Date: 20200626

Docket: A-104-19

Citation: 2020 FCA 110

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

SYLVAIN LAFRENIÈRE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Online videoconference hearing organized by the Registry on June 11, 2020

Judgment delivered at Ottawa, Ontario, on June 26, 2020.

REASONS FOR JUDGMENT: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal and a cross-appeal from an order made on February 22, 2019, by Justice Luc Martineau of the Federal Court (the Federal Court or Justice Martineau). Pursuant to his order (*Lafrenière v. Canada (Attorney General)*, 2019 FC 219 (Order)), Justice Martineau allowed in part the respondent's motion to strike the action in damages filed by the appellant in this case, under subsection 221(1) of the *Federal Courts Rules*, SOR/98-106 (Rules), on the

ground that the said action runs almost completely counter to the immunity from prosecution provided for in section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50 (CLPA).

[2] Under section 9 of the CLPA, no proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made. In addition, under subsection 221(1) of the Rules, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, when it discloses no reasonable cause of action or defence, as the case may be. In order to strike an action on this ground, the Court, assuming the alleged facts to be true, must be satisfied that it is plain and obvious that the action undertaken, even if interpreted liberally, has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 R.C.S. 45, at paragraph 17; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, at paragraph 15; *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, page 980).

[3] The appellant submits that he was harmed by a series of acts and gestures committed by his superiors while he was a member of the Canadian Armed Forces (CAF). The root of these acts and gestures were on allegations of inappropriate conduct that ultimately turned out to be groundless. The appellant therefore argues that insofar as his claim against the respondent is based on attacks “on his civil, constitutional and fundamental rights”, section 9 of the CLPA cannot serve to circumvent these rights on the ground that he receives a pension or disability

award under the *Veterans Well-being Act*, S.C. 2005, c. 21. As a result, he asks that the judgment of the Federal Court be set aside.

[4] For his part, the respondent submits that Justice Martineau should have struck the appellant's appeal in its entirety. According to the respondent, the fact that Justice Martineau did not do so constitutes an error warranting the intervention of this Court. He argues that, like the portion struck from the said appeal, the portion that survived the motion to strike rests on the same factual basis, which gives rise to the appellant's receiving a pension or a disability award paid out of the Consolidated Revenue Fund within the meaning of section 9 of the CLPA.

[5] Before deciding on the merits of the judgment of the Federal Court as to the merits of the respondent's motion to strike, I must first rule on a foreclosure argument raised by the appellant on the basis of a case decided by this Court in the same litigation on August 13, 2018 (*Canada (Attorney General) v. Lafrenière*, 2018 FCA 151 (*Lafrenière 2018*)), according to which the appellant's appeal, initiated as an "application" within the meaning of Part 5 of the Rules, was converted into an "action" within the meaning of Part 4 of the Rules, as allowed under subsection 18.4(2) of the *Federal Courts Act*, RSC 1985, c. F-7.

I. Background

[6] The appellant joined the CAF in 1997 and was discharged for medical reasons in October 2012. The incident at the origin of the setbacks that prompted him to bring this action occurred on September 8, 2009, when he was informed, without any explanations, that he was relieved of his duties. At the time, the appellant held the position of military journalist in the

"Army News" unit. Hindered by a debilitating knee injury suffered a few years earlier, he took advantage of a retention program designed to help him return to civilian life.

[7] A few weeks later, on October 22, 2009, after being transferred to another unit, the appellant was informed that the decision to relieve him of his duties within the “Army News” unit was a preventive administrative measure related to an investigation into his production and distribution of DVDs while he was working in that unit.

[8] He was not provided with all the details but, more specifically, he was accused of having produced a DVD honouring the soldiers who served in Afghanistan without first obtaining prior approvals to use the “Army News” unit’s facilities. He was also accused of using material protected by copyright to produce the DVD and having personally profited from the sale of copies of this DVD, which could possibly lead to charges of fraud, trademark infringement and conduct to the prejudice of good order and discipline.

[9] One year later, while still awaiting explanations regarding his preventive transfer to other duties, the appellant filed a grievance under the *National Defence Act*, RSC 1985, c. N-5. He sought to be informed in writing of the reasons for which he had been relieved of his position as a journalist; he also wanted to know why he was under investigation and why he had still not been questioned. What he did not know was that the military police officer in charge of the investigation was on sick leave, and that the case had not been assigned to another investigator. This information had been available to the appellant’s superiors since November 2009, but had not been shared with him.

[10] In February 2012, still awaiting a decision on his grievance, the appellant filed a harassment complaint against his immediate superior in connection with the same events. The complaint was allowed in part a few months later. A few weeks after the complaint was filed, the appellant was informed that the military investigation into his conduct was closed and that no further action would be taken because the allegations against him had turned out to be groundless.

[11] On July 22, 2013, the initial authority responsible for deciding the appellant's grievance rendered its decision, which answered the three questions set out in the grievance. Dissatisfied with the answers provided, the appellant submitted his grievance to the final authority, amending it to include a claim for compensatory and punitive damages.

[12] In accordance with the grievance procedure engaged pursuant to the *National Defence Act*, the appellant's grievance was then referred to the Military Grievances External Review Committee, which held that there had been serious breaches of procedural fairness in connection with his superiors' decision to relieve him of his duties as a military journalist. With regard to relief, the Committee held that it could not recommend that financial compensation be awarded on the ground that the final grievance authority did not have the jurisdiction to award this type of relief. Nevertheless, the Committee suggested that the appellant's case be referred to the Director of Claims and Civil Litigation at the Department of National Defence for consideration as to whether such compensation should be paid to the appellant.

[13] On June 29, 2015, the final authority, finding that the appellant had been harmed by his chain of command, allowed his grievance in part, but refused to grant him the relief that he sought. The appellant then applied to the Federal Court to challenge the legality of that decision. He also requested that his appeal, initiated as an application for judicial review, be heard as an action because he was seeking, in particular, an award of damages, a remedy that section 18.1 of the *Federal Courts Act* does not provided for.

[14] In a judgment rendered on July 7, 2016 (*Lafrenière v. Canada (Director General Canadian Forces Grievance Authority)*, 2016 FC 767), Justice Martine St-Louis allowed the application for judicial review and referred the matter back to the final authority for a new determination. She held that the final authority's failure to address the issue of financial compensation sought by the appellant was a fatal error that rendered the decision unreasonable. However, Justice St-Louis refused to convert the appellant's appeal to an action on the ground that the appellant had not exhausted all other remedies.

[15] Both parties appealed from this judgment, the respondent believing that Justice St-Louis erred on the merits of the case while the appellant complained that the respondent had not ordered that his appeal be heard as an action. This is what gave rise to the judgment of this Court in *Lafrenière 2018*, according to which this Court allowed the appellant's cross-appeal and ordered that his action be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*. In view of this ruling, the Court does not deem it necessary to rule on the merits of the appeal.

II. The appellant's action

[16] The statement of claim, filed on September 11, 2018, described the chronology of the events that led to the filing of the appellant's appeal to the Federal Court. It stated what the appellant considered to be the admissions of errors arising from the decisions rendered in connection with the examination of his grievance and, in so doing, reproduced large extracts from these decisions.

[17] At paragraphs 69 to 90 of the statement of claim, the appellant listed the infringements and harm of which he claimed to be the victim. He essentially alleged that the respondent violated his constitutional and fundamental rights by failing to inform him of the specific facts alleged against him that the military police were investigating, depriving him of the opportunity to give his version of the facts, leaving open for more than two years the possibility that criminal or penal charges could be laid and relieving him of his duties as a military journalist in connection with allegations for which he was ultimately exonerated from all blame.

[18] The appellant believed that he had been deeply humiliated and that his honour and dignity had been besmirched. He said that his reputation had been irreparably damaged, as well as his right to protection of private, personal and family life and protection against unreasonable searches. He also said that these prejudices had been exacerbated by excessive delays in the processing of his grievance and of his harassment complaint. In addition to damage to his reputation, honour and dignity, they had caused a loss of enjoyment of life, damage to his health and earning capacity and the loss of a civilian career in communications and marketing.

[19] In addition to a letter of apology signed by the "senior military leadership", the appellant claimed a total amount of $400,000 as compensation, which could be adjusted, in addition to demanding that the solicitor-and-client costs be awarded against the respondent.

III. Impugned decision

[20] Justice Martineau started by providing background information: according to the evidence introduced by the respondent in support of his motion to strike, the appellant received or has been receiving disability awards since at least March 2012 pursuant to sections 45 and 46 of the *Veterans Well-being Act* for physical and psychological sequelae that were related to his service in the CAF or conditions that were aggravated by service, based on favourable decisions of the Veterans Review and Appeal Board.

[21] He further specified that the appellant was receiving a disability award for an adjustment disorder with anxiety that emerged in the fall of 2009 and was diagnosed in February 2010. The appellant was also receiving such awards for erectile dysfunction and drug-induced gynecomastia brought on by the adjustment disorder with anxiety (Order, at paragraph 66).

[22] Justice Martineau then sated the chronology of events that led to the final disposition of the appellant’s grievance and, subsequently, to Justice St-Louis’s judgment. He then discussed *Lafrenière 2018*. According to him and contrary to the appellant’s claims, the practical effects of that decision did not curtail his power to render a decision on the respondent’s motion to strike.

[23] After recalling the principles underlying the examination of a motion to strike made pursuant to subsection 221(1) of the Rules, Justice Martineau set out what he considered to be the factual basis for the disability awards paid to the appellant under the *Veterans Well-being Act*. This factual basis, he believed, was "directly related to the events that occurred in 2009 and to the military investigation that ended in March 2012" (Order, at paragraph 58).

[24] He then raised the question whether, based on these facts, section 9 of the CLPA barred the appellant's action. In this regard, he rejected the appellant's submission that the application of the immunity ordered by this provision of the CLPA depended on the nature of the relief sought, including the type of damage for which a pension or compensation is paid under the *Veterans Well-being Act*. His reading of the leading case in this matter, *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 SCR 921 (*Sarvanis*), led him to conclude that, instead, it was the characterization of the cause of action that served as a basis for the claim against the Crown that constituted the determining factor in the application of section 9 of the CLPA.

[25] In other words, Justice Martineau was of the view that "[i]f the factual basis for the action is the same as the factual basis that resulted in the applicant receiving a pension or compensation under sections 45 and 46 of the (Veterans Well-being Act), section 9 of the CLPA applies" (Order, at paragraph 67), even if the claim made in the action refers to heads of damages separate from the amounts paid as awards, according to him, the Crown cannot be held liable for consequential damages for which the said award has been paid (Order, at paragraph 68).

[26] Justice Martineau then provided a detailed analysis of the appellant's statement of claim, broke down the wrongful acts alleged by the appellant into three main categories:

> "a) First, the applicant's superiors were negligent or otherwise acted wrongfully at the time of the events in 2009, by suspending the applicant, without explanation, from his position as a journalist and transferring him to work as a driver during the military investigation [the first cause of action];
>
> b) Second, during the military investigation which took place from September 2009 to March 2012, the military police acted wrongfully by failing to adhere to the principles of procedural fairness and by violating the applicant's fundamental human rights. Most notably, the military police questioned numerous individuals and told them that the military investigation concerned a so-called "fraud" [the second cause of action];
>
> c) Lastly, the responsible authorities acted wrongfully in handling the applicant's grievance and harassment complaint. In particular, the delays involved were excessive and unacceptable, which also caused him prejudice [the third cause of action]."

[27] In the light of the first and second causes of action identified above, Justice Martineau held that any damage arising from the events that occurred in 2009 and the military investigation "constitutes a loss that shares the same factual basis as the disability benefits paid (to the appellant) since the decision rendered by the (Veterans Review and Appeal Board) in March 2012". (Order, at paragraph 79). In his view, both are therefore inadmissible under section 9 of the CLPA.

[28] In particular, regarding the allegations of violations of the appellant's fundamental and constitutional rights, Justice Martineau held that the statement of claim "does not disclose any fact that is separate and distinct from the events that occurred in 2009 and the military investigation that followed and ended in March 2012"; hence, insofar as it was based on such

allegations, section 9 of the CLPA also barred the statement of claim. He also stated that the fact that the appellant only learned after he was discharged from the CAF that certain wrongful acts had been committed during the military investigation did not change the factual basis of these acts (Order, at paragraph 95).

[29] With regard to the third category of wrongful acts relating to the delays in processing the appellant's grievance and harassment complaint, Justice Martineau considered that it revealed "a scintilla of a cause of action" because it dealt with facts that occurred after the appellant was discharged from the CAF, and "at first glance", were therefore not covered by section 9 of the CLPA (Order, at paragraph 80). He therefore allowed the appellant's action to continue on this sole basis and gave him 30 days to file and serve an amended statement.

IV. Standard of review on appeal

[30] The Court is called upon here to determine whether, in ruling as it did, the Federal Court correctly stated the law. In the affirmative, it will only intervene if, in applying the legal principles relevant to the facts of the case, the Federal Court made a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *Prentice v. Canada*, 2005 FCA 395, [2006] 3 FCR 135, at paragraphs 23–25 (*Prentice*); *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331; *Badawy v. 1038482 Alberta Ltd.*, 2019 FCA 150, at paragraph 12; *Canada (Attorney General) v. Whaling*, 2018 FCA 38, [2018] F.C.J. No. 257 (Q.L.), at paragraph 9).

V. *Lafrenière 2018*'s impact on this appeal

[31] As I stated at the outset, I must first rule on the foreclosure argument advanced by the appellant based on this Court's judgment in *Lafrenière 2018*. The appellant argues that by converting his application for judicial review into an action within the meaning of Part 4 of the Rules, as allowed under subsection 18.4(2) of the *Federal Courts Act*, this Court ordered that the said action be heard on the merits without any further procrastination or delay.

[32] The appellant says that the respondent's motion to strike therefore appears contrary to the imperatives of justice set out in this judgment. He considers that Justice Martineau should therefore have dismissed the motion on that basis alone.

[33] I cannot accept this argument. Justice Martineau discussed *Lafrenière 2018* in detail in his order, and I am of the view that he clearly understood its scope in ruling that he retained full power to rule on the respondent's motion to strike.

[34] He also carefully noted that this Court had not dealt with the issue of whether the claim for monetary compensation directed against the respondent in the application for judicial review, which he wanted to have converted, could be admissible, in whole or in part, notwithstanding the provision set out in section 9 of the CLPA. It should be pointed out that the Court had before it neither the statement of claim nor the proof of payment of such compensation, evidence produced subsequently in the context of the motion to strike.

[35] I therefore see no reason to intervene here. The judgment of this Court in *Lafrenière 2018* must be taken for what it is in the light of the considerations expressed therein, a judgment authorizing the appellant to proceed with his appeal against the respondent as if it were an action, nothing more. It did not have the effect of precluding or limiting the respondent's right to raise the ground provided for in the Rules to respond to the appellant's action, including subsection 221(1) of the Rules.

VI. Soundness of the Federal Court judgment

[36] As to the soundness of the Federal Court judgment, I am of the view that the main appeal should be dismissed, but that the cross-appeal should be allowed.

[37] At the outset, Justice Martineau correctly identified the legal principles applicable to motions to strike. He pointed out that for such a motion to be allowed, it must be plain and obvious that the action sought by the motion, interpreted generously in favour of the applicant, has no prospect of success (Order, at paragraph 55).

[38] The appellant did not dispute the applicable principles. Rather, he criticized Justice Martineau for relying on the evidence introduced by the respondent in support of his motion to strike in order to hold that section 9 of the CLPA applied, whereas, according to subsection 221(2) of the Rules, he was not allowed to consider this evidence.

[39] Indeed, under subsection 221(2) of the Rules, no evidence shall be heard on a motion to strike out a pleading on the ground that it discloses no reasonable cause of action. However, as

Justice Martineau correctly pointed out, this limitation has been tempered by the case law, which recognizes the parties' right to produce in evidence documents referred to in the pleadings sought to be struck (Order, at paragraph 56).

[40] In that case, Justice Martineau noted that the appellant had not challenged the admissibility of the Veterans Review and Appeal Board decisions produced by the respondent in his Motion Record. He further noted that, during oral argument, counsel for the appellant had even referred to passages from one of these decisions. He said that, under these circumstances, consideration of this evidence did not "conflict with the justifications for the rule of inadmissibility" and "served the interests of justice" (Order, at paragraph 57).

[41] I agree. Indeed, the appellant's statement of claim did not conceal the fact that the appellant was receiving "a veterans' pension", arguing rather that the damages he claimed in his action were not covered by this pension and therefore did not constitute losses that, within the meaning of section 9 of the CLPA, gave rise to a pension or compensation paid out of the Consolidated Revenue Fund (Appeal Book, vol. II, page 242, at paragraphs 91–95). Under these circumstances, and given the relevance and importance of section 9 of the CLPA, we cannot proceed as if the decisions which gave rise to the payment of compensation to the appellant did not exist. The Federal Court, therefore, correctly considered them, especially since they were not challenged by the appellant.

[42] The appellant also criticized the Federal Court for failing to make a distinction between an "injury" for which a pension may be paid under the *Veterans Well-being Act* and the

continuous and subsequent violation of his civil and fundamental rights, and for having misinterpreted *Sarvanis* in this way.

[43] He reprised before this Court the argument rejected by the Federal Court that the application of section 9 of the CLPA depends on the nature of the remedy sought against the Crown in the action brought against it. According to the appellant, insofar as the compensation is paid from the Consolidated Revenue Fund under a particular head of damages, section 9 of the CLPA cannot be used to hinder a claim against the Crown for the same harmful event, where compensation is sought for another type of damage.

[44] This argument cannot succeed.

[45] On the few occasions when this Court has been called upon to interpret *Sarvanis*, a case that stands for a broad interpretation of section 9 of the CLPA "to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated", merely because the claimed head of damages "did not match the apparent head of damages compensated for in that pension" (*Sarvanis*, at paragraph 29), the Court has uniformly held that the determining factor in analyzing whether section 9 of the CLPA applied to a given situation was whether the compensation drawn from the Consolidated Revenue Fund and the loss claimed in the action had the same factual basis (*Dumont v. Canada*, 2003 FCA 475, [2004] 3 F.C.R. 338, at paragraph 67 (*Dumont*); *Begg v. Canada (Minister of Agriculture)*, 2005 FCA 362, at paragraph 29 (*Begg*); *Prentice*, at paragraph 65; *Lebrasseur v. Canada*, 2007 FCA 330, at paragraph 12 (*Lebrasseur*)).

[46] In *Begg*, more particularly, the Court expressed the view that the source of the alleged wrongful act or negligence was not relevant for the purposes of determining the applicability of section 9 of the CLPA if payment of the compensation drawn from the Treasury and the compensation requested pursuant to the action resulted from the same event:

> [32] Like Campbell J., I cannot see how it can be argued that the factual basis of the compensation and the action differ. In my view, they are one and the same. Whether the destruction of the appellants' animals results from the negligence of officials in failing to prevent the entry of tuberculosis into Canada or by reason of any other ground of negligence, is, in my respectful view, irrelevant. The plain fact is that both the compensation received and the recovery sought by way of the appellants' action result from the same occurrence, i.e. the destruction of their herd.

[47] In this case, I conclude that Justice Martineau correctly interpreted *Sarvanis*. He held that for the purposes of determining the applicability of section 9 of the CLPA, it was necessary to consider, not the characterization of the damages claimed in the action, but the characterization of the event giving rise to it. I also conclude that he did not make any palpable and overriding error, at least with regard to the first and second category of wrongful acts that he enumerated, holding that their factual basis was the same as the factual basis for which the appellant receives a pension or compensation from the Consolidated Revenue Fund, i.e. the events of 2009 that led to his transfer to another unit and the ensuing military investigation that ended in March 2012 with his exoneration.

[48] However, the appellant pointed out that his claim was largely based on allegations of violation of his constitutional rights and that any analysis of the applicability of section 9 of the CLPA must take into account section 24 of the *Canadian Charter of Rights and Freedoms, Part*

I of the Constitution Act, 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c. 11 (Charter). He insisted that section 9 of the CLPA cannot deprive him of the right to go to court to obtain an appropriate and just remedy under the circumstances.

[49] The Supreme Court of Canada, like this Court, has not yet had an opportunity to decide the substantive question as to whether the immunity provided for in section 9 of the CLPA also applies to remedies sought under the Charter. Prudence is therefore warranted.

[50] However, the appellant has not persuaded me that the Charter can be of any help to him in this case. At this point, I would note what the Court had to say in *Prentice* regarding the treatment of a motion to strike filed under the Rules when the pleading sought in the motion is a claim under section 24 of the Charter.

[51] In that case, the plaintiff, a former Royal Canadian Mounted Police (RCMP) officer, claimed damages under section 24 of the Charter in the amount of $3,250,000 for the violation of his rights to security of the person. He alleged that he had been, without any preparation, posted to peace-keeping missions deployed under the aegis of the United Nations in Namibia in 1989 and in the former Yugoslavia in 1992, which went beyond his usual employment as a police officer and during which, he says, he experienced stressful events.

[52] After he was released from the RCMP for medical reason, he brought an action against the Crown, in which he alleged that the defendant harmed his health, that she refused to acknowledge his illness and provide him with appropriate treatment, that she engaged in

harassment, that she violated his privacy and that she engaged in discrimination. The remedy sought by the plaintiff was compensatory damages for loss of income, loss of pension and for the costs of future therapy. He also sought an award of moral damages for the "loss of a brilliant career in the RCMP", destruction of the family unit, and suffering, loss of enjoyment and loss of dignity. He also sought an award of exemplary damages. These damages are reminiscent of the damages sought by the appellant in this case.

[53] On behalf of the Court, Justice Robert Décary recalled that in the context of a remedy sought under the Charter, in order to oppose a motion to strike, the plaintiff must "at least be able to establish a threat of violation, if not an actual violation, of (his) rights under the *Charter*", regardless of how innovative the cause of action underlying the remedy sought may appear. He recalled in this regard that it is the facts that are assumed to be true, not the facts as they may be interpreted in the statement of claim or the legal assertions that may be made in it:

> [23] A motion to strike a pleading under paragraph 221(1)(a) of the *Federal Court Rules* on the ground that it discloses no reasonable cause of action will be allowed only if, assuming the facts alleged in the statement of claim to be true, the judge concludes that the outcome of the case is "plain and obvious" or "beyond reasonable doubt" (see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, Wilson J. at page 980). It is clear from what Madam Justice Wilson said that the power to strike out pleadings must be exercised with considerable caution and reluctance and that neither the length or complexity of the issues nor the novelty of the cause of action should prevent a plaintiff from proceeding with his or her action.
>
> [24] That does not mean, however, that a party who advances an unprecedented cause of action will have an easy time of it at the motion to strike stage. The courts are certainly prepared to give such a party his or her day in court, but the cause of action, novel as it may be, must still have some chance of being recognized at the end of the road. A cause of action is not "reasonable" simply because it has not yet been explored. The courts must not naively assume that something novel is or may be part of the normal course of evolution in the law.

> For instance, in order to determine whether a case arises out of an employer-employee relationships [*sic*], the facts giving rise to the dispute must be considered, and not the "characterization of the wrong" alleged; otherwise, "innovative pleaders" could "evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action" (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paragraph 49; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, at paragraph 11 and *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at paragraph 93). In *Vaughan*, according to Mr. Justice Binnie, the appellant had undoubtedly felt obliged "to frame his action, with a degree of artificiality, in the tort of negligence" (paragraph 11) to circumnavigate the *Crown Liability and Proceedings Act*, which did not stop the Court from striking the action brought on a preliminary motion.
>
> [25] In the context of a remedy sought under the Charter, it is worthwhile to refer to Chief Justice Dickson's remarks in *Operation Dismantle*, at page 450:
>
> > I agree . . . that, regardless of the basis upon which the appellants advance their claim for declaratory relief - whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law - they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter*.
> >
> > In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the *Charter*.
>
> [26] It also goes without saying that it is the facts that are assumed to be true, not the facts as they may be interpreted by the plaintiff in his statement of claim or the legal assertions that he may make in it.

[54] In this case, the statement of claim contains but one reference to a right protected by the Charter, the right against unreasonable searches. However, there are no allegations – and nothing on the record currently before the Court – that directly or indirectly suggest that the appellant was the subject of a search in connection with the military investigation or otherwise. This allegation, based on the Charter, clearly has no prospect of success.

[55] In the memorandum that he filed with this Court, the appellant argued that his case is also based on sections 2 (b), 7, 10, 11 and 12 of the Charter. Beyond the fact that these complaints were not articulated anywhere in his statement, which no doubt explains why the appellant asked us to allow him to amend it, the appellant was unable to persuade us at the hearing that there was a likelihood that they would ultimately be upheld.

[56] Paragraph 2(b) of the Charter protects freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. I fail to see how his having been removed from his duties as a military journalist or not having been able to provide his version of the facts before the military investigation into his conduct was concluded triggers this provision of the Charter.

[57] Nor do I see how section 7 of the Charter could apply in this case since it is well settled that section 7 does not provide broad protection against violations of a person's dignity or reputation, no more than it stands as a bulwark against stigma (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307), which is the appellant's main complaint.

[58] Finally, sections 10, 11 and 12 of the Charter are of no use to him. Section 10 enshrines a series of procedural protections in the event of arrest or detention. The appellant was not arrested or detained. Section 11 provides protections in the event that a person is charged with an offence. Although it appears from the record that the military investigation into the appellant's conduct was botched, no charges were laid.

[59] Under section 12, everyone has the right not to be subjected to any cruel and unusual treatment or punishment. This section primarily applies in penal and criminal law. For this protection to apply, it must be shown that the impugned sentence or treatment is grossly disproportionate; it must therefore be excessive to the point of being incompatible with human dignity, in addition to being abhorrent or intolerable to society (*R v. Morissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at paragraph 26; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at paragraph 24 (*Lloyd*); *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paragraph 45 (*Boudreault*)). The threshold is high (*Lloyd*, at paragraph 24; *Boudreault*, at paragraph 45). As prejudicial as the situation may have been, I am not persuaded that the appellant has any prospect of proving that the respondent's action to remove him from his duties as a military journalist in order to transfer him to another unit and conduct an investigation into possible misconduct has violated this right. Moreover, the appellant is already receiving a form of compensation for this action.

[60] As the Court noted in *Prentice*, here it is necessary to examine the real nature of the action brought by the appellant and to be wary of the red herrings that may be found in his statement of claim in order to wittingly or unwittingly circumvent the immunity provided for in section 9 of the CLPA.

[61] In that case, the Court held that the plaintiff's action was in reality an action brought by an employee against his employer seeking damages for harm allegedly suffered in the course of his employment (*Prentice*, at paragraph 69). It held that this was a disguised action in liability

against the Crown prohibited by section 9 of the CLPA (*Prentice*, at paragraph 69). The same conclusion applies in this case.

[62] Without deciding that in all circumstances section 9 of the CLPA bars a claim against the Crown based on section 24 of the Charter, for the above reasons, this case cannot be exempted from the effects of section 9 of the CLPA on the basis of the appellant's completely unsupported complaints, based on the Charter.

[63] The appellant's appeal from the order of Martineau J. will therefore be dismissed, without possibility of amendment.

[64] That being said, and as the respondent argues, the appellant's statement of claim should have been struck in its entirety. With all due respect, I am of the view that the Federal Court committed a palpable and overriding error in considering an irrelevant factor in its determination of the admissibility of the appellants' action based on delays in the processing of his grievance and of his harassment complaint.

[65] This factor is that the facts for which the respondent was criticized occurred after the appellant was discharged from the CAF in October 2012 (Order, at paragraph 80). However, the question to be asked regarding this aspect of the appellant's appeal, properly identified by the Federal Court when it reviewed the general principles applicable to the operation of section 9 of the CPLA, was still whether the factual basis of the appellant's pension award and the factual basis of his claim for damages were the same (*Lebrasseur*, at paragraph 12). If the answer is

affirmative, the appellant's action is just as inadmissible for this aspect of the claim as for the two other categories of wrongful acts which the Federal Court struck out.

[66] Here, there is no doubt that the processing of the grievance and of the harassment complaint is intrinsically related to the factual basis which gave rise to the payment of the pension or disability award to the appellant under the *Veterans Well-being Act*. I am in complete agreement with the respondent when he said that this grievance and this complaint [TRANSLATION] "are related and are part of the same set of facts, the same sequence of events for which the appellant is receiving a pension" (Respondent's memorandum of fact and law, at paragraph 100).

[67] In *Dumont*, this Court pointed out that the compensation scheme established under the *Pension Act*, R.S.C. 1985, c. P-6 was "a comprehensive scheme designed to ensure the efficacious compensation of persons for their injuries and losses incurred in the public service" (*Dumont*, at paragraph 70). This characterization also holds for the *Veterans Well-being Act*, which, for all practical purposes, has replaced the *Pension Act*. Some might argue that the compensation scheme created by the *Veterans Well-being Act* is not generous enough or that it suffers from imperfections. However, it is up to Parliament, not the courts, to remedy any shortcomings that the Act may contain.

[68] For all these reasons, I conclude that the main appeal must fail and that the cross-appeal must succeed, the whole with costs to the respondent.

"René LeBlanc"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

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