Federal Court  Cour fédérale

Date: 20110124

Docket: T-1183-10

Citation: 2011 FC 79

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 24, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

GUY VÉZINA

Applicant

and

CHIEF OF THE DEFENCE STAFF AND ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

[1] On July 22, 2010, the applicant filed an application for judicial review against a decision by the Chief of the Defence Staff on June 15, 2010, partially allowing two grievances filed by the applicant with respect to travel and meal allowances paid to him in relation to two periods of temporary employment. The first grievance, filed in 2006, dealt with compensation received in respect of temporary employment during the summer of 2006, while the second grievance, filed in

2007, dealt with compensation received in respect of temporary employment during the summer of 2007.

[2] On August 26, 2010, the applicant served two motions. The first was to have the application for judicial review heard as though it were an action, in accordance with subsection 18.4(2) of the *Federal Courts Act* (R.S., 1985, c. F-7). The second was to have the proceedings certified as a class action and to have the applicant appointed representative, in accordance with Rules 334.12 et seq. of the *Federal Courts Rules*, (SORS/98-106) (the "Rules").

[3] In this case, the Court is not being called upon to decide the merits of the application for judicial review, only both motions brought by the applicant.

I. The Facts

[4] Major Vézina is a reservist with the Canadian Armed Forces. Since October 14, 201l, he has been posted with the 6th Régiment d'artillerie du Canada as a Class "A" service Reservist as commander of the 57th Battery. Between October 14, 2001, and September 19, 2008, he completed several periods of Class A and B service with the Reserve Force. His residence was in L'Ange Gardien, Québec.

[5] From May 29, 2006, and August 12, 2006, the applicant accepted an offer for Class B reserve service at the Land Force Quebec Area Training Centre, located at Camp Vimy in Valcartier. From May 7 to August 11, 2006, the applicant accepted an offer for Class B service at the Support Services Unit at CFB Valcartier. At the end of the 2006 and 2007 summer periods, the

applicant submitted requests for allowances relating to temporary duty, including reimbursement of his incidental expenses and his meal and travel expenses. The requests were denied, and it is in response to these refusals that the applicant filed both grievances.

[6] In his grievance concerning the summer of 2006, the applicant stated that his posting location was the 6th Régiment's 57th Battery in Lévis. He claimed that he was not transferred to Land Force Quebec Area Training Centre for the summer period because this service offer was temporary. He also stated that Valcartier was located outside of his unit as well as his headquarters area, which according to him required travel of approximately 100 kilometres per day. He challenged the Canadian Forces' refusal to reimburse his incidental expenses and his meal and travel expenses, and he claimed $2,650 as well as the legal interest under the *Civil Code of Quebec* as well as special compensation.

[7] In his second grievance related to the summer of 2007, the applicant claimed that the Individual Training Summer Term Financial Directive, which is based on the Canadian Forces Temporary Duty Travel Instructions, violates the *National Defence Act*, R.S.C. 1985, c. N-5, as well as the Treasury Board *Travel Directive*. The applicant consequently applied for a reimbursement for his travel costs and a meal allowance.

[8] The Commander of the Land Force Quebec Area and Joint Task Force (East), acting as the Initial Authority, partially allowed Mr. Vézina's request in a decision on November 25, 2008. He found that although the applicant was in temporary service during the two summer periods in 2006 and 2007, he was in the same geographic area and, therefore, the same posting location as his parent

unit. Referring to a directive from the Chief of the Defence Staff, he ruled that Major Vézina was entitled to partial reimbursement of his travel expenses, equivalent to approximately 50 kilometres per day. He also decided that the applicant was not entitled to damages, in the absence of any legal or statutory basis warranting such compensatory payment. The decision with respect to the second grievance is essentially the same.

[9] The applicant then turned to the Canadian Forces Grievance Board. After a lengthy analysis of the applicant's arguments and the Initial Authority's findings, on November 13, 2009, the Board recommended to the Chief of the Defence Staff to uphold the original decision.

[10] After hearing the applicant's comments following the recommendation by the Grievance Board, the Chief of the Defence Staff endorsed the Board's key findings. First, he found that there was no inconsistency between the Treasury Board of Canada's *Travel Directive* and the Minister of National Defence's *Compensation and Benefit Instructions.* He was also of the opinion that the applicant was on "temporary duty" rather than "attached posting" during his temporary employment in 2006 and 2007 and that, as a result, he was not entitled to the more generous compensation provided for "temporary duty." Finally, he also dismissed the request for interest on the outstanding balance claimed by Major Vézina. At most, he modified the initial decision by agreeing to consider that the actual distance travelled by the applicant was 94 kilometres per day rather than 82, with the consequences that this resulted in for his transportation allowance.

A. *Should the Court exercise its discretion to authorize the conversion of the application for judicial review filed by the applicant into an action?*

[11] Subsection 18(3) of the *Federal Courts Act* clearly provides that the appropriate remedy for challenging the legality of a federal administrative decision is an application for judicial review. As stated in subsection 18.4(1), this application shall be heard and determined without delay and in a summary way to allow the subject to be settled on its rights and obligations, thereby avoiding potentially long and costly proceedings.

[12] That said, under subsection 18(4), the Court may, "if it considers it appropriate," direct that an application for judicial review be treated and proceeded with as an action. As the Federal Court of Appeal noted in *Macinnis v Canada*, [1994] 2 F.C. 464 (at para 60), such a conversion shall only be ordered in the clearest circumstances.

[13] The factors which the Court must consider in exercising its discretion, however, are not specified. Although each case stands on its own merits, the case law has nonetheless developed a certain number of tests that can be used to establish whether a judicial review should be converted into an action. The Federal Court of Appeal recently considered the issue in *Association des crabiers acadiens Inc. v The Attorney General of Canada*, 2009 FCA 357:

> 37. The courts have developed certain analysis factors that apply to an application for conversion so as to better frame the exercise of the discretion set out at subsection 18.4(2). It goes without saying that each case involving an application for conversion turns on its own distinct facts and circumstances. And, depending on those facts and circumstances, the individual or collective weight of the factors may vary. We will now go over those factors.
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> 38. The conversion mechanism makes it possible, where necessary, to blunt the effect of the restrictions and constraints resulting from the summary and expeditious nature of judicial review. These are, for example, far more limited disclosure of evidence, affidavit evidence instead of oral testimony, and different and less advantageous rules for cross-examination on affidavit than for examination on discovery

> (see *Merck Frosst Canada Inc. v. Canada (Minister of Health)* (1998), 146 F.T.R. 249 (F.C.)).
>
> 39. Therefore, conversion is possible (a) when an application for judicial review does not provide appropriate procedural safeguards where declaratory relief is sought (*Haig v. Canada*, [1992] 3 F.C. 611 (F.C.A.)), (b) when the facts allowing the Court to made a decision cannot be satisfactorily established through mere affidavit evidence (*Macinnis v. Canada*, [1994] 2 F.C. 464 (F.C.A.)), (c) when it is desirable to facilitate access to justice and avoid unnecessary cost and delay (*Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536 (F.C.A.)) and (d) when it is necessary to address the remedial inadequacies of judicial review, such as the award of damages (*Hinton v. Canada*, [2009] 1 F.C.R. 476).

[14] Although the applicant's arguments for the conversion of his application for judicial review into an action are not very clear, three reasons emerge from his written and oral submissions: (1) extending the review to 2003 to 2005 and 2008 to 2010, (2) claiming interest under the *Civil Code of Québec* since the filing of his grievances and (3) adducing evidence by testimony instead of affidavits. I will deal with these three issues in that order.

[15] Although he challenged by way of grievances only the compensation received in 2006 and 2007 and the decision by the Chief of the Defence Staff covers only those two years, the applicant is attempting by way of his request to extend his claim to 2003-2005 and 2008-2010. He submits that he was unable to file a grievance before 2006 because he did not know that he had legal authority to do so. Invoking the three-year limitation period provided for in the *Civil Code of Québec*, he submits that the filing of his grievance in 2006 interrupted this period and that he could therefore also claim for 2003 to 2005 should his application be converted into an action. The same would be true for 2008 to 2010, notwithstanding that it would not be in the interest of justice nor of the sound

application of the grievance procedure to file a complaint successively for two claims that relate to similar facts and are subject to the same legal rules.

[16] In my opinion, this argument does not seem to be acceptable, to the extent that a procedural mechanism, i.e., the conversion of an application for judicial review into an action, cannot have the effect of resurrecting rights that are prescribed. The *Queen's Regulations and Orders for the Canadian Forces*, adopted under the authority of the *National Defence Act*, stipulate under article 7.02 that a grievance shall be submitted within six months after the day on which the grievor knew or ought reasonably to have known of the decision, act or commission in respect of which the grievance is submitted. Only the Initial Authority may relieve a member of failure to comply with this limitation period. I agree with the respondent that conversion into an action cannot relieve the applicant of his failure to have challenged by way of grievance the amount of compensation that he could have received for the years from 2003 to 2005. The conversion cannot have the result of substituting the limitation period of the *Civil Code of Québec* with those provided for by the Canadian Forces' grievance procedure. This finding also holds for the period from 2008 to 2010. Finally, it is clear that each grievance can only be valid for the period expressly stated therein. Major Vézina therefore had a duty to submit a grievance for each of the years for which he claims that he did not receive compensation to which he was entitled, as he in fact did by filing identical grievances for 2006 and 2007.

[17] With respect to the second argument, the applicant argued that the Chief of the Defence Staff should have granted him interest on the amounts awarded following his decision as well as the additional compensation under the *Civil Code of Québec* since the filing of his grievances in 2006

and 2007. He alleges that the refusal to pay interest on the compensation that he received violates the Treasury Board of Canada Secretariat's *Directive on Payment Requisitioning and Cheque Control* as well as Chapter 1016-10 of the *Financial Administration Manual*. In support of his claim, the applicant also relies on section 36 of the *Federal Courts Act* as well as section 31 of the *Crown Liability and Proceedings Act*, R.S., 1985, c. C-50. For his part, the respondent argues that neither the *Directive*, the *Manual* nor the statutory provisions on which the applicant relies can serve as the basis for his claims.

[18] As mentioned above, it is not for me to decide the merits of the case in the context of these motions. The only question that I must answer is whether the nature of this case is such that it would be preferable to deal with it as an action instead of an application for judicial review. However, the arguments put forward by both parties are clearly of an entirely legal nature and do not require the introduction of factual elements. In his Reply to the Respondent's Reply Record, the applicant himself stated that [TRANSLATION] "[t]hat the issue is a very simple question of law." (para 18(e)(iv)). As in *Association des crabiers acadiens Inc.*, *supra*, before me is a classic case of challenging the legality of an administrative decision that, in the interest of the parties, should normally be the subject of an application for judicial review.

[19] Furthermore, the interest claimed by the respondent does not require that his application for judicial review be converted into an action. In *Hinton v Canada*, 2008 FCA 215, the Federal Court of Appeal recognized that in some cases it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review. But that is not the situation here.

[20] Major Vézina argues that the Chief of the Defence Staff erred in refusing to award him interest on the compensation granted following his decision as well as the additional indemnity provided for under the *Civil Code of Québec* since the filing of his grievances in 2006 and 2007. In doing so, he is challenging the legality of the decision by the Chief of the Defence Staff, which has nothing to do with an action for damages based on the Crown's tort or contractual liability. In the latter case, an application for judicial review would be inappropriate insofar as it cannot give rise to the awarding of damages.

[21] On the contrary, this application for judicial review submitted by Major Vézina will allow him to obtain the relief sought if he is successful on the merits. In fact, if the applicant succeeds in satisfying the Court that the Chief of the Defence Staff's decision is erroneous because he did not apply the correct travel expenses compensation directives and because he refused to grant him interest on the amounts owed to him, this decision will be set aside, and the case will be returned to the decision-maker for reconsideration based on the Court's reasons. Instructions may also be given to the Chief of the Defence Staff regarding the directives that should be applied and the interest that should be awarded. We are therefore far from the situation contemplated by the Federal Court of Appeal in *Hinton*, above, insofar as this application for judicial review submitted by Major Vézina will allow him to obtain all the remedies sought if he succeeds on merit.

[22] Finally, the applicant alleges that affidavit evidence would not be appropriate given the numerous situations where politics and directives were allegedly incorrectly applied. In his view, the evidence required to establish the various situations where the incorrect application of policies

and directives on temporary service and attached postings are overly complex and varied to be submitted by the affidavits of several hundred individuals affected by temporary service rules.

[23] It may well be that the burden of collecting affidavits from many individuals for the purposes of illustrating the many situations where the policies and directives on temporary postings are applied is extremely cumbersome for the applicant. But that is not the issue. What is at issue in this case is the interpretation of these policies and directives by the Chief of the Defence Staff. In this regard, factual evidence may prove useful to illustrate the context in which the policies and directives are applied, but its role will always be secondary. Ultimately, the issue is essentially legal, and the Court's response will depend much more on his argumentation than the number of affidavits that he files.

B. *Should the Court certify the proceeding as a class proceeding and appoint the applicant as representative?*

[24] Since December 4, 2002, the *Federal Courts Rules* have clearly set out the class action procedure applicable in the context of an action brought before the Federal Court. These provisions were amended on December 13, 2007, to add the possibility of initiating class proceedings in the context of an application for judicial review. The regime for class proceedings are in found in Rules 334.12 et seq.

[25] Subsection 334.16(1) first provides the conditions required to have a case certified as class proceedings:

Certification	**Autorisation**
Conditions	**Conditions**

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(e) there is a representative plaintiff or applicant who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

b) il existe un groupe identifiable formé d'au moins deux personnes;

c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au

solicitor of record. dossier.

[26] These conditions are conjunctive and, as such, must all be met. As soon as one of the conditions is not met, application for leave must be dismissed: *Sander Holdings Ltd v Canada (Minister of Agriculture)*, 2006 FC 327; *Daniel King v Canada*, 2009 FC 796.

[27] Second, subsection 334.16(2) states the relevant factors that the Court must consider in deciding whether class proceedings are preferable for deciding common questions efficiently:

Matters to be considered	**Facteurs pris en compte**
(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :
(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those	e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à

likely to be experienced if relief were sought by other means.	celles associées à la gestion d'autres mesures de redressement.

[28] Finally, section 334.18 is also relevant:

Grounds that may not be relied on	**Motifs ne pouvant être invoqués**
334.18 A judge shall not refuse to certify a proceeding as a class proceeding solely on one or more of the following grounds:	334.18 Le juge ne peut invoquer uniquement un ou plusieurs des motifs ci-après pour refuser d'autoriser une instance comme recours collectif :
(a) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;	a) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait communs tranchés, une évaluation individuelle;
(b) the relief claimed relates to separate contracts involving different class members;	b) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;
(c) different remedies are sought for different class members;	c) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;
(d) the precise number of class members or the identity of each class member is not known; or	d) le nombre exact de membres du groupe ou l'identité de chacun est inconnu;
(e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all of the class members.	e) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe.

[29] These rules almost entirely reiterate the provisions of British Columbia's *Class Proceedings Act*, R.S.B.C. 1996, c. 50. They are also similar to the mechanism provided for under Ontario's *Class Proceedings Act*, S.O. 1993, c. 6. It is true that there are certain differences between the Rules

and the *Quebec Code of Civil Procedure in this regard.* Nonetheless, the general principles that have been adopted in all the provinces may, with the necessary modifications, serve as a useful guide for interpreting the relatively new rules of this Court with respect to class proceedings. The same will be true, of course, for the tests that emerge from the following three Supreme Court cases that deal with class proceedings: see *Hollick v Toronto (City)*, 2001 SCC 68; *Rumley v British Columbia*, 2001 SCC 69 and *Western Canadian Shopping Centre Inc. v Dutton*, 2001 SCC 46.

[30] Among the decisions rendered by the Federal Court to date, *Samson Cree Nation v Samson Cree Nation (Chief and Counsel)*, 2008 FC 1308, should be mentioned, in which my colleague Justice Anne L. Mactavish conducted an exhaustive analysis of class proceedings before the Federal Court. This decision was recently upheld by the Federal Court of Appeal in *Buffalo v Samson Cree Nation*, 2010 FCA 165. The reasons that follow are largely based on the principles that emerge from the two latter decisions, as well as the respondents' case.

[31] The first factor to be considered, under subparagraph 334.16(1)(a) of the Rules, is whether the pleadings disclose a **reasonable cause of action**. In assessing this factor, it is appropriate to apply the principles related to the striking of the proceedings. It is therefore unnecessary for the applicant to establish that his cause of action is reasonable. Rather, the issue is whether it is "plain and obvious" that the pleadings do not disclose any reasonable cause of action. This is a low threshold: see *Le Corre v Canada (Attorney General)*, 2004 FC 155, at para 23; *Manuge v Canada*, 2008 FC 624, at para 38. In contrast to the situation that exists in the context of a motion to strike under subsection 221(1) the Rules, however, it is up to the applicant to establish that his pleadings indeed disclose a reasonable cause of action.

[32] Although neither the motion nor the applicant's memorandum or oral argument clearly states the conclusions sought as part of the class proceedings, it seems that his cause of action is based on the following two claims: (a) the Chief of the Defence Staff applied the wrong rules when determining the compensation to which the applicant was entitled following his grievances and (b) the applicant is entitled to interest on the compensation that the Chief of the Defence Staff awarded him following his grievances.

[33] As previously noted, the applicant argues in his notice of application that there are inconsistencies between the specific rules establishing travel allowance payable to members and the general rules establishing travel allowance payable to federal public servants. He argues that the Chief of the Defence Staff should have found these inconsistencies and used the general rules applicable to federal public servants instead of the rules specific to members in the context of his grievances.

[34] In the absence of more thorough submissions by the applicant, it is difficult for me to reach a definitive conclusion on his claims. A priori, the respondents' case appears convincing. They submit that the Chief of the Defence Staff was correct in finding that there are no inconsistencies in travel expenses between the Treasury Board's general scheme and the specific rules governing Armed Forces members.

[35] The Treasury Board Secretariat's *Travel Directive* has the following application:

> Application
>
> This directive applies to Public Service employees, exempt staff and other persons travelling on government business, including training. It does not apply to those persons whose travel is governed by other authorities.

[36] On the other hand, it appears that travel by members is primarily governed by Chapter 209 of the *Compensation and Benefits Instructions ("CBI")* and the *Canadian Forces Temporary Duty Travel Instructions* ("CFTDTI"). These provisions state the following:

> [TRANSLATION]
> **Compensation and Benefits Instructions**
> 209.01 – Definitions
>
> "travelling expenses" mean travelling expenses established under CBI 209.30 – Entitlement and Instruction (*See Canadian Forces Temporary Duty Travel Instructions*)
>
> […]
>
> "transportation" means transportation provided at public expense under CBI 209.30 – Entitlement and Instruction (*See Canadian Forces Temporary Duty Travel Instructions*)
>
> 209.30 (1) – Droit aux frais de voyage
>
> An office or a non-commissioned member is entitled to reimbursements and allowances for trips while on temporary duty in pursuant to the conditions, which are established by the Treasury Board and outlined in the *Canadian Forces Temporary Duty Travel Instructions*.
>
> **Canadian Forces Temporary Duty Travel Instructions**
>
> 2.2 – Purpose and scope
>
> The purpose of the CFTDTI is to ensure fair and reasonable reimbursement of expenses incurred by members of a CF unit travelling on TD [temporary duty] in Canada or abroad.

> 2.3 – Application
>
> The CFTDTI applies to all CF members on TD when travelling to or from an attached posting. It does not apply to relocations, local health care trips, imposed limitations, separations expenses or to DCDT operations (unless the member is on TD). In the event of a discrepancy between the FTDTI and other TB instructions or regulations, the CFTDTI shall prevail.

[37] Thus, there does not appear to be any inconsistencies between these two systems, since the Treasury Board has authorized the administration of compensation, reimbursement of travel expenses and other expenses incurred for military reasons and by members in accordance with the terms and conditions set out in the specific regime of Chapter 209 of the *Compensation and Benefits Instructions.*

[38] I am also of the view that the statutory provisions on which the applicant is relying to seek payment of interest do not seem to apply to this grievance. Section 36 of the *Federal Courts Act* provides for prejudgment interest in cases before the Federal Court; this provision cannot be used to claim prejudgment interest in the context of the internal grievance process available to members. Furthermore, this Court has already stated that section 36 applies only to the actions against the Crown and not to proceedings to review the legality of a decision by a federal board, commission or other tribunal: see *Sherman v Canada*, 2006 FC 1121, at para 26. With respect to section 31 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, it plays a similar role to section 36 of the *Federal Courts Act* in proceedings before provincial courts and is subject to the same restrictions.

[39] Based on the foregoing observations, I would therefore be inclined to think that the applicant's pleadings do not raise any reasonable cause of action, even in applying the low threshold that applies to this first factor. But since I do not wish to presume as to the outcome of the issue on the merits and it is not necessary for me to decide this issue to establish whether this proceeding can be certified as a class proceeding, I shall avoid definitive conclusions in this regard. I am therefore prepared, solely for the purposes of this motion and without disposing of the issue, to assume that Major Vézina's application for judicial review in fact disclosed a reasonable cause of action.

[40] The second factor to consider is whether there is an **identifiable class** of two or more persons (paragraph 334.16(1)(b) of the Rules). In *Western Canadian Shopping Centre Inc. v Dutton*, *supra*, the Supreme Court stated that the class should be determined by stated, objective criteria that should not depend on the outcome of the litigation. On this point, the Court stated the following:

> 38. While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria […]

[41] The applicant defines identifiable class in different ways. In his application, he begins by identifying a class of [TRANSLATION] "of several thousand people" whose complaints regarding travel allowances and compensation claimed for 2006 and 2007 were not allowed by the Initial

Authority and the Chief of the Defence Staff (par. 3). He then states that the group comprises [TRANSLATION] "members employed outside of their posting area and whose travel allowances were not paid because their headquarters area corresponded to the geographical area of their temporary employment or because their temporary employment overrode their attached posting such as described in their personnel record resume." (par. 4). Finally, he mentioned in his memorandum that the group [TRANSLATION] "is composed of members who were employed outside of their headquarters area during the period between 2003 and 2010 and did not receive compensation for temporary duty to which they were entitled and when they were entitled to it." (par. 27).

[42] In addition to the fact that the class identified by Major Vézina appears to change depending on his various pleadings, the other problem is that it would indirectly have the effect of resurrecting rights that are now prescribed. As previously mentioned, subsection 7.02(1) of the *Queen's Regulations and Orders for the Canadian Forces* adopted under the *National Defence Act* stipulates that the grievance shall be submitted within six months after the day that the grievor knew or ought reasonably to have known of the decision in respect of which the grievance is submitted. Subsection 7.04(3) further provides that it is not possible to file a class proceeding. Finally, section 29.15 of the *National Defence Act* stipulates that grievance decisions by the Chief of the Defence Staff are final and binding subject to an application for judicial review filed before the Federal Court within 30 days.

[43] Failure to meet the deadlines set out above extinguishes a member's right of action against a given decision, act or omission. A member's filing of a grievance or an application for judicial review does not suspend either the limitation period for his own claims for the years that are not

subject to his grievance or the limitation period for similar claims that other members who have not filed a grievance may have. As a result, members who have not challenged allowances paid to them and members who have grieved the amount of the allowances but have not applied for judicial review cannot attempt to resurrect their right by participating in a class proceeding. Unlike several provincial class proceedings regimes, the *Federal Courts Rules* do not provide for suspension or interruption of limitation periods with respect to class members after one of them applies to have the proceeding certified as a class proceeding: see *Tihomirovs v Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, at paras 92-97.

[44] With respect to members whose claims are not statute-barred, they must avail themselves of the grievance process before they can become a member of a class proceeding. Specifically, the case law recognizes that the grievance mechanism provided for under the *National Defence Act* must be exhausted before a person can apply to the court to seek remedy: see *Sandiford v Canada*, 2007 FC 225, at paras 28-29; *Anderson v Canada (Armed Forces)*, [1997] 1 F.C. 273 (FCA).

[45] In support of his application, Major Vézina filed the affidavits of five members who claimed that they did not receive travel allowance to which they believe they were entitled. However, only one of them (Warrant Officer Benoît Thériault) reportedly filed a grievance regarding the amount of the travel allowance that he received. Yet the latter moved for personal reasons and is disputing the amount of allowance that he received since this move as well as the decision requiring him to reimburse some allowance that he was allegedly paid in error. Thus, the grievance raises issues that have little or no rational connection to those raised by the applicant. Furthermore, it appears that this

grievance is still under consideration by the Chief of the Defence Staff. This member, therefore, cannot participate in the class proceeding that the applicant seeks to initiate.

[46] I am therefore of the opinion that the applicant does not meet the second condition set out by the Rules to have his application for judicial review certified as a class proceeding. Not only has there been no evidence submitted that at least one other person besides the applicant would be part of the identifiable group, but, moreover, the definition of class that he puts forth is inadequate for the following reasons:

- The group should include only individuals with a rational connection to the common issues. Given that the applicant has not identified any common issues to resolve in the context of a class proceeding, as we will see shortly, it is impossible to determine who would be subject to his application;
- The geographical area subject to the class proceeding has not been defined. Since the applicant seeks to argue that the provisions of *Civil Code of Québec* relating to the interest, additional indemnity and limitation period apply in this case, logically he cannot include members serving outside of the province of Quebec in his action;
- The applicant argues that he was on temporary duty and not attached posting, which requires a subjective evaluation. Only members whose allowance claims were refused on the basis that they were on attached posting instead of temporary duty could potentially benefit from this Court's decision on the merits.
- Finally, it is impossible to establish whether an individual is a class member without referring to the merits of the action, to the extent that the class is composed of members

who have not received temporary duty allowances and amounts to which they were entitled, as the applicant argues at paragraph 27 of his memorandum.

[47] This finding alone would be sufficient to dismiss the applicant's application. However, I will briefly address the other conditions set out in subsection 334.16(1) of the Rules.

[48] In accordance with paragraph 334.16(1)(c) of the Rules, the claims of the class members must raise **common questions of law or fact**. This is the crucial aspect of a class proceeding: *Manuge*, above, at para 26; *Buffalo (FC)*, *supra*, at para 81. It is not necessary that common questions predominate over non-common questions, or that the resolution of the common issues would be determinative of each class member's claim. The class members' claims must share a substantial common ingredient to justify a class action: *Western Canadian Shopping Centres Inc.*, above, at para 39.

[49] For this condition to be met, the applicant must at the very least clearly and explicitly identify the common question(s), especially since these questions will ultimately be found in the certification order. However, despite his allegations that the class members' claims raise common questions of fact and of law, the applicant did not identify any common question that the Court would be called upon to decide were the proceeding certified as a class proceeding, nor did he provide any particulars on the questions of law or of fact that would be common.

[50] It is true that courts considering a motion to have an action certified as a class action must be flexible and help specify common questions. However, the Court cannot supplement the applicant's

silence by defining the common issues itself, as the Federal Court of Appeal noted in *Buffalo*, above:

> 10. In oral submissions, counsel for the appellant (not counsel on the original motion) submitted that the motions judge should have granted an adjournment to the appellant in order to allow the appellant to improve the quality of his motion, review the deficiencies in it, and meet the certification requirements. The appellant conceded, however, that he did not ask the motions judge for an adjournment. He also submitted that the motions judge knew that there were some common issues and should have gone further and identified these, even though the appellant had not.
>
> 11. The essential submission here is that the motions judge was obligated to help further. In support of this, the appellant cited the purpose of class proceedings, which includes facilitating access to justice. He also observed that courts in class proceedings play a more active and flexible role than they do in many other types of litigation. They regularly exercise their discretion to give relief different from that sought in a notice of motion for certification, such as by changing the definition of the common issues.
>
> 12. I accept that in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff's litigation plan, and they can play a key role in case management.
>
> 13. However, the role of courts in these areas, active and flexible though it may be, does not extend to an obligation to grant adjournments, even when not sought, in order to permit those seeking certification to cooper up their motion or to help them meet the substantive certification requirements under Rule 334.16. The burden of satisfying the certification requirements is solely upon those seeking certification and a motions judge, of course, must remain a neutral arbiter of whether those requirements have been met.

[51] The mere fact of alleging that the same statutes, regulations and directives applicable to temporary duty and postings governed class members is clearly insufficient to establish common questions of law and of fact. In the absence of further clarification on the existence of common

questions, it is therefore impossible to determine whether their resolution in the context of a class proceeding is likely to advance the members' individual claims. The applicant's application must therefore be dismissed for this second reason.

[52] As soon as the applicant failed to identify the common questions, it also became impossible for me to establish whether the class proceeding would be the **preferable procedure for the just and efficient resolution of the common questions of law or fact** (paragraph 334.16(1)(d) of the Rules), particularly since the applicant did not provide a litigation plan and it is therefore impossible to use it to answer this question.

[53] Finally, I am also of the view that for several reasons the applicant cannot **act as a representative plaintiff**. First, and as previously mentioned, the applicant did not provide any details on the nature of the common questions of law and fact, he did not provide any issue and the group was not properly defined. These deficiencies do not suggest that the applicant would be likely to represent the interest of the class.

[54] On the other hand, the applicant did not submit a comprehensive litigation plan and merely asserted in paragraph 13 of his application that he prepared an efficient plan since he filed the necessary procedures to date and previously had allegedly dealt with a telecommunications company in the context of an application for a class proceeding before the Quebec Superior Court. This is clearly insufficient for the Court to decide that the applicant should be given the responsibility to continue the proceedings on behalf of the class members.

[55] In B*uffalo*, above, the Federal Court noted at para 18 that the litigation plan must show that the applicant and his counsel have thought the process through and that they grasp its complexities. The Court went on to provide a list of the matters to be addressed in such a plan:

> 151. However, the jurisprudence has established the following non-exhaustive list of the matters to be addressed in a litigation plan:
>
> i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> ii) the collection of relevant documents from members of the class as well as others;
>
> iii) the exchange and management of documents produced by all parties;
>
> iv) ongoing reporting to the class;
>
> v) mechanisms for responding to inquiries from class members;
>
> vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and;
>
> ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

[56] In this case we are far from a plan of this nature.

[57] Finally, paragraph 334.32(5)(d) of the Rules stipulates that in the event that a proceeding is certified as a class proceeding, a notice is sent to the members that shall, among other things, "summarize any agreements respecting fees and disbursements between the representative plaintiff

or applicant and that representative's solicitor." This notice allows members to decide whether they intend to opt out of the group or intend to modify the agreement respecting fees since the agreement will bind all class members and affect the amount of compensation they could obtain even though they did not participate in negotiating the agreement.

[58] As the interest of the class members is necessarily affected by the agreement respecting fees between the applicant and his solicitor, in subparagraph 334.16(e)(iv) of the Rules, Parliament provided that the Court be able to verify the quality of the content of the agreement respecting fees and thereby assess the applicant's ability to act as representative plaintiff.

[59] In this case, the fee agreement between the applicant and his solicitor does not allow potential members to determine what amounts will be owed to the solicitor of record. In fact, according to the unsigned agreement filed by the applicant, fees are set at 25% of the amount recovered and [TRANSLATION] "fees for other services will also be established separately at an hourly rate of $210 (Agreement respecting fees and disbursements between the applicant and his solicitor, Exhibit "C" of Guy Vézina's affidavit in support of the application).

[60] No details are provided as to the list of services covered by payment to the solicitor of a percentage of the recovered amount nor as to the "other services" for which the solicitor will submit a monthly invoice payable upon receipt. In the absence of such guidance, it is impossible for potential class members to understand the scope of the fees that would be payable to the solicitor of record during the proceedings and that the members would be required to pay monthly. As

submitted, the agreement is therefore insufficient and does not support a finding that the applicant would be an appropriate representative.

[61] For all the foregoing reasons, the applicant's application to have the proceeding certified as a class proceeding and to have himself appointed representative must be dismissed. Given that none of the circumstances outlined in section 334.39 of the Rules was not alleged, no costs will be awarded.

ORDER

THIS COURT ORDERS that the applicant's motions to have the application for judicial review treated and proceeded with as an action and to have the proceeding certified as a class proceeding and with the applicant appointed as representative are dismissed, without costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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