Date: 20071213

Docket: A-77-07

Citation: 2007 FCA 400

CORAM: **RICHARD C.J.**
DÉCARY J.A.
LÉTOURNEAU J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PATRICK BERNATH

Respondent

Hearing held at Montréal, Quebec, on December 10, 2007.

Judgment delivered at Montréal, Quebec, on December 13, 2007.

REASONS FOR JUDGMENT: DÉCARY J.A.

CONCURRED IN BY: RICHARD C.J.
LÉTOURNEAU J.A.

Date: 20071213

Docket: A-77-07

Citation: 2007 FCA 400

CORAM: **RICHARD C.J.**
DÉCARY J.A.
LÉTOURNEAU J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PATRICK BERNATH

Respondent

REASONS FOR JUDGMENT

DÉCARY J.A.

[1] The issue in this appeal is essentially whether the Chief of the Defence Staff (CDS) constitutes a "court of competent jurisdiction" within the meaning of section 24 of the *Canadian*

Charter of Rights and Freedoms (the Charter) for the purpose of granting a monetary remedy to a member of the Canadian Forces who alleges that his Charter rights have been violated.

[2] The respondent is a former member of the Canadian Forces.

[3] On March 27, 1998, prior to his discharge from the Forces, the respondent submitted a grievance under section 29 of the *National Defence Act*, R.S.C., 1985, c. N-5 (the Act). The CDS allowed the grievance in part three years later, but refused the monetary compensation claimed by the respondent. The respondent did not seek judicial review of this decision.

[4] Instead, he initiated proceedings in the Federal Court in which he claims [TRANSLATION] "the sum of $4,510,000 as a remedy under section 24 of the *Canadian Charter of Rights and Freedoms* for infringement of his right to security of the person, a right conferred upon him by section 7 of the Charter." The actions impugned in the claim are substantially the same as those referred to in his grievance.

[5] The appellant then moved to dismiss the action and strike out the proceedings on grounds of *res judicata* and that the only recourse available was judicial review of the CDS' decision. The motion was allowed by Prothonotary Tabib (2005 FC 1232), whose decision was subsequently set aside by Mr. Justice Simon Noël (2007 FC 104) in the decision under appeal.

[6] The only issue in this appeal is the one I stated *supra* in paragraph 1.

[7] Noël J. found that “the Canadian Forces grievance resolution process has not been designed and structured to address Charter issues or the issue of relief” (par. 95).

[8] It is common ground that in labour relations cases the courts have been adopting a non-interventionist approach for some years now with regard to administrative tribunals specialized in this area, including arbitrators (see *Vaughan v. Canada*, [2005] 1 S.C.R. 146, par. 13).

[9] It is also common ground, since *Vaughan*, that this non-interventionist approach can be followed even if the law in question, as in this case, does not provide for the presence of an independent decision-maker—which does not mean that the absence of such a decision-maker is not an element that can be taken into consideration.

[10] Finally, it is common ground that, regardless of the applicable area of law, a tribunal can be “competent” for the purpose of granting a remedy claimed under Charter section 24 even if the enabling legislation does not explicitly grant it that power and even if the remedy claimed is not the “type” of remedy provided by the enabling legislation (see *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, par. 28 to 34). According to this last cited judgment, the approach to be followed to determine the power of a tribunal to grant the remedy claimed consists in examining the function and the structure of the tribunal in question:

> The paramount question remains whether the court or tribunal, by virtue of its function and structure, is an appropriate forum for ordering the *Charter* remedy in issue. [Para. 35.]

[11] It is this functional and structural analysis that Noël J. undertook in his reasons, and counsel for the appellant was unable to point to any decisive error committed by the judge, either in the course of his analysis or in the conclusion he drew.

[12] I will merely add a few observations. It is true, as stated by counsel, that subsection 29(1) of the *National Defence Act* is expressed in particularly encompassing terms:

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.	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.

[13] The Federal Court has affirmed the scope of this grievance mechanism in several cases (see *Jones v. Canada et al* (1994), 87 F.T.R. 190; *Pilon v. Canada* (1996), 119 F.T.R. 269).

[14] It is not a question here of deciding whether the CDS has jurisdiction to apply the Charter in examining grievances submitted to him (see *Nova Scotia (W.C.B.) v. Martin*, [2003] 2 S.C.R. 504). The question, rather, is whether the CDS has the power to grant a remedy under the Charter.

[15] Until the decision being appealed, the Court had never analyzed this question in depth. In *Pilon*, for example, Wetston J., at par. 10, seems to have dealt separately with the part of the

statement of claim dealing with the Charter section 15 remedy. In *Dumont v. Canada*, [2004] 3 F.C.R. 338, our Court struck a statement of claim "except for that part of the actions that is based on […] the *Charter*" (par. 82).

[16] Here, the CDS acknowledged, in his memorandum filed with Noël J., that he [TRANSLATION] "lacks the authority to award monetary relief in the form of damages in a grievance proceeding under section 29" (reasons of Noël J., par. 55).

[17] At page 15 of the Annual Report of the Canadian Forces Grievance Board (2006), it is stated that:

> An issue that has been identified previously but remains a recurring problem within the current grievance system is that neither the Initial Authority nor the CDS (the Final Authority), have claims adjudication authority. The authority to settle claims against the Crown or to give ex gratia payments to members of the CF has been delegated to the Director Claims and Civil Litigation (DCCL) …

[18] In the report he submitted to the Minister of National Defence on September 3, 2003, the Right Honourable Antonio Lamer made the following recommendation:

> (81) I recommend that the Chief of Defence Staff be given the necessary financial authority to settle financial claims in grievances and that the Chief of Defence Staff be entitled to delegate this authority.
> [First independent review of the provisions and the application of Bill C-25, *An Act to Amend the National Defence Act and to Make Consequential Amendments to other Acts*, in accordance with Section 96 of the Statutes of Canada (1998), c. 35, at p. 108.]

[19] To date, this recommendation has not been carried out.

[20] Moreover, as noted by Noël J., article 7.16 of the *Queen's Regulations and Orders for the Canadian Forces* expressly provides at paragraph (1) that:

7.16 - SUSPENSION OF GRIEVANCE	**7.16 – SUSPENSION DE GRIEF**
(1) An initial or final authority in receipt of a grievance submitted by a member shall suspend any action in respect of the grievance if the grievor initiates an action, claim or complaint under an Act of Parliament, other than the *National Defence Act*, in respect of the matter giving rise to the grievance.	(1) Une autorité initiale ou de dernière instance saisie du grief d'un militaire est tenue de suspendre toute mesure prise à l'égard du grief si ce dernier prend un recours, présente une réclamation ou une plainte en vertu d'une loi fédérale, autre que la *Loi sur la défense nationale*, relativement à la question qui a donné naissance au grief.

[21] This provision, according to counsel for the appellant, is not to be found in any other Canadian legislation or regulation. It constitutes a significant indication of the possibility of initiating in other forums proceedings related to "the matter giving rise to the grievance."

[22] Certainly, access to a "one-stop service" (if I may use this expression associated with the dispensing of medical services) standing as the established authority to settle all matters relating to the exercise of employment would simplify the process here and elsewhere and eliminate the duplication of proceedings. But when the established authority—the Chief of the Defence Staff in this case— itself acknowledges that it does not have the power to award a monetary remedy, it is not for this Court to fill the void left intentionally by the legislator.

[23] Therefore, the judge was correct in refusing to strike the statement of claim.

[24] That being said, the respondent should understand that this is but a procedural and preliminary victory. He will eventually have to identify precisely the principle of fundamental justice, if any, on which his position is based. The judgment of this Court in *Prentice v. Canada*, 2005 FCA 395, clearly demonstrates that it is not an easy task.

[25] For these reasons, I would dismiss the appeal. Since the respondent was self-represented, he is entitled to reimbursement only for reasonably incurred expenses.

"Robert Décary"
J.A.

I concur.
J. Richard, C.J.

I concur.
Gilles Létourneau, J.A.

Translation certified true

Stefan Winfield, reviser

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-77-07
STYLE OF CAUSE:	Her Majesty the Queen v. Patrick Bernath
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 10, 2007
REASONS FOR JUDGMENT BY:	DÉCARY J.A.
CONCURRED IN BY:	RICHARD C.J. LÉTOURNEAU J.A.
DATED:	December 13, 2007

APPEARANCES:

Pierre Salois	FOR THE APPELLANT
Patrick Bernath Laval, Quebec	RESPONDENT (for himself)

SOLICITOR OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT