

Date: 20010123  
Docket: CA 165834

**NOVA SCOTIA COURT OF APPEAL**  
[Cite as: **Canada (Attorney General ) v. M.J.D., 2001 NSCA 13**]

**Bateman, Saunders and Oland, J.J.A.**

**BETWEEN:**

THE ATTORNEY GENERAL FOR CANADA IN RIGHT OF  
THE DEPARTMENT OF NATIONAL DEFENCE and HER  
MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

- and -

M.J.D.

Respondent

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**REASONS FOR JUDGMENT**

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Counsel: Leanne M. Wrathall for the appellant  
John A. McKiggan and Norman Fraser for the respondent

Appeal Heard: January 23, 2001

Judgment Delivered: January 23, 2001

**THE COURT:** Appeal dismissed per oral reasons for judgment of Bateman, J.A.:  
Saunders and Oland, J.J.A. concurring.

**BATEMAN, J.A.:**

- [1] The parties applied to a judge of the Supreme Court sitting in chambers for a preliminary determination on a point of law, pursuant to **Civil Procedure Rule 25.01(1)(a)**.
- [2] The respondent (plaintiff in the action), a former member of the Canadian armed forces, has sued the Department of National Defence for damages resulting from a sexual assault. She alleges that while engaged in her duties with the military she was sexually assaulted and raped by a fellow member of the force. This, she alleges, resulted in her early dismissal from the military. Her application for a disability pension pursuant to the **Pension Act**, R.S.C. 1985, c. P-7 was refused. The respondent initiated a civil action against her employer for damages on account of the injuries sustained in the assault. The question before the chambers judge was whether the respondent was precluded from pursuing a civil remedy by s.111 of the **Pension Act** and s. 9 of the **Crown Liability and Proceedings Act**, R.S.C. 1985, c. C-50. These statutes bar a civil action “. . . *if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund*” (**Crown Liability and Proceedings Act**) or “. . . *in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death*” (**Pension Act**).

- [3] Counsel submitted an Agreed Statement of Facts to the chambers judge. Justice A. David MacAdam rendered his decision finding that the action could proceed and was not barred by the statutes. After his decision was rendered the parties discovered that one of the Agreed Facts was in error. Under the scheme of the **Pension Act** the applicant may request a review of the Minister's refusal of a pension. The applicant may also appeal the results of that review. Counsel had submitted a fact agreeing that the limitation period for appealing the Ministers decision pursuant to the **Pension Act** refusing a pension had expired. That was incorrect. There is no time limit on the right to request a review of the Minister's decision, nor upon the right of appeal arising from that review. The appeal period, therefore, had not expired. A significant issue before the chambers judge was whether the respondent was required to exhaust her rights of review and appeal under the relevant statutes, prior to commencing action. The respondent took the position that it was sufficient that she had applied for a pension which had been refused. The Crown urged that she must pursue all rights of review and appeal before initiating action.
- [4] In determining that the respondent could proceed, the judge said in part:

[17] It is unnecessary to decide whether, in order to satisfy the conditions contained in *s. 9* and *s. 111*, the plaintiff first had to make application for a pension. Here the plaintiff made an application and was denied. The Crown says she should have appealed or applied for a review, both steps being available to her under the *Pension Act*. A review requires, apparently, new information, and therefore presumably an application for review without new information would be bound to fail. The appeal period has now expired. As such, absent new information, the plaintiff would have nowhere to go to seek relief or redress.

[18] It is also inconceivable that having been denied the application for a pension the plaintiff is precluded from bringing this proceeding because she failed to appeal in time. Assuming an individual accepts the Minister's denial but believes for reasons unrelated to the pension application they are entitled to relief or remedy against the Crown, counsel's position would require the plaintiff to pursue meaningless appeals simply to meet the conditions of *s. 9* and *s. 111*.

[5] Upon learning of the error in the Agreed Statement of Facts, the Crown asked the chambers judge to reconsider his decision taking the corrected fact into account. The respondent would not agree to do so. Failing agreement of the parties, the judge was of the view that it was a matter for the Court of Appeal. No order has issued from the chambers decision.

[6] It is our view that the appeal before us is moot. The facts upon which the chambers judge based his decision are not the correct facts of this case. It would serve no purpose for us to comment upon the correctness of his decision. Nor do we accept the submission that it is appropriate for us to decide the matter *de novo* using the corrected Statement of Facts and the novel arguments raised today. This matter should be decided by a Supreme Court judge in the first instance. The respondent says that the incorrect fact was not material to the judge's decision. Taking into account the judge's

comments reproduced above, we cannot say that the fact is not material to the result.

[7] If counsel remain of the view that this issue is one which can be determined as a point of law within the requirements of **Rule** 25.01(1)(a), then the proper procedure is to take the matter again before a chambers judge for determination on a proper record.

[8] Accordingly, the appeal is dismissed but without costs.

Bateman, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.