetary compensation as relief under section 24 of the Charter if he determines that the pension otherwise granted is insufficient in the circumstances.

[36] The plaintiff did not return to this point in his written submissions or his oral argument.

Whether grievance procedure appropriate in circumstances

[37] Under the rules recognized in *Vaughan*, access to the ordinary courts of law is still possible in cases where use of the administrative procedure would not be proper or efficient. The plaintiff submitted that the very nature of his complaint meant that use of the grievance procedure would not have been proper or efficient. For the reasons given below, this argument cannot be accepted.

[38] The circumstances in which the courts would be justified in exercising their residual discretionary powers to hear disputes are not expressly defined or listed in *Vaughan*. At the same time, the discussion of Binnie J. for the majority in recognizing the existence of this residual authority is based on the special cases in which recourse to the courts has been allowed despite the existence of a grievance procedure, namely *Pleau (Litigation Guardian of) v. Canada (Attorney General)* (1999), 182 D.L.R. (4th) 373 (N.S.C.A.), and *Guenette v. Canada (Attorney General)* (2002), 60 O.R. (3d) 601 (C.A.). Those two cases involved employees who alleged they had been the victims of harassment or punitive measures by their superiors after reporting misconduct or the squandering of public monies, in other words whistle-blowers. In those special cases, Binnie J. concluded, recourse to the courts had been possible because the grievance procedure before the person ultimately responsible for operation of the Department in question was not appropriate:

> [20] The courts were understandably reluctant to hold that in such cases the employees' only recourse was to grieve in a procedure internal to the very department they blew the whistle on, with the final decision resting in the hands of the person ultimately responsible for the running of the department under attack, namely the Deputy Minister (or designate). The judges concluded that at some point their complaints should be dealt with by an adjudicator independent of the department but that the PSSRA did not provide for it. In both cases, it was pointed

> out that the "exclusivity" language of ss. 91 to 96 of the PSSRA was weaker than the labour relations provision at issue in *Weber*. The legislative door had been left open enough for the judiciary to enter.

[39] Relying on this exception, the plaintiff submitted that, since the basis of his action questioned the operation or systemic conduct of the Armed Forces, for which the Chief of Staff, the final level in the grievance process, is ultimately responsible, it was [TRANSLATION] "difficult to believe" that the person deciding the grievance could have the necessary independence to render a proper decision on the merits of the grievance.

[40] The plaintiff reads much too broadly the comments of Binnie J., forgetting that those comments related very specifically to cases involving whistle-blowers, in which very specific allegations were made not only that the employees in question had reported wrongful conduct but that those employees had also suffered reprisals from their superiors for doing so. If we were to adopt the interpretation suggested by the plaintiff, every grievance having to do with directives, decisions or omissions adopted or tolerated by senior decision-making authorities would be treated as "whistle-blowing", that would make the grievance procedure illusory or ineffective and would automatically give litigants access to the courts. In my view, what makes the case of whistle-blowing employees special and the grievance procedure ineffective or inappropriate is not the initial whistle-blowing nor the wrongdoing or abuses reported, but the existence of reprisals or punitive action taken against the whistle-blowing employee for doing so. Moreover, it is such reprisals themselves which are generally the basis for the grievance and give rise to a reasonable fear of bias on the part of the decision-maker.

[41] It should be borne in mind that although the plaintiff questioned the legality and the constitutional validity of the decisions and actions taken by the Armed Forces, he did not allege that he filed any complaint in regard to those decisions or actions: accordingly, he also did not allege that he suffered any reprisals or threats on account of such complaint or report. The nature of the plaintiff's complaint does not make him a whistle-blower: there is nothing in the statement of claim or the court record to suggest that the circumstances could reasonably indicate that, in the case at bar, use of the grievance procedure by the plaintiff would have been inappropriate or ineffective. Further, as final determination of the grievance was subject to judicial review by the courts, the plaintiff would have had to establish more than a mere possibility that a decision on the grievance would be tainted by bias.

[42] In conclusion, I am of the view that the grievance procedure provided for by section 29 of the *National Defence Act*, both in its original version and as amended on June 15, 2000, was a dispute resolution procedure both appropriate and effective in disposing of the plaintiff's claim as made in his statement of claim that, in the light of both versions of section 29 of the *National Defence Act* the grievance body created thereby, had the necessary authority to order adequate relief and that, accordingly, this Court does not have jurisdiction to hear this action.

[43] For this reason, the plaintiff's action will be dismissed.

(d) Prescription

[44] The defendent's argument based on the prescription period barring the action was that it was apparent on the face of the record that it applied. In response, the plaintiff only made a faint and unconvincing challenge in relation to the starting-point of the prescription period. The plaintiff's main argument was that the prescription period was suspended due to actual impossibility to act caused by the post-traumatic stress syndrome. Accordingly, the parties dealt squarely with the following issue: were the allegations of fact in the statement of claim sufficient to establish an inability to act, assuming the facts were proven?

[45] Counsel for both parties took the position in the case at bar that the three-year prescription period provided for by article 2925 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, applied here by operation of section 32 of the *Crown Liability Act*, which reads as follows:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> 32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

[46] As mentioned in *Bernath*, and in accordance with the holding of the Federal Court of Appeal in *Canada v. Maritime Group (Canada) Inc.*, [1995] 3 F.C. 124, for provincial rules on

prescription to apply, all the elements of the cause of action (including the "fault", the damage and proximate cause) must have occurred in the same province.

[47] In *Bernath*, I concluded, at paragraph [73], that :

> Since the hardships for which relief is requested all have some connection, directly or indirectly, with the events occurring in Haiti in September 1997, it is impossible, in my opinion, to conclude that it is plain and obvious that the six-year limitation period is unavailable for any or all of the alleged causes of action. Nor does it seem to me appropriate, without hearing the evidence, to try to separate out the various possible elements of fault, damages and causal connections, if any, that would found a distinct cause of action located solely in Quebec, and to which the three-year prescription would clearly apply.

[48] Similarly, in spite of the submissions by the parties, in determining the applicable rule of prescription, I just cannot disregard the fact that the post-traumatic stress syndrome complained of by the applicant, which was the ultimate basis for all the damage claimed, was caused by or on the occasion of his participation in the Gulf War. As this crucial event occurred out of Quebec, the Court is unable to hold, for the purposes of a motion to dismiss, that all or part of the plaintiff's claim can clearly be governed by the prescription period provided for by the *Civil Code of Quebec*.

[49] The parties did not deal at length with the question of how their arguments on prescription would be affected if it were held that the six-year prescription could be applicable. It is true that the length of the prescription period, whether three or six years, is hardly relevant in the case at bar as the action was brought over six years after the first post-traumatic stress diagnosis was given to the plaintiff. What the parties do not appear to have contemplated is that the possible application of the six-year prescription under the *Crown Liability Act* would not only change the length of the

applicable prescription period but also the fundamental legal principles applicable to the determination of issues pertaining to prescription on a preliminary basis.

[50] Even when the Court expressed doubts as to the applicable prescription period, the parties still proceeded to plead the substantive argument developed in their motion records, assuming it would be necessary whatever the applicable rule of prescription might be. The parties assumed that this argument would in any case have to be disposed of, whether the prescription was that of the *Civil Code of Quebec* or the six-year prescription under section 32 of the *Crown Liability Act*. That is not the case.

[51] While it is common in Quebec for courts to strike out an action on a preliminary motion to dismiss on the ground of prescription, that is not true in common law jurisdictions. Under Quebec law, prescription is not simply a ground of defence which a defendant must plead and prove specifically. Prescription has the effect of completely extinguishing a cause of action (art. 2921 C.C.Q.). Since it does not have to be "pleaded" as a ground of defence, it may be raised at any time, even on appeal (art. 2881 C.C. Q.).

[52] In other words, if, on the very face of the statement of claim, the facts indicate that the action is prescribed, the defendent may rely on prescription by way of a preliminary motion and ask the Court to dismiss the action in its entirety on the ground that the statement of claim discloses no reasonable cause of action, since the cause of action put forward is *prima facie* extinguished by prescription. Moreover, if there are facts to support an argument of waiver, interruption or

suspension of prescription, it is for the plaintiff to make them, since it is incumbent on him to allege in his statement of claim all the facts giving rise to a cause of action. If this is not done, the cause of action is *prima facie* extinguished.

[53] At common law, on the contrary, prescription is not a substantive bar to the right relied on by the plaintiff, but merely a procedural ground of defence which may prevent the plaintiff from asserting the right of action in question. A defendant who does not specifically raise prescription in his defence in his argument is barred from presenting evidence of it or relying on it. This means that a plaintiff who undertakes an action that is *prima facie* prescribed has no duty to justify it or to guard against a possible defence of prescription. The right he is asserting is not extinguished simply by the lapse of time and remains entirely actionable, so long as the defendant does not raise prescription in his defence. This is why facts which may suspend, interrupt or defeat prescription do not have to be pleaded in the statement of claim and are generally only put forward in reply, in response to a specific defence of prescription. This fundamental difference as to the nature and effect of prescription means that, when prescription does not have the effect of extinguishing rights – as is the case with general legislation on prescription in provinces other than Quebec and section 32 of the *Crown Liability Act* – the prescription of an action is not an admissible basis for dismissing an action on a preliminary motion. This rule was set out clearly and unequivocally by the Federal Court of Appeal in *Kibale v. Canada (F.C.A.)*, [1990] F.C.A. No. 1079:

> A motion under Rule 419(1)(a) must be considered solely on the basis of the procedural documents, as no evidence is admissible. This is stated in Rule 419(2) ... On the other hand, a statute of limitations under the common law does

> not terminate the cause of action, but only gives the defendant a procedural means of defence that he may choose not to employ and must, should he choose to employ it, plead in his defence (see Rule 409). In other words, a plaintiff is not, in writing his declaration, obligated to allege all the facts demonstrating that his action was brought in due time. A plaintiff is not obligated to foresee all the arguments the adverse party might bring against him. He can wait until the defence is filed and, should the defendant argue that the application is late, plead in reply any facts disclosing, in his opinion, that it is not late. It follows that, as Collier J. held in *Hanna et al. v. The Queen* (1986), 9 F.T.R. 124, a defendant must plead a statute of limitations in his defence; he cannot do so in a motion to strike out under Rule 419 because, for the reasons I have set out, an action cannot be said to be late on the sole ground that the statement does not demonstrate it is not late.

[54] As mentioned, neither the applicant nor the respondent cited this case or submitted any argument in this regard. The parties seemed entirely willing to let the Court simply resolve the preliminary question of prescription on the following question: were the allegations in the statement of claim, if taken as proven, [TRANSLATION] “sufficient” to answer the argument of prescription?

[55] Notwithstanding the attitude and expectations of counsel, the Court is bound by the conclusions in *Kibale*. Accordingly, as I have found that it was possible that the applicable period could be the six-year prescription period specified in the *Crown Liability Act*, I cannot allow a motion to strike based solely on the ground that the statement of claim did not allege sufficient facts to establish interruption or suspension of the prescription.

(e) The striking out of certain paragraphs

[56] I mentioned earlier that, on account of the significant contradictions and discrepancies in the allegations of a systemic refusal to recognize and treat the plaintiff's illness, certain paragraphs might have to be struck out with the option of amending if the action were to continue. The defendent's request for partial striking out, as made in its motion record and at the hearing, was not based on the allegation which seemed directly contradictory and deficient to the Court and was prompted by completely different considerations, namely that they were vague, general, unsupported by relevant facts and redundant.

[57] I am not persuaded by the defendent's argument and, consequently, if I had not struck the action on other grounds I would not have struck the paragraphs identified by the defendent for the reasons suggested by it.

CONCLUSIONS AND SUBSIDIARY DISPOSITIONS

[58] For the reasons given above, I allow the defendent's motion in part and dismiss the applicant's action on the ground that this Court lacks jurisdiction because of the existence of an appropriate remedy set out in section 29 of the *National Defence Act*; with costs to the defendent.

[59] As for *Bernath* and *Dumont*, the deadlines in the case at bar, including the deadlines mentioned in Rule 51 for appealing this order, are stayed until a contrary order is made so that

possible appeals from these decisions and the decisions to be rendered in some 25 related cases can be managed in the most effective manner for the parties and the Court.

ORDER

THE COURT ORDERS THAT:

1. The defendent's motion is allowed in part;

2. The plaintiff's action is dismissed with costs to the defendent on the motion and the action;

3. Deadlines for the next stages in this proceeding, including deadlines laid down by Rule 51 of the *Federal Court Rules* for appealing this order, are stayed until a contrary order is made by the Court.

"Mireille Tabib"
Prothonotary

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

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