Date: 20080520

Docket: T-463-07

Citation: 2008 FC 624

Ottawa, Ontario, May 20, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DENNIS MANUGE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] The Plaintiff in this action, Dennis Manuge, seeks to have the action certified as a class action in accordance with Rule 334.16 of the Federal Court Rules, S.O.R. 98/106. The Defendant (the Crown) opposes this motion on several grounds. The Crown says that "at the heart of [the] action is a dispute as to the validity of a federal administrative decision" the lawfulness or validity of which must first be determined by way of judicial review. Accordingly, only if that judicial review application is determined in favour of Mr. Manuge can the matter proceed as an action for damages. The Crown also argues that, whether or not judicial review is a prerequisite to the claim moving forward, it is preferable that the case proceed as an individual

judicial review because of the practical concerns for judicial economy and efficiency. Those are concerns which the Crown says will arise in some measure whether the proceeding is certified as an application or as an action.

I. Background

[2] Mr. Manuge is a former member of the Canadian Forces who served from September 9, 1994 until he was released on medical grounds on December 29, 2003. In 2002, Mr. Manuge was awarded a disability pension under the *Pension Act*, R.S. 1985 c. P-6 payable in the monthly amount of $386.28 (the VAC benefit). This VAC benefit was in addition to his Canadian Forces salary of $3,942.00 per month.

[3] Upon his release, Mr. Manuge was approved to receive long-term disability benefits under the Canadian Forces' mandatory disability plan (the SISIP Plan). In accordance with Article 24 of the SISIP Plan, the monthly disability benefit payable to Mr. Manuge was set at 75% of his gross monthly income reduced by the monthly VAC benefit he receives. This offset of the VAC benefit has left Mr. Manuge with monthly disability income at a level of 75% of his gross employment income, which is approximately 59% of his total pre-release income (employment income and VAC income).

[4] It is the treatment of the VAC Benefit that is at the crux of Mr. Manuge's claim to relief. He asserts that the "clawback" of that benefit from his SISIP income is unlawful and unfair. The Crown argues that this "benefit offset" is nothing more than a legitimate attempt to rationalize or

coordinate benefits very much in keeping with the contractual models for long term disability insurance that apply in the public and private sectors.

[5] The evidence before me indicates that the income replacement benefits payable to members of the Canadian Forces and to their dependents were historically inconsistent and, in some instances, markedly inadequate. Since at least the late 1960's, efforts were taken within the Canadian Forces to improve the coverage and to eliminate anomalies. The primary response to the identified coverage problems was the creation, under section 39 of the *National Defence Act*, R.S.C. 1985 c. N-5, of the SISIP Plan.

[6] Initially the SISIP Plan was voluntary but in 1982, enrollment became mandatory. Over the years, the coverages available under the SISIP Plan have changed as have the membership contribution levels. Presently, the Plan is 85% funded by the Treasury Board with the remaining funding coming from membership premiums. The affidavit of André Bouchard, President of SISIP Financial Services, indicates that the SISIP Plan was amended in 1976 to provide for the reduction of SISIP benefits by the amounts payable to members under the *Pension Act* and that this was done "for reasons of cost and equity".

[7] Since the passage of the New Veterans Charter in 2006, the issue of the deduction of VAC benefits from SISIP income is no longer of any concern because the monthly VAC benefit has been replaced by a non-deductible, lump sum payment. However, for Mr. Manuge and for

about 4000 other Canadian Forces members in a similar situation, the monthly offset of the VAC benefit from their SISIP income continues.

II. The Scope of the Claim

[8] The Statement of claim filed by Mr. Manuge alleges that Article 24 of the SISIP Plan is unlawful, *ultra vires* and contrary to the *Pension Act*, and that the Article also breaches his equality rights under section 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter). The Statement of Claim further alleges that the Crown has breached public law and fiduciary obligations owed to Mr. Manuge and that it has otherwise acted in bad faith and has been unjustly enriched by its conduct. Mr. Manuge seeks relief in the form of various declarations in support of his asserted liability allegations, reimbursement of the monies deducted from his SISIP income, general, punitive, exemplary and aggravated damages, interest and costs.

III. Issue

[9] Should this action be certified as a class proceeding under Federal Court Rule 334.16?

IV. Analysis

[10] The Crown contends that this proceeding is indistinguishable from the situation in *Canada v. Grenier*, 2005 FCA 258, [2006] 2 F.C.R. 287, where it was held that, where a party's claim to damages rests upon a decision of a federal board or tribunal, the lawfulness of that underlying decision must first be determined by way of an application for judicial review. This

argument is succinctly framed in the following passage from the Crown's Memorandum of Fact and Law in the case at bar:

> 25. The SISIP insurance policy, and more specifically, the SISIP LTD benefit, was designed and modified over the years by the Chief of Defence Staff or his delegates, pursuant to his authority under ss. 18(1) and 39(1) of the *National Defence Act*, which read:
>
> > 18(1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.
> >
> > …
> >
> > 39(1) Non-public property acquired by contribution but not contributed to any specific unit or other element of the Canadian Forces shall vest in the Chief of the Defence Staff and, subject to any specific directions by the contributor as to its disposal, may be disposed of at the discretion and direction of the Chief of the Defence Staff for the benefit of all or any officers and non-commissioned members or former officers and non-commissioned members, or their dependants.
>
> 26. In setting up the SISIP LTD scheme, the CDS and/or his delegates were acting as a "federal board, commission or other tribunal" within the meaning of s. 2 of the FCA. They were "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" when they designed the SISIP scheme for the better administration of the CF and the benefit of its members.
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> 27. Each of the claims pleaded in the Plaintiff's statement of claim must stand or fall based on the validity of the decision to include *Pension Act* benefits in the list of deductions against SISIP LTD benefits in s. 24(a)(iv) of the SISIP policy. It follows then, that the essence of this claim is whether the decision to reduce

> SISIP LTD benefits by the amount of *Pension Act* benefits was a valid federal administrative decision. As stated in *Dhalla*:
>
> > As the Statement of Claim is currently drafted, the Plaintiffs cannot avoid the finding that all of its heads of action are an indirect attack on the validity of the process and the decision itself. Therefore, the Plaintiffs cannot use collateral attack on that decision to sustain their damages claim.
>
> 28. As such, it is submitted that the Plaintiff *must* successfully challenge the decision by an application for judicial review under s. 18 of the FCA before grounding an action under s. 17 of the FCA. Unless and until this administrative decision be judged invalid by way of judicial review, the claim discloses no reasonable cause of action and is premature.

[11] First of all, I do not agree with the Crown that the liability issue which Mr. Manuge has raised in his pleadings is based upon a decision of a federal board or tribunal. While it is undoubtedly correct that the inclusion of Article 24(a)(iv) of the SISIP Plan emanates from a decision made many years ago by the Chief of Defence Staff or by his delegate, what Mr. Manuge seeks to challenge is the lawfulness of the government's policy (as reflected in Article 24 of the SISIP Plan) and by the corresponding action to reduce his monthly SISIP income by the amount received by him under the *Pension Act*. This situation is more in keeping with that addressed by the Federal Court of Appeal in *Krause v.Canada*, [1999] 2 F.C. 476, 236 N.R. 317 (C.A.) than in *Grenier*, above. In *Krause*, the Applicants sought prerogative relief to compel the Crown to credit their pension accounts as required by the *Public Service Superannuation Act*,

R.S.C. 1985 c. P-36 and by the Ca*nadian Forces Superannuation Act*, R.S.C. 1985 c. C-17. The Court summarized the claim in *Krause* as follows:

> 6 The principal complaint in issue is that in each fiscal year beginning with the 1993-94 fiscal year, the responsible Ministers have failed to credit each of the pension accounts with the full amounts required to be credited pursuant to subsections 44(1) of the PSSA and 55(1) of the CFSA, respectively. The appellants assert that in each of those years a portion of the surpluses standing in the accounts has been improperly amortized over a period of several years through the use of the Allowance for Pension Adjustment Account and that these actions are ongoing and are in violation of the Ministers' duties imposed by those subsections.

[12] It appears from the reasons given in *Krause*, above, that the accounting treatment that was in issue went back to a decision made by the responsible Ministers almost 10 years earlier. The Court dismissed the Crown's preliminary objection that the proceeding had been commenced out of time on the following basis:

> 23 I agree with these submissions. In my view, the time limit imposed by subsection 18.1(2) does not bar the appellants from seeking relief by way of mandamus, prohibition and declaration. It is true that at some point in time an internal departmental decision was taken to adopt the 1988 recommendations of the Canadian Institute of Chartered Accountants and to implement those recommendations in each fiscal year thereafter. It is not, however, this general decision that is sought to be reached by the appellants here. It is the acts of the responsible Ministers in implementing that decision that are now claimed to be invalid or unlawful. The duty to act in accordance with subsections 44(1) of the PSSA and 55(1) of the CFSA arose "in each fiscal year." The charge is that by acting as they have in the 1993-94 and subsequent fiscal years the Ministers have contravened the relevant provisions of the two statutes thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rule of law. The merit of this contention can only be determined after the judicial review application is heard in the Trial Division.

> 24 I am satisfied that the exercise of the jurisdiction under section 18 does not depend on the existence of a "decision or order." In *Alberta Wilderness Association et al v. Canada*, 17 Hugessen J. was of the view that a remedy envisaged by that section "does not require a decision or order actually in existence as a prerequisite to its exercise." In the present case, the existence of the general decision to proceed in accordance with the recommendations of the Canadian Institute of Chartered Accountants does not, in my view, render the subsection 18.1(2) time limit applicable so as to bar the appellants from seeking relief by way of mandamus, prohibition and declaration. Otherwise, a person in the position of the appellants would be barred from the possibility of ever obtaining relief under section 18 solely because the alleged invalid or unlawful act stemmed from a decision to take the alleged unlawful step. That decision did not of itself result in a breach of any statutory duties. If such a breach occurred it is because of the actions taken by the responsible Minister in contravention of the relevant statutory provisions.

[13] The *Krause* decision has been applied in a number of subsequent decisions including *The Moresby Explorers Ltd. et al. v. Attorney General of Canada et al.*, 2007 FCA 273, 284 D.L.R. (4th) 708 at para. 24; *Morneau v. Canada*, [2001] 1 F.C. 30, 189 D.L.R. (4th) 96 at para. 42; and *Attorney General of Canada v. H. J. Heinz Company*, 2006 SCC 13, 1 S.C.R. 441 at para. 44.

[14] The one issue that is conclusively resolved by the *Krause* decision is that, even if this is a matter which should be initially resolved by way of an application for judicial review, the 30-day time limit for initiating such an application as required by section 18.1(2) of the *Federal Courts Act*, R.S., 1985, c. F-7, has no application because Mr. Manuge is not challenging a decision or order of a federal board, commission or tribunal. Were it otherwise, Mr. Manuge and others in

his situation would be required to seek leave to challenge the validity of a policy decision apparently made many years before their claims to long-term disability compensation even arose.

[15] The question remains, however, as to whether Mr. Manuge is still required by section 18(3) of the *Federal Courts Act* to successfully challenge the lawfulness of Article 24(a)(iv) of the SISIP Plan by way of judicial review before commencing an action for damages against the Crown under section 17 of the *Federal Courts Act*. He is, after all, seeking declaratory relief against the Crown claiming, *inter alia,* that the contractual offset is unlawful, *ultra vires*, discriminatory and in breach of public and fiduciary duties. Mr. Manuge does not assert a cause of action against the Crown framed either in contract or in tort. Therefore, the fact that *Grenier* may not apply to actions against the Crown based in contract or tort (see *Genge v. Canada (Attorney General),* 2007 NLCA 60, 285 D.L.R. (4th) 259) does not answer the problem presented here where the claim seeks only declaratory relief and damages and, on its face, is caught by section 18(3) of the *Federal Courts Act*.

[16] Mr. Manuge argues that the holding in *Grenier,* above, should be restricted to cases where the matter being challenged is a discrete administrative decision and that *Grenier* does not apply to a challenge to the lawfulness of government policy or to related government conduct.

[17] There is no question that much of what was of concern to the Court in *Grenier* and in its earlier decisions in *Tremblay v. Canada*, 2004 FCA 172, 4 F.C.R. 165, and in *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, 338 N.R. 75, had to do with the desire for finality

around administrative decisions and to ensure that appropriate deference was accorded to the decision-maker (see, for example, paras. 27 to 30 in *Grenier*). The Court was also rightfully concerned about a process which would allow a party to collaterally attack a decision well beyond the 30-day time limit for bringing an application for judicial review. All of these are concerns that carry much less significance in a case where the challenge is limited to the lawfulness of a government policy and where the application of that policy has on-going implications for the party affected. It is also perhaps noteworthy that in *Grenier*, *Tremblay* and *Berhad*, the Court's discussion of these policy considerations invariably referred to the lawfulness of the underlying decisions and no explicit reference was made to challenges to government policy, legislation, or conduct. In *Tremblay*, the Court also noted "the fine line that exists between judicial review and a Court action" where extraordinary remedies are sought.

[18] I also accept that on each and every occasion that Mr. Manuge and the other proposed class members are subject to the offset of VAC benefits from their SISIP income, they have a fresh claim to relief and a corresponding right to judicially attack the lawfulness of the policy giving rise to the reduction in benefits. This situation is very different from the kind of decision under review in *Grenier*, which was discrete in a temporal sense and where a later legal action could be seen as a true collateral attack by which the limited time to initiate an application for judicial review could be avoided.

[19] Notwithstanding these observations, I am unable to conclude that in *Grenier* the Court intended to confine the requirement for judicial review to cases involving challenges to

administrative decisions. The ultimate focus of the Court in *Grenier* was to the mandatory language of section 18(3) of the *Federal Courts Act* (see *Grenier* paras. 25 and 33) subject, of course, to the discretion available under section 18.4(2) for conversion of an application for judicial review into an action. It is, therefore, with respect to that conversion discretion that I now turn my attention.

[20] If this is an appropriate case for conversion to an action then nothing useful would be served by requiring Mr. Manuge to go through the process of starting again. What he began as an action should simply be allowed to continue as an action.

[21] I am of the view that the strictness of the ratio in *Grenier* can be mitigated in appropriate cases by the authority to convert an application for judicial review into an action. In a case like this one where the policy concerns about collateral attacks, finality and deference do not obviously apply, the rationale for requiring judicial review as a prerequisite to an action for damages is mostly, if not completely, absent. What one is essentially left with is a consideration of the practical benefits and efficiencies (or the corresponding disadvantages and inefficiencies) of allowing one type of proceeding over another.

[22] In addition, even if this type of claim to prerogative relief should be initiated as an application, the Court must consider the plaintiff's desire to convert the application into a class action. Indeed, on a motion to convert an application into an action in support of an intention to certify the proceeding as a class action, the Court in *Tihomirovs v. Canada (Minister of*

Citizenship and Immigration), 2005 FCA 308, [2006] 2 F.C.R. 531, held that the relevant considerations to a conversion motion included those which applied to a motion to certify under Rule 334.16. This point is made in the following passages from the decision of Justice Marshall Rothstein:

> 16 Where the reason advanced to support an application for conversion is an intention to certify a class action and an applicant is unable to satisfy the court that a class action should be certified, it would follow that justification for conversion has not been made out. If a certification application would fail, the conversion application should also fail.
>
> 17 Technically, of course, conversion must precede certification because a judicial review cannot be certified for class proceedings. In other words, the judicial review must first be converted to an action before certification can be granted. Therefore, it may be suggested that having to satisfy the criteria for certification before a conversion order is made is to put the cart before the horse.
>
> 18 The practical answer is that both conversion and certification applications should be heard and considered together. If the evidence satisfies the certification tests, conversion should be ordered followed immediately by a certification order. Only if a party can demonstrate the simultaneous consideration of conversion and certification would be prejudicial should conversion be dealt with in advance of certification. However, in such case, I would think the considerations applicable to certification would still be applicable to conversion unless it could be shown otherwise.
>
> 19 To answer the Minister's concern that conversion for the purpose of certifying a class action defeats the purpose of judicial review, the question of the preferable procedure is a matter to be taken into account in the conversion/certification proceeding. The court will look at the questions of practicality and efficiency and which procedure will provide the least difficulty for resolving the matter. For example, a multiplicity of judicial review proceedings, which a class action might avoid, might also be avoided if the parties agree to treat one judicial review as a test case for other judicial reviews dealing with the same issue. These and other

> considerations should allow the court to determine whether to grant conversion and certification.
>
> 20 I would observe that, in immigration matters, leave must be obtained before judicial review may proceed. Therefore, in immigration matters, when a judicial review application gives rise to conversion/certification applications, the question of whether there is a reasonable cause of action has been determined and should not be an issue on the conversion/certification applications. In the case of non-immigration judicial reviews, the reasonableness of the cause of action will be argued by the parties. If it is demonstrated that there is no reasonable cause of action, the conversion/certification application will be dismissed. The judicial review may proceed but the applicant will know that the prospects of success are dim.
>
> 21 For these reasons, I am of the view that where the intention of conversion is to certify an action as a class action, the conditions in rule 299.18 [now Rule 334.16] will normally be as relevant to the conversion application as they are to the application for certification. Of course, as there are no limits on the matters the court may consider relevant in a conversion application, I do not rule out other matters being taken into account by the court. However, the focus will normally be on the conditions for certification in rule 299.18.

I note that the Court's concern about the inability at that time to certify an application for judicial review as a class proceeding is no longer applicable. In the result, this proceeding could still be certified as a class proceeding even if it goes forward as an application for judicial review.

[23] Federal Courts Rule 334.16 sets out the general and specific considerations that apply to a motion to certify. The Rule states:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions

suivantes sont réunies :

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

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

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

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

(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;

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

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

(e) there is a representative plaintiff or applicant who

e) il existe un représentant demandeur qui :

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

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

(ii) has prepared

(ii) a élaboré un

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 solicitor of record.

Matters to be considered

(2) All relevant matters shall be considered in a determination of

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 dossier.

Facteurs pris en compte

(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

whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of

suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

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) l’aspect pratique ou l’efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d’autres mesures de redressement.

> the class proceeding
> would create
> greater difficulties
> than those likely to
> be experienced if
> relief were sought
> by other means.

[24] This Court's Class Proceedings Rules are modelled on the British Columbia Rules and are similar to the Ontario Rules; in the result, decisions from those jurisdictions can be looked to for guidance in considering a motion to certify: see *Tihomirous v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] 4 F.C.R. 341, at para. 45. As Justice Frederick Gibson observed in *Rasolzadeh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 919, [2006] 2 F.C.R. 386 at para. 23 the mandatory language of our Rule [shall…certify] excludes an overriding discretion to refuse to certify a class proceeding if the prescribed factors for certification are met.

[25] The Crown does not dispute that the proposed class action raises questions of law common to all prospective class members or that the proposed class is identifiable. The Crown also accepts that Mr. Manuge is an appropriate representative plaintiff. Mr. Manuge has also fulfilled the requirement under Rule 334.16 for presenting a workable litigation plan. The Crown opposes the certification motion principally on the basis that the common issues can be more efficiently managed and resolved within the context of a single application for judicial review which would then bind the Crown with respect to the other affected members. It also contends that there would be no judicial economy realized from a class proceeding in any form.

Instead, it says that a class proceeding would only serve to complicate and delay the resolution of a matter that is ideally suited to summary resolution by way of an individual application. The Crown also takes issue with several of the claims asserted in the Statement of Claim and argues that they fail to disclose a reasonable cause of action which can be the subject of questions for certification.

[26] The question of commonality of issues has been described as lying at the heart of a class proceeding: see *Campbell v. Flexwatt Corp.*, [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 at para. 52. There is no question that the preponderance of issues as framed in Mr. Manuge's Statement of Claim would be common to all members of the proposed class. I think it is fair to say that all of the liability issues raised in this case are common issues and that if Mr. Manuge succeeds on any one of them, the individual claims of class members to restitution would be amenable to a rather simple calculation.

[27] There is no indication in the evidence that a significant or any number of members of the proposed class have a valid interest in prosecuting individual claims. So far no one other than Mr. Manuge has initiated a claim. The amounts in issue in most cases appear to be quite modest and well below the financial threshold for prosecuting individual claims. In the case of Mr. Manuge, the amount in issue is said to be $9,411.86 which he says is insufficient to justify the prosecution of his individual claim. The affidavit of Jodie Archibald, an employee of the law firm representing Mr. Manuge, indicates that all of the approximately 150 former and interested Canadian Forces members contacted to date have indicated support for the proposed class action.

[28] The issue of access to justice is an important consideration in determining whether a proceeding ought to be certified. Where it is not economical for any one person to prosecute a claim and where the Crown has not indicated a willingness to indemnify Mr. Manuge or anyone else for the costs required to prosecute a binding test case, the argument for a class proceeding is enhanced: see *Bodnar v. The Cash Store Inc.,* 2006 BCCA 260, 9 W.W.R. 41, at paras. 19 and 20, *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Ont. G.D.) at para. 35, and *Howard Estate v. British Columbia*, 66 B.C.L.R. (3d) 199, 32 C.P.C. (4th) 41 at para. 43.

[29] Here, the Crown argues that it will be bound by any declaration of invalidity that is given at the conclusion of Mr. Manuge's case but that, of course, imposes upon Mr. Manuge the entire financial burden of prosecuting his claim for the potential benefit of all of the other members of the proposed class. Within the context of this proposed class proceeding, the cost consequences will be borne by legal counsel under a contingency fee arrangement and, if the claim succeeds, spread evenly among the class beneficiaries.

[30] Even assuming that Mr. Manuge was able and willing to carry all of the financial risk of the proceeding including the risk of paying costs to the Crown, there is no guarantee that the Crown would abide by a declaration issued in his favour and, indeed, where the public interest is engaged, the doctrines of abuse of process and *res judicata* may not be applicable in subsequent litigation involving the Crown (see *Withler v. Canada (Attorney General),* 2002 BCSC 820,

[2002] 9 W.W.R. 477. In *Scott v. TD Waterhouse Investor Services (Canada) Inc.* 2001 BCSC 1299, (2001), 94 B.C.L.R. (3d) 320, Justice Donna Jean Martinson observed that the accrual of the benefit of a favourable class judgment or settlement upon the entire class, without the need to resort to principles of estoppel, was a practical advantage of a class proceeding. Here we also do not know how and when the Crown might choose to make a distribution of money to other interested Canadian Forces veterans in the event that Mr. Manuge is successful. These are matters which were of concern to the Court in *Lee Valley Tools Ltd. v. Canada Post Corp.*, 162 A.C.W.S. (3d) 889, [2007] O.J. No. 4942 and where the similar arguments of Canada Post were rejected for the following reasons:

> 46 Canada Post submits that the determination on the central issue whether Canada Post is in violation of the Act would be binding whether or not the action is certified and there is therefore no benefit to class members that would justify the additional costs and judicial resources associated with the class action process. It undertakes that if certification is denied, it will be bound by a final judicial determination of the central issue in relation to all Canada Post customers who would have met the proposed class definition. This submission assumes that there is a credible basis for believing that there will be an individual action, but the evidence of Mr. Lee is to the contrary and I accept it. There is no evidence that any other individual is prepared to litigate, notwithstanding that Lee Valley launched a website that chronicles its concerns and has taken out three full-page advertisements in the Ottawa Citizen newspaper in January 2006 to publicize its complaints about Canada Post's practices.
>
> 47 Even if an individual action determined the core liability issue against Canada Post, the assessment of damages of individual class members would remain. Canada Post has not explained how these claims would be adjudicated. Moreover, it is not credible to presuppose that all class members will advance a claim. I do not see how this contributes to the policy objective of access to justice. This submission also overlooks that while an individual action that resulted in a determination that the practices of Canada Post are illegal could result in behaviour modification, an individual action

> would not require Canada Post to account on a global basis for the alleged harm it has caused. A class action is a more efficient and judicious means of achieving behaviour modification and redress for widespread harm.

[31] On this issue, I agree with counsel for Mr. Manuge that issues of enforcement are better addressed and supervised within the context of a class proceeding than by relying solely on the assurances of a party which, at the end of the day, could have a significant financial interest in limiting its obligations.

[32] The ability of the Court to actively manage a class proceeding is also one of the means by which the Crown's concerns about efficiency can be addressed. This is a case where a right of discovery and oral testimony will undoubtedly be necessary to fully explore some of the issues advanced by Mr. Manuge. However, at the end of the day some of the liability issues he raises may be amenable to a form of summary disposition. Effective trial management is the means by which judicial economy and efficiency can be maintained in a class proceeding. This point was made by Justice Peter Cumming. in *Campbell v. Flexwatt Corp.*, above, at para. 25:

> 25 I preface my discussion of the issues with a note of caution. Appellate courts are always slow to interfere with discretion properly exercised. This course should be particularly so in considering the terms of a certification order. The Legislature enacted the Class Proceedings Act on 1 August 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, if pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants. Many of the arguments made by counsel for the appellants, focused on fairness

> to the defendants and third parties, can be made to the chambers judge charged with managing the action as it proceeds. In considering those arguments, I will be keeping in mind the ability of the chambers judge to vary his order from time to time as the action proceeds and the need arises, whether from concern about fairness or efficacy; he may even decertify the proceeding….

[33] In *Hinton v. Canada (Minister of Citizenship and Immigration*), 2008 FC 7, 67 Imm. L.R. (3d) 61, Justice Sean Harrington came to the same conclusion about the value of active case management in a class proceeding as a means of maintaining efficiency:

> 44 The Minister submits that if it turns out that the narrow platform of an ordinary judicial review, even with the Court ordering that more documentation be produced and allowing for the testimony of witnesses in open court, is found insufficient, then the judicial review could be converted into an action. To my way of thinking, this proposal is far less practical and far less efficient than converting now and through case management cutting back if, as and when appropriate. By the same token, I do not think that the administration of a class action would cause greater difficulties than if relief were sought by other means.

[34] One other concern raised by the Crown involves the magnitude of the contingency fee that would be payable under the terms of the Retainer Agreement entered into between Mr. Manuge and his legal counsel. That Agreement provides for a fee of 30% of any favourable financial judgment plus disbursements. The Agreement also duly notes that the fee payable "shall be subject to approval by the Court". There is certainly nothing inappropriate about a contingency fee arrangement in a case like this one where the outcome is unpredictable and where the amounts individually in issue appear insufficient to support litigation. The amount of fee payable at the end of a class proceeding is, of course, subject to assessment by the trial court

and must bear some reasonable relationship to the effort actually expended and to the degree of risk assumed by counsel. I have no reservations about the ability of the Court to deal with this issue, if necessary, in the exercise of its supervisory jurisdiction.

[35] Although there are certainly some additional procedures and costs associated with the prosecution of a class action, the salutary value of those steps must be recognized. There is much to be said for the widespread advance notification to interested parties that is a requirement of a class proceeding because that, too, enables access to justice by other claimants. It seems to me that after-the-fact notice (if required) is not an equivalent substitute for the procedure that is established by the Court's Class Proceedings Rules and, indeed, there would be nothing to compel the Crown to advise other similarly situated Canadian Forces members if Mr. Manuge's claim to past benefits were successful. In addition, the Court has the ability under Rule 334.32 to modify the terms of giving notice to class members as dictated by the circumstances. In this case, the class is identifiable and manageable. Presumably the Crown knows who the interested parties are and has the information available to facilitate effective notice upon them.

[36] I agree that the costs of giving effective notice to the members of the class could, in some cases, militate against certification particularly where there is an expectation that the Crown should contribute to those costs. However, in this case where the size of the class is relatively modest and where reliable contact information is likely available, I do not see this issue as an impediment to certification.

[37] On all of these issues which are relevant to the determination of whether it is preferred that this action be certified, I would adopt the following views of the British Columbia Court of Appeal in *Nanaimo Immigrant Settlement Society v. British Columbia* , 2001 BCCA 75, 149 B.C.A.C. 26 at paras. 20 and 21:

> 20 But as Mr. Branch responded, the question is not whether the class action is necessary - i.e., whether there are other alternatives - but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the Act states that that question involves a consideration of "all relevant matters" - a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods. In the plaintiffs' submission, what makes a class action preferable in this case are the practical advantages provided by the Act for the actual litigation process. Some of these advantages accrue only to the plaintiffs: as Mr. Branch noted, if the claims are aggregated, contingency fee arrangements are likely to be available for the plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial licence fees in connection with bingo and casino games can pursue the matter to completion - something very few individual charities could do on their own. Other advantages arising under the Act are beneficial to both parties - the assignment to the action of one case-management judge, and the attendant elimination of lengthy Chambers proceedings before different judges. From the Province's point of view, none of these considerations prejudices its ability to defend the action fully, except to the extent that financial constraints on the plaintiffs are eased. Those constraints are not an "advantage" the Province should wish to preserve.
>
> 21 In my view, these factors militate strongly in favour of certification, and are obviously consistent with the stated objectives of the Act. The fact that the threshold questions include matters of constitutional law that could be resolved in a shorter declaratory action should not, in my view, overshadow these realities. As Mr. Branch said, the obtaining of a declaration is not the plaintiffs' primary objective; the repayment of their fees is. Nor should the fact that restitution is being sought by individual

> plaintiffs outweigh the fact that a class action will move the proceedings forward to a considerable extent.

[38] The parties agree that there must be a reasonable cause of action to support a motion to certify. It is clear from the authorities that the threshold which the plaintiff must meet to establish a reasonable cause of action is very low: see *Le Corre v. Canada (Attorney General)*, 2004 FC 155, 131 A.C.W.S. (3d) 813 at para. 21. The test for resolving this issue is the same as that which is applied to a motion to strike such that it must be "plain and obvious" that the plaintiff cannot succeed; it should not be applied such that novel legal propositions would be stifled: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 977, 43 C.P.C. (2d) 105 at p. 123. In *Sylvain v. Canada (Agriculture and Agri-Food)*, 2004 FC 1610, 267 F.T.R. 146, Justice Pierre Blais described the test as follows:

> 26 In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the Supreme Court of Canada indicated the circumstances in which the statement of claim could be struck out: the action came from a proceeding in the British Columbia Supreme Court and the conditions for striking out were stated in the Rules of Court of that province. The conditions are essentially the same as those set out in the Federal Court Rules. In view of the importance of preserving the right to seek judicial relief, the application will only be struck out if the outcome is plain and obvious, namely that even if the facts alleged in the statement of claim are true, the case has no chance of success. The Supreme Court of Canada put it this way, at paragraphs 32 and 33:
>
> > The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".
> >
> > ... As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of

> the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[39] The only issues raised in Mr. Manuge's Statement of Claim which are arguably untenable are his pleadings of unjust enrichment and breach of fiduciary duty. The allegations of unlawfulness, *ultra vires* and a breach of section 15(1) of the Charter easily meet the legal threshold of a reasonable cause of action. The allegation of a breach of a public law duty is simply an alternative plea to those that assert that the impugned SISIP provision is unlawful and contrary to the *Pension Act*. Similarly, the allegation of bad faith is not obviously pleaded as an independent cause of action but is linked to the further allegations of unlawful and discriminatory conduct and breach of fiduciary duty. This bad faith allegation is also made in support of the claim to general, punitive, exemplary and aggravated damages. Whether bad faith can be established on the evidence remains to be seen but this is not the point in the proceeding to reflect on the significance or weight to be assigned to the evidence, including the report of the military Ombudsman.

[40] The Crown argues, with some justification, that Mr. Manuge's rather sparse allegations of breach of fiduciary duty and unjust enrichment cannot be made out against it. While I agree that such allegations are inherently difficult to establish against the Crown, a significant

component of the Crown's argument is based on evidentiary matters which, it says, have not been properly pleaded or cannot be established. This is apparent from the following passages from the Crown's Memorandum of Fact and Law:

> 68. First, there has been no enrichment of the Crown. The funds held by SISIP are held strictly for the purposes of the payment of the SISIP benefits. They can be used for no other purpose. Similarly, were SISIP to become underfunded, public money collected and placed in Canada's Consolidated Revenue Fund would not be available to provide SISIP benefits. All premium contributions received from Treasury Board and CF members are pooled, and there are no individual accounts. There is extensive cross-subsidization of benefits; those receiving SISIP LTD benefits are subsidized by those CF members who pay premiums but never receive SISIP benefits.
>
> 69. Further, it is plan and obvious that there is a juristic reason for the SISIP reduction in the present case – it is a mandatory term of an insurance contract which is applicable to all SISIP LTD beneficiaries. The fact that monies have been collected and dealt with under the terms of a contract has been held to constitute a juristic reason.
>
> 70. The Supreme Court of Canada has held that in determining whether there is an absence of juristic reason for the enrichment, the fundamental concern is the legitimate expectation of the parties. The Plaintiff was explicitly made aware of the terms of the SISIP Policy and the reduction in particular. He can have had no expectation that he would not be subject to the SISIP reduction.
>
> […]
>
> 78. In order for Mr. Manuge's allegation of breach of fiduciary duty to be sustainable as a cause of action, the pleadings must disclose sufficient material facts to support the existence of a fiduciary relationship between the Federal Crown who crafted the SISIP policy, its administrators, and those who receive SISIP benefits. There can be no fiduciary duty in the absence of a fiduciary relationship.

79. The facts as pled by the Plaintiff are not sufficient to support a finding that a fiduciary relationship exists between the parties. Mr. Manuge's allegations rely on an alleged fiduciary relationship by virtue only of his past employment status with the Defendant. The relationship of the Crown to its employees, including CF members or former members, in administering contractually mandated insurance benefits does not create the basis for a fiduciary duty and has no prospect of success at trial.

80. Mr. Manuge has not pled that such a relationship imports any special element of trust or confidentiality. He has not pled that Crown servants entering into contractual insurance agreements with the Crown are particularly vulnerable. He has not plead that the Crown relinquished its own self-interest in maintaining an affordable and balanced insurance scheme while remaining accountable to Canadian taxpayers in order to act solely in the best interests of a segment of society in need of long term disability insurance.

81. In his Memorandum of Fact and Law, the Plaintiff asserts that the Crown has been found to owe fiduciary duties to members of the Canadian Forces. He also argues that pension administrators are often found to be in a fiduciary relationship with the beneficiaries of those pension policies. That is insufficient to establish that the fiduciary relationship pled in this case is valid absent an examination of the nature of particular relationships found to exist in those cases.

[…]

85. When the government is exercising public authority governed by a statute it is not likely in a fiduciary relationship. This is because the act of governing must balance the interests of all Canadians; when enacting public legislation which affects all Canadians with diverse interests, it is difficult to conclude that the government has agreed to act in the interests of a particular person or class of persons. This is equally true when government designs policy pursuant to legislation.

[41] Some of the Crown's concerns as noted-above appear to arise from drafting deficiencies and could be overcome with amendments to Mr. Manuge's Statement of Claim; as such, they should not be relied upon on a motion such as this: see *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350, 148 D.L.R. (4th) 158 (S.C.) at para. 26. With respect to the legal principles advanced by the Crown, I am drawn to the wisdom of Justice Marion Allan in B*rogaard v. Canada (Attorney General)*, 2002 BCSC 1149, 7 B.C.L.R. (4th) 358 at paras. 100 and 101 where she held as follows:

> 100 In *Hislop*, supra, Mr. Justice Cullity concluded that, on a preliminary application to strike the plaintiffs' statement of claim for failing to disclose a cause of action, it was inappropriate to attempt to decide difficult legal issues in dispute between the parties that had not been resolved in previous cases. He noted at para. 6 that "each of the impugned claims falls within a branch of the law that has either recently been subject to significant developments whose scope has yet to be determined with precision, or is comparatively unexplored."
>
> 101 In my opinion, it is clear that unjust enrichment and breach of fiduciary duty are developing areas of the law, as are issues relating to the constitutional validity of legislation and available remedies. I cannot conclude at this stage that it is plain and obvious that the plaintiffs cannot succeed on these issues. Accordingly, I find that the pleadings disclose a cause of action as required by s. 4(1)(a) of the CPA.

Also see *Kranjcek v. Ontario*, (2004), 69 O.R. (3d) 231, 40 C.C.E.L. (3d) 24 (ON S.C.) at paras. 33-37.

[42] In summary, this proceeding seems to me to be ideally suited to certification as a class action. There are no apparent competing interests, indemnity claims or subclasses. The questions of law and liability raised in the pleadings appear to be common throughout the class and the only individual questions relate to the quantification of loss which, if necessary, should be amenable to simple mathematical calculation. The individual claims of the proposed class members including Mr. Manuge appear to have insufficient value to justify litigation in any form and are such that obtaining legal representation would be problematic. The issues of judicial economy, efficiency and fairness can be effectively managed by the Court and, as such, do not displace the overall advantages of a class proceeding as discussed above. While the Crown apparently believes that a single application would be less burdensome to it, I cannot identify anything about the class process that would result in unfairness to its litigation interests.

[43] In conclusion, I will allow the Plaintiff's motion for certification of this action as a class proceeding. I will permit the parties some time to discuss the remaining issues of notification to class members including the process of opting out of the proceeding. Failing agreement, either party may bring those matters to the Court for discussion and resolution.

[44] In accordance with Rule 334.39 there will be no costs awarded in connection with this motion.

ORDER

THIS COURT ORDERS that this motion to certify this proceeding as a class action is allowed on the following terms:

1. This action is certified as a class action;

2. The class is described as:

> "all former members of the Canadian Forces whose long-term disability benefits under S.I.S.I.P. Policy No. 901102 were reduced by the amount of their VAC Disability benefits received pursuant to the *Pension Act* (the "Class") from April 17, 1985 to date."

3. Mr. Manuge is appointed as the representative Plaintiff of the Class;

4. The nature of the claim is stated as follows:

    a. that section 24(a)(iv) of Part III(B) of SISIP Plan Policy No. 901102:

        i. is unlawful pursuant to the provisions of the *Pension Act*;

        ii. *ultra vires* the legislative authority of the Crown;

        iii. breaches the public law duty owed by the Crown to the Plaintiff and the Class;

        iv. unlawfully assigns, charges, attaches, anticipates, commutes, or gives as security the VAC disability benefits paid or payable to the Plaintiff and the Class contrary to section 30 of the *Pension Act*;

v. infringes the equality rights of the Plaintiff and Class under section 15(1) of the Charter to live free from discrimination that cannot be saved under section 1 of the Charter;

vi. unjustly enriches the Crown to the detriment of the Plaintiff and the Class;

vii. breaches the fiduciary duties owed by the Crown to the Plaintiff and the Class as disabled former members of the Canadian Forces involuntarily terminated from service; and

viii. has been implemented and maintained by the Crown in bad faith.

5. The relief sought by the Class is stated as follows:

a. a declaration that section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 is unlawful;

b. a declaration that section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 is *ultra vires* the legislative authority of the Crown;

c. a declaration that the Crown has breached the public law duty owed to the Plaintiff and the Class to fulfill its obligations under the *Pension Act*;

d. a declaration that the benefits paid and/or payable to the Plaintiff and the Class pursuant to the *Pension Act* have been unlawfully "assigned, charged, attached, anticipated, commuted or given as security" by the Crown contrary to section 30 of the *Pension Act* as a result of the application of section 24(a)(iv) of SISIP Plan Policy 901102;

e. a declaration that section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 infringes the equality rights of the Plaintiff and the Class under section 15(1) of

the Charter to live free from discrimination that cannot be saved under section 1 of the Charter;

f. a declaration that the Crown has breached the fiduciary duties owed to the Plaintiff and the Class as former servants and members of the Canadian Forces terminated as a result of injuries sustained during the course of their service and suffering resulting disabilities;

g. a declaration that the Crown has acted in bad faith in the implementation of section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 and its impact on the Plaintiff and the Class as former servants and members of the Canadian Forces terminated as a result of injuries sustained during the course of their service and suffering resulting disabilities;

h. an Order pursuant to section 24 of the Charter that section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 be expunged;

i. an Order that damages are a just and appropriate remedy pursuant to section 24 of the Charter that the Plaintiff and the Class be reimbursed in an amount equal to the amount of long-term benefits deducted pursuant to section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 from the amount of long-term disability benefits otherwise payable to the Plaintiff and the Class;

j. in the alternative, damages in an amount equal to the amount of benefits payable to the Plaintiff and the Class unlawfully and wrongfully deducted pursuant to section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 from the amount of long-term disability benefits otherwise payable to the Plaintiff and the Class;

k. in the further alternative, an Order for restitution;

l. liability and general damages for;

i. discrimination;

ii. breach of fiduciary duties; and

iii. bad faith.

m. punitive, exemplary and aggravated damages;

n. interest pursuant to the *Federal Courts Act*;

o. costs of this action on a solicitor-and-client basis; and

p. such further relief as this Honourable Court may deem just.

6. The following questions are certified as common questions of law or fact as the case may be:

a. Is section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 unlawful?

b. Is section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 *ultra vires* the legislative authority of the Crown?

c. Has the Crown breached the public law duty owed to the Plaintiff and the Class to fulfill its obligations under the *Pension Act*?

d. Are the benefits paid to the Class pursuant to the *Pension Act* unlawfully "assigned, charged, attached, anticipated, commuted or given as security" by the Crown contrary to section 30 of the *Pension Act* as a result of the application of section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102?

e. Does section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102 infringe the equality rights of the Class under section 15(1) of the Charter including their

rights under section 15(1) to live free from discrimination in a manner that cannot be saved under section 1 of the Charter?

f. Does the Crown owe fiduciary duties to the Plaintiff and the Class and has the Crown breached the fiduciary duties owed to the Class by implementing section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102?

g. Has the Crown acted in bad faith in the implementation of section 24(a)(iv) of Part III(B) of SISIP Plan Policy 901102?

h. Is the Class entitled to relief under section 24 of the Charter and what relief should be granted?

i. Are damages payable by the Crown to the Class for the unlawful application of the SISIP Clawback and what is an appropriate amount of damages?

j. Has the Crown unjustly enriched and is an Order for restitution appropriate?

k. Is the Crown liable for general damages for discrimination, breach of fiduciary duties and bad faith?

l. What, if any, aggregate award is appropriate under Rule 334.28 [formerly Rule 299.3] of the *Federal Courts Rules*?

m. Does the conduct of the Crown justify an award of punitive damages, and what is an appropriate amount of punitive damages?

n. Is interest payable to the Class pursuant to the *Federal Courts Act*?

o. Should the costs of this action be awarded the Class on a solicitor-and-client basis?

7. The following matters shall be agreed upon by the parties or, failing such agreement, as ordered by the Court upon further submissions in writing by the parties:

   a. the contents of the Notice of Certification;

   b. the means of giving notice to the members of the Class and for allocating the costs of notification; and

   c. specifying the time and manner for Class members to opt out of the class proceeding.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-463-07
STYLE OF CAUSE:	Manuge v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	February 12 to 14, 2008
REASONS FOR ORDER AND ORDER BY:	Mr. Justice Barnes
DATED:	May 20, 2008

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