Date: 20090402

Docket: T-1683-02

Citation: 2009 FC 341

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 2, 2009

PRESENT: Madam Prothonotary Tabib

BETWEEN:

PATRICK BERNATH

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion by the plaintiff seeking an order that the defendant pay him interim costs to allow him to bring this action to trial.

[2] For the following reasons, notwithstanding great sympathy for the plaintiff's circumstances and the tragic events of which hew as a victim, I find that the plaintiff does not meet the established criteria for granting this exceptional remedy.

Procedural background

[3] Mr. Bernath is representing himself. Given his lack of legal training, the difficulties associated with his post-traumatic stress and the complexity of the factual and legal issues involved, Mr. Bernath is conducting this litigation and representing himself intelligently, coherently and with some ability. As case manager, I have noted the great thoroughness with which Mr. Bernath's motion files and appearances have been prepared, as well as his concern for following procedural rules and understanding the applicable legal principles. If we can find any fault, however, it must be noted that problems with evidence, sometimes gathered at the last minute, the lack of synthesis and the inability to distinguish between the nuances of the applicable legal principles bely the plaintiff's lack of legal training and emotions.

[4] Mr. Bernath, a former member of the Armed Forces, suffered severe trauma during a mission to Haiti. He does not fault his superiors or military authorities for the onset of his post-traumatic stress syndrome resulting from that trauma. However, he alleges that the subsequent refusal or failure by military authorities to provide him with or give him access to appropriate medical care are systemic in nature and constitute an infringement of the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In his action, he is seeking damages from the Crown under section 24 of the *Charter*.

[5] Although the statement of claim (both the original and the subsequent amendment) use the format and vocabulary of a liability action, it is clear and acknowledged by the parties that the only

cause of action put forth by the plaintiff is based on the infringement of a *Charter* right and the authority of the courts to order an appropriate and just remedy under section 24 of the *Charter*. The fact that no liability action is available for injuries or conditions for which a pension is paid (which the plaintiff receives for his post-traumatic stress syndrome) has also been affirmed by the Federal Court of Appeal in *Dumont v. Canada*, [2004] 3 F.C.R. 338, 2003 FCA 475.

[6] The plaintiff, who was initially part of a group of some 25 veterans who all filed separate actions but were represented by the same counsel, left the others and continued to pursue his case on his own in 2007. Since then, the proceedings have moved through the stages of the closing of pleadings, the disclosure of evidence and the pre-trial conference. The trial, scheduled to last 10 weeks, will begin on September 14, 2009. When the motion was heard, the approximately 24 other cases of former military members had not moved beyond the stage of the amended statement, but were, however, in a process of mediation under the auspices of the Court.

The applicable law

[7] It is well-established, since the Supreme Court decision in *British Columbia v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, that the courts have the discretion, in exceptional circumstances, to order the payment of interim costs.

[8] As the basis of the plaintiff's action is the alleged infringement of *Charter* rights, the two parties have correctly characterized it as a public law case - as defined by the Supreme Court in

Okanagan. The parties are therefore *ad idem* that the conditions that must be met for interim costs to be awarded are as follows: as summarized in *Okanagan*:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> [*Okanagan*, at para 40]

[9] It must also be noted that each and every condition must be met, and that, even when they are met, the court has the discretion to award or refuse interim costs (see *Okanagan*, par. 41; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38, at para 72; *Vail v. Prince Edward Island*, [2008] P.E.I.J. no. 32, at para 13).

[10] Regarding financial resources, the Supreme Court noted in *Little Sisters* that the plaintiff must satisfy the Court that all other funding options have been exhausted, including credit, fundraising, contingency fee agreements, etc. and that the Court must consider the potential cost of the litigation and the evidence submitted in support of the cost estimates in determining whether the litigant is impecunious to the extent that interim costs are the only viable option (*Little Sisters*, at para 40 and 68 to 70).

[11] Regarding merits, at first glance, jurisprudence clearly cautions the Court against requiring the demonstration of exceptional merits, or applying an overly strict condition, for fear of prejudicing the outcome of the application. However, the majority opinion in *Little Sisters* notes that this criterion is conditioned by the need to consider the interests of justice, such that "mere proof that one's case has sufficient merit not to be dismissed summarily" is not enough. It must also be noted that, in *Little Sisters*, the Supreme Court found compelling the lack of *prima facie* evidence of the existence of statements that must be demonstrated to make the case one of public importance (see para 54 to 56).

[12] In closing, and continuing on the topic of the requirement of a case of public importance, the Supreme Court clarified that "[i]t is in general only when the public importance of a case can be established regardless of the ultimate holding on the merits, that a court should consider this requirement from *Okanagan* satisfied." (*Little Sisters*, at para 66).

<u>Application of the law to the facts</u>

(a) Lack of resources:

[13] The plaintiff is not indigent, quite to the contrary. Although not wealthy, the evidence before me shows that Mr. Bernath receives a disability pension from the Department of Veterans Affairs of close to $40,000.00 per year, non-taxable, as well as disability benefits from the Quebec Pension Plan of just over $9,000.00 per year, for a net annual income of $48,486.00. Mr. Bernath is also the sole shareholder and director of his photography business, Agence de Photo Illustrade Inc. The

financial statements of that business were not submitted as evidence, and Mr. Bernath's income tax returns indicate that his work as a photographer is not lucrative, is simply therapeutic for him, and that the minimal income from the agency is entirely reinvested in the period renewal of his photographic equipment. The fact remains that the photography cannot be set aside as a possible source of income for Mr. Bernath, and that the market value of the equipment alone is estimated by Mr. Bernath at $15,000.00. Mr. Bernath's personal balance sheet as of October 2008, incomplete because it does not include a description of the nature of the [translation] "other personal assets" assessed at $288,000.00, nonetheless shows a net worth of $73,828.40.

[14] Mr. Bernath argues that, like the legislative provisions that dismiss military disability pensions from the calculation of taxable income, the Court should not consider that disability pension income in assessing the plaintiff's financial resources regarding this motion. Mr. Bernath argues that it was held by the Honourable Noël J. in *Bernath v. R*, 2007 FC 104, that Canadian Forces Grievance Authority is not a court of competent jurisdiction to decide an infringement of *Charter* rights or the appropriateness of granting relief under section 24 of the *Charter*. Thus having no access to a competent grievance mechanism, military members whose fundamental rights have been infringed have no other recourse but to turn to the common law courts. Forcing such military members, victims of infringement of their health and their fundamental rights, to use the funds intended as compensation for their sacrifices to have access to justice is, in itself, an injustice.

[15] I will not comment on the implied assertion in that argument, to say the least surprising, that access to an administrative process to determine and decide allegations of infringement of *Charter*

rights is apparently a quasi-fundamental right, and that the obligation to turn to the common law courts to argue such rights is apparently an anomaly or injustice. To dismiss the essence of Mr. Bernath's argument, it need simply be noted that granting interim costs is a last resort and that the very clear criteria set out in *Okanagan* expressly refer to the genuine lack of means, a lack of realistic sources of funding and thus, the litigant's inability to proceed without the order sought. As soon as a sufficient source of income is demonstrated, there is no longer a true inability to pay or a lack of realistic sources of funding. Following the plaintiff's reasoning would see the Court weighing the reasonability of the litigant's desire to prioritize the preservation of certain resources, nonetheless available, over the exercise of his or her right to take legal action. An exceptional measure and a last resort, to only be granted when the need is clearly established, the discretion to award interim costs would become an alternative source of funding, no longer only available to avoid injustice of a case with merit and of public interest simply being able to proceed, but also to avoid of some litigants having to compromise sources that are available to them for that same purpose.

[16] As stated by the majority of the Supreme Court in *Little Sisters*:

> Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation. Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon. *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so.
>
> (at para 5)

[17] That said, Mr. Bernath's pension income and other assets that he seems to be able to dispose of would not, on their own, prevent the Court from considering his application for interim costs. Indeed, the Supreme Court stated the following in particular, in *Little Sisters*:

> If the plaintiff cannot afford all costs of the litigation, but is not impecunious, the plaintiff must commit to making a contribution to the litigation.
>
> (at para 40)

[18] Hence the need for the Court to assess the plaintiff's capacity to complete the case without the order being sought in light of the probable costs of the litigation.

[19] Unfortunately, the plaintiff did not submit any evidence in this regard. The only information available to the Court are Mr. Bernath's submissions, unsworn, given at the hearing on the motion, that he must pay the cost of subpoenas for several witnesses (and again, the defendant indicated that she was prepared to serve several of them herself) and the contribution to the parties' fees for a lengthy proceeding (section 2 of Tariff A), that he has already taken on debts to pay the fees of an accounting expert ($5,000.00), that he is still in debt to the psychiatric expert for the preparation of his report ($7,500.00), and that he expects to disburse $15,000.00 to ensure that those two experts are at the proceeding. Although those amounts were established by evidence, I find it difficult to see how the resources available to the plaintiff would leave him unable to fund those costs. The plaintiff submitted no evidence that he has tried to obtain a loan, whether from a financial institution or a close friend or family, to make deferred payment arrangements, or to do fundraising among former military members, for whom he nonetheless presents himself as champion. He simply stated at the

hearing, without more detail, that he is already [translation] "indebted to the maximum" and that "his debt ratio" has increased in the last two years by "$40,000.00", while his balance sheet shows more than sufficient positive assets to pay the costs that he alleges are required, and that the pension benefits that he receives are stable and foreseeable.

[20] Regarding the costs of representation by counsel, I do not need to examine whether or not it is reasonable for Mr. Bernath to have left the group of other military members and to have thus renounced the possibility of sharing the costs of an eventual proceeding with that group. It must simply be noted that the plaintiff plans to continue to represent himself, but plans to use part of any interim costs awarded to him to pay for the services of legal counsel specializing in *Charter* issues, to assist him in preparing and presenting constitutional arguments. Here again, the plaintiff did not submit any evidence for assessing the cost of that measure. The plaintiff also acknowledged at the hearing that he has not yet taken steps to approach legal counsel to that end, and therefor has no way of estimating the costs or the feasibility.

[21] It is entirely premature, for the purposes of interim costs, to consider the possible costs of such counsel before it is even determined that such an expert in constitutional law would be amenable to that exercise. Without prejudging the issue, it nonetheless seems that, although it is common to see counsel specializing in a field of law act as an advisor for another counsel during a proceeding, such an arrangement between counsel and a lay litigant is unusual. One could even wonder if a counsel would agree to formally appear to argue at a proceeding on behalf of a lay client

without having any other control or responsibility regarding the strategy for the proceeding or the introduction of evidence.

[22] Regardless, even if that the plaintiff had met the conditions for authorizing the awarding of interim costs, including the demonstration of public importance, the very importance of the case and the public interest in ensuring that public funds used to fund the plaintiff's case are used with care would have required that the Court ensure that the case was adequately presented, and thus that the case, including the evidence needed to support the legal argument, was prepared and presented by qualified counsel.

[23] Finally, it must be noted that the evidence submitted by the plaintiff does not satisfy me that he has done everything possible to ensure that he has the services of counsel apart from his previous counsel without being awarded interim costs. The evidence submitted does not establish that the fact that the plaintiff and two other members of the group took steps unsuccessfully in 2006, when they were still represented by Mr. Ferron, to find another counsel. It must be noted that the agreement with Mr. Ferron, which still seemed to be in effect at that time, was one of conditional fees, that the evidence only shows a firm's refusal to take on the case *pro bono* (i.e. without conditional fees) and that no other steps seem to have been taken since the case was withdrawn from Mr. Ferron to try to find and retain the services of counsel under a fee agreement.

[24] In conclusion, the plaintiff has not discharged his burden of convincing the Court that he has exhausted all funding options, that he truly does not have the means of paying the costs of the litigation or that he would be unable to take legal action without the order sought.

(b) The merits at first glance

[25] The plaintiff's amended statement contains certain allegations that he should not have been deployed to Haiti due to a shoulder injury, that the mission in Haiti was poorly planned, that the training he was given to prepare for the Haiti mission was deficient, that the medical follow-up promised for his shoulder in Haiti was not provided, and that his shoulder injury was aggravated by the failure to respect the medical restrictions to which his participation in the Haiti mission was subject. Despite this, neither the evidence submitted in support of the plaintiff's motion, nor his written or oral arguments referred to those allegations other than marginally. More specifically, while the deadlines for filing medical expertise have passed, the plaintiff did not submit any medical expertise supporting his allegations regarding that shoulder injury. Thus, as no *prima facie* evidence was submitted regarding the merits of that portion of the action, I will not examine it further.

[26] The statement also contains various allegations regarding the processing of the grievance filed by the plaintiff concerning events detailed in the application. Once again, the plaintiff's motion record is silent in this regard. Regardless, given the principles set out in *Canada v. Grenier* [2006] 2 F.C.J. 287, 2005 FCA 384, it seems at first that any irregularity in the processing of the grievance could not validly form the basis, in whole or in part, of the plaintiff's action unless there has been a prior application for judicial review. Those allegations therefore need not be discussed further.

[27] As indicated above, the essence of the plaintiff's allegation is related to the alleged "systematic" refusal by the Armed Forces to recognize and treat mental illness in soldiers and the resulting discrimination, which the plaintiff claims was characterized in his case by denigration by his superiors, refusal to access the physician of his choice, the inadequate treatment prescribed, refusal of treatment - in the form of refusal to respect the sick leaves and work restrictions prescribed - and acceptance of his application for release, despite medical opinions that he was medically unfit.

[28] *Okanagan* requires that the plaintiff demonstrate that his case is *prima facie* meritorious. He must therefore at least demonstrate that the factual basis of his action is likely to be proven Although the exercise must be more than simply assuming the alleged facts to be true, it certainly does not require the weighing of contradictory evidence that may be submitted by the parties, or that proof be required for each alleged fact. In my view, the plaintiff had to at least establish the probable existence of evidence that would establish the main facts underlying his action. In this case, Mr. Bernath had to satisfy the Court that he would be able to not only establish that he was the subject of some denigration, inadequate treatment and alleged refusals, but also that those inappropriate treatments were the result of "systematic" conduct - whether through the application of general or institutional rules, policies, guidelines, instructions or orders or through the implementation of systems and procedures that had that result.

[29] Beyond the factual basis, the plaintiff had to demonstrate that those facts give rise to a valid legal argument, that they constitute a deprivation of his life, liberty or security, and then that that deprivation is contrary to the principles of fundamental justice.

[30] I have carefully examined the evidence submitted by the plaintiff. More specifically, I have carefully read the very detailed and supported report from the psychiatrist Dr. Côté, as well as all documents included with it. At the hearing, Mr. Bernath confirmed that that report and its supporting documents fully presented his version of the facts and what the evidence that he plans to present during the proceeding. I took that version of the facts as likely to be proven and as the most favourable for the plaintiff. I must note that my conclusions do not at all reflect the possible or probably outcome off the proceeding. Any or all of the evidence that Mr. Bernath plans to present could be inadmissible; it could be contradicted or not believed; the problems that I note could be overcome; the trial judge could draw different conclusions. In short, my analysis is limited to assessing the *prima facie* merits of the case; it cannot determine the actual existence of any state of facts or any conclusions that can be drawn; it does not at all prejudge the case or any portion of it.

[31] Based on a careful examination, following are the facts that, *prima facie*, the evidence establishes and those that it entirely fails to establish:

September 1997

[32] The traumatic event occurred on September 9, 1997 in Haiti. the post-traumatic stress syndrome that the plaintiff still suffers from was caused directly by that event.

[33] Mr. Bernath first consulted a physician, Dr. McLeod, regarding the matter in Haiti on September 16, 1997 and again on September 25, 1997. He also saw a social working in Haiti. Mr. Bernath was scheduled to return home on October 2 and Dr. McLeod made arrangements for Mr. Bernath to bee seen by a physician and social worker as soon as he returned. Dr. Côté's expert report did not identify any error or insufficiency in the treatments provided to Mr. Bernath in Haiti.

October 3 to November 27, 1997

[34] When he returned to Canada on October 3, 1997, Mr. Bernath met with a social worker and a physician, Dr. Cooper. Dr. Cooper diagnosed post-traumatic stress and, on October 9, 1997, requested a psychiatric consultation with Dr. Pépin. Mr. Bernath was followed regularly by Cr. Cooper and the social worker until November 27. Although the expert report by Dr. Côté finds that the therapy provided during that period did not seem to have improved Mr. Bernath's condition, he also did not say anything against the treatments provided to Mr. Bernath by the social worker and Cooper. Mr. Bernath met with the psychiatrist, Dr. Pépin, On October 28, 1997 and saw him again during that period on November 4, 1997. In October, Dr. Pépin confirmed the diagnosis of post-traumatic stress syndrome and prescribed certain treatments. Dr. Côté did not question the appropriateness of the treatments prescribed by Dr. Pépin during that period.

November 27, 1997 to January 23, 1998

[35] It was during this period, based on the evidence submitted, that there began to be problems with the plaintiff's treatment. Dr. Cooper saw Mr. Bernath on November 24 and 27. He extended the sick already prescribed for Mr. Bernath since his return from Haiti by another month, as well as the treatment that had already begun. As there was difficulty establishing a relationship between Mr. Bernath and the social worker, Dr. Cooper took note to find another social worker, who would be a psychologist specializing in post-traumatic stress. Dr. Cooper also informed Mr. Bernath on November 27 that, is was common practice, his file would be retransferred to the physician in his unit, Dr. Deilgat, as he had now returned from Haiti.

[36] That same day, on November 27, 1998, there was a multidisciplinary meeting with the social worker, Dr. Deilgat and the psychiatrist, Dr. Pépin, to discuss, Mr. Bernath's case, among other things. The meeting was held and decisions were made regarding Mr. Bernath's future treatment, despite the absence of Dr. Cooper, who had been Mr. Bernath's attending physician until then for his post-traumatic stress, and despite the fact that Dr. Deilgat had not yet met with Mr. Bernath since his PTSS diagnosis. It would seem that Dr. Deilgat had been the subject of a complaint to the College of Physicians' Ethics Committee regarding decisions he made under those circumstances , and that blame was placed on him for it. The notes taken by the social worker at that meeting indicate that Dr. Deilgat apparently decided to recommend that Mr. Bernath gradually return to work. Thus, the sick leave previously prescribed by Dr. Cooper was subsequently cancelled.

[37] Mr. Bernath told Dr. Cooper that he wanted to continue being treated by him rather than Dr. Deilgat, and to have his sick leave restored. Dr. Cooper sent a memo to Dr. Deilgat in that regard, indicating that he was prepared to resume the treatment and to restore the leave, as long as the unit's commanding officer approved Mr. Bernath's treatment by a physician other than the one in his unit. Although it does seem that Dr. Deilgat received that note, there is a complete lack of evidence of what was done about that request to change attending physicians. Questioned about this at the hearing, Mr. Bernath admitted that he had no idea whether Dr. Deilgat or anyone sent a request in that regard and, therefore, whether it was or would have been granted or refused by the commanding officer. Dr. Deilgat is therefore still Mr. Bernath's *de facto* attending physician.

[38] December 8, 1998 marked the first clinical interview between Mr. Bernath and Dr. Deilgat. It did not go well, to say the least. Dr. Deilgat saw Mr. Bernath's insistence on being followed by Dr. Cooper – and on having his sick leave restored – as manipulation and told him so. The sick leave was not restored. However, as Mr. Bernath had annual leave that he had to use, he remained on annual leave until mid-January 1998. Dr. Deilgat indicated that the medication that was previously prescribed would be gradually reduced after he returned. It also seems that Dr. Deilgat took steps to have Mr. Bernath followed, again when he returned, by another social worker, this time a social worker whose mandate would be to examine a narcissistic personality disorder perceived by Dr. Deilgat.

[39] The expert psychiatrist retained by the plaintiff is highly critical of Dr. Deilgat's conduct. He sees the loss of the relationship with Dr. Cooper, the fact that Dr. Deilgat called him a manipulator

without sufficient clinical data, the cancellation of the sick leave (and the ensuing obligation to replace it with annual lave), the total lack of treatment during the period of annual leave, the lack of psychological follow-up for PTSS and the psychological follow-up for a personality disorder without sufficient basis to be major stressors for Mr. Bernath that deteriorated his condition. As those stressors were the main result of the medical intervention that Mr. Bernath received, Dr. Dr. Côté concludes that they are serious failures and gaps in treatment.

[40] Mr. Bernath returned on January 14, 1998. He saw Dr. Pépin on January 15, 1998. Dr. Pépin again prescribed medication and recommended that Mr. Bernath return to work, but for eight hours per day, with no overtime. Although Dr. Côté is critical of the fact that Dr. Pépin issued a diagnosis at that time of mild post-traumatic stress, rather than severe, he does not seem to be otherwise critical of the medication prescribed or the limited return to work.

[41] At that time, Mr. Bernath's unit was in Montréal, deployed to deal with the ice storm hitting the area. Mr. Bernath was assigned to the rear guard. On January 22, 1998, a Thursday, he was informed that he would be working Saturday and Sunday that weekend. Mr. Bernath raised the medical restrictions. The commanding officer of the rear guard called Dr. Dr. Deilgat to clarify whether the restrictions excluded weekend work. Dr. Deilgat saw no contraindication, and the order to work on the weekend was maintained. The next day, on January 23, 1998, Mr. Bernath applied for his release. Here again, Dr. Côté cited the stress of these events as factors that contributed to the deterioration of the plaintiff's condition.

January 23, 1998 to release

[42] The medical examination for release was performed on January 27. The medical officer consulted Dr. Cooper and, together, they questioned Mr. Bernath's mental capacity to make the decision to apply for his release. Both physicians signed a request for a psychiatric consultation in that regard, and Dr. Cooper recommended 14 days of sick leave. When the recommendation was presented to the commanding officer of the rear guard, he called Dr. Deilgat: the leave was refused. A new recommendation for sick leave was made by Dr. Cooper the next day. This time, it was refused without consulting Dr. Deilgat.

[43] On January 29, Dr. Pépin met with Mr. Bernath following a request for a consultation regarding the mental capacity to apply for leave. Dr. Pépin recommended that Mr. Bernath to reconsider his decision, but nonetheless declared him apt to make the decision. Dr. Côté acknowledged that, at that time, Mr. Bernath did not present any symptoms of psychosis that would hinder his capacity to make that decision, but expressed the opinion, however, that the post-traumatic stress symptoms at the time seriously hindered his judgment and his ability to make that decision. The release process concluded on January 30, 2008. At that time, although the release would not become effective until a few months later, Mr. Bernath was no longer on active service and his care was administered by the services of Veterans Affairs. As of February 11, 1998, he received his medical, psychiatric and psychological care under their auspices, which Dr. Côté deemed to be adequate.

Other facts, or generally applicable policies, guidelines, instructions, orders or regulations

[44] Apart from the practice mentioned earlier that military members have the physician in their unit as their attending physician, no other factual element was identified or announced to establish the existence of a policy, a guideline, instructions or general orders supporting the theory of "systematic" conduct. There was reference to investigation reports by the Armed Forces Ombudsman that allegedly found a culture in which mental illness was seen as a weakness to be repressed and ignored, rather than an illness to be treated, but those reports were not before the Court for the purposes of this motion. There was also no indication whether that culture was translated into tangible or general policies, guidelines, instructions or orders, or of their scope, as applicable..

[45] The plaintiff finally cited section 16.16 of the Queen's Regulation and Orders("QR&O"), as it read at the time, which stated that the commanding officer had the discretion to accept or refuse a medical recommendation for sick leave.

Analysis

[46] If we can see the failure by Dr. Cooper and Dr. Deilgat to have the commanding officer authorize Mr. Bernath's continued treatment by Dr. Cooper to a [translation] "refusal of access to the physician of his choice", Dr. Deilgat's decision, as attending physician, to change the established treatment plan to replace sick leave with a progressive return to work, and psychological follow-up focusing on PTSS by follow-up focusing on a personal disorder as a "refusal of

treatment" and a "failure to provide adequate treatment", and the decision by Dr. Deilgat, as attending physician, to interpret differently or to bypass work restrictions or leave prescribed by other doctors with a "refusal of treatment", then the plaintiff has discharged his burden of establishing, *prima facie*, that he suffered from those refusals and inadequate treatments and that they had a serious impact on his health. Personally, I have doubts that, in the circumstances mentioned above, failure to forward a request for approval amounts to a refusal, and that changes or disagreements between health care professionals regarding the appropriate treatment, as questionable as the final opinion retained may be, truly constitutes a refusal of treatment. However, I set those doubts aside for the purposes of this analysis. After all, if the plaintiff's action were based on Crown liability resulting from personal or professional negligence by Dr. Deilgat, I would have no hesitation in finding that there was a *prima facie case.*

[47] As mentioned earlier, the cause of action argued here, however, is not based on negligence. It requires the demonstration that the inappropriate treatments suffered by Mr. Bernath were the result of systematic conduct by the Armed Forces. However, as the facts cited above show very clearly, the only causal constant in Mr. Bernath's difficulties is that the decisions in his regard were made – or not made – in the timely exercise of the duties and responsibility of the individuals involved, and most often in the exercise of professional competencies reserved for medical personnel.

[48] If treatment by Dr. Cooper was refused, there is no indication that that refusal was by the commanding officer, or that the practice of assigning treatment of military members to the unit

physician was imposed institutionally. An exception to that practice was provided for: either Dr. Deilgat personally failed to forward the application for exemption, or he personally took it upon himself to refuse it. If treatment was refused, it was the result of the personal decision by Dr. Deilgat that the leaves, restrictions or treatments prescribed by others could be bypassed; whether that decision was based on an opinion or professional negligence, it is clearly not institutional or systematic. Even the ultimate refusal by individuals in authority to authorize the prescribed sick leaves or restrictions does not seem to have been based on or justified by the application of the discretion granted under section 16.16 of the QR&O, but on the timely opinion of a health care professional. The only instance of denigration of the plaintiff demonstrated in the evidence is again the personal aspect of Dr. Deilgat. As for the approval by military authorities of the application for release, here again, the evidence does not, *prima facie*, establish that it was done despite an incompetent medical opinion, but rather based on a qualified medical opinion. One might challenge the merits of that opinion, but here again, it would be an attack on a professional opinion, not an institutional or systematic decision.

[49] To conclude, as I do, that the plaintiff did not demonstrate the *prima facie* merits of the essential allegations in his action, that the systematic conduct of the Armed Forces resulted in an infringement of his *Charter* rights, does not necessarily mean that the plaintiff was not a victim of injustices or negligence, that there is no factual basis for the deficiencies, attitudes and failures criticized by the Armed Forces Ombudsman, or that those deficiencies would never likely form the basis for a valid action under the *Charter*. Quite simply, the plaintiff's case does not demonstrate

any *prima facie* or plausible causal relationship between any systematic conduct within the Armed Forces and the failures or tragic combination of circumstances that affected the plaintiff.

[50] I would also add that, in terms of the law, the plaintiff has still not been able to identify precisely or even generally the principle of fundamental justice on which he bases his conclusion that there is an infringement of section 7 of the *Charter.* The plaintiff's reference to *Chaoulli v. Québec (Attorney General),* [2005] 1 S.C.R. 791, 2005 SCC 35, is not a sufficient articulation of the principle of fundamental justice applicable to this case. *Chaoulli* does not establish a duty for the Crown to provide medical care. That decision instead notes that limitations that the Crown may impose on citizens to use certain care can breach section 7 of the *Charter* if they are not consistent with the principles of natural justice. The principle of fundamental justice identified in that case was the principle that rules of law must not be arbitrary. The only rule of law raised here is section 16.16 of the QR&O. As mentioned above, the evidence does not indicate that the plaintiff's leaves were refused under that provision, such that *Chaoulli* would not apply. Moreover, even if section 16.16 were truly at issue, no reasoning was put forth to justify how the provisions of that section are arbitrary.

[51] As Court of Appeal noted to the plaintiff in its decision on December 13, 2007 (indexed as *R. v. Bernath* 2007 FCA 400):

> [24] That being said, the respondent should understand that this is but a procedural and preliminary victory. He will eventually have to identify precisely the principle of fundamental justice, if any, on which his position

> is based. The judgment of this Court in *Prentice v. Canada*, 2005 FCA 395 (CanLII), clearly demonstrates that it is not an easy task.

[52] It must be concluded that that task still escapes the plaintiff.

(c) Public importance of the case:

[53] Having concluded that, *prima facie*, the circumstances that so tragically affected the plaintiff are specific to him and are apparently the result of personal failures by certain individuals, it must necessarily follow that the resolution of this dispute does not extend beyond the personal interests of the plaintiff.

[54] The plaintiff argues with conviction that hundreds of military members are affected by post-traumatic stress, that their families suffer from it, that that suffering and the deficiencies in how the Armed Forces treat those soldiers has been recognized many times in independent investigations, but that the government still refuses to recognize the problem and take action to resolve it. The plaintiff argues that it is of public importance that this proceeding be held to determine the constitutional obligations of Her Majesty the Queen regarding soldiers whose lives and mental health she puts at risk for the good of the nation.

[55] With great respect for Mr. Bernath and the deepest sympathy that I have for those military members and their families, I sincerely do not believe that holding the proceeding desired by Mr. Bernath would resolve this fundamental issue, or that it would be in the public interest for the

exceptional remedy of interim costs to be used to try to respond to it as part of this action. The circumstances present in Mr. Bernath's case are so specific to him, the individuals involved and their personal actions that it is likely that the Court cannot, in a useful way for the general interest, consider the role that that attitude could have played in the alleged institutional failures.

[56] Mr. Bernath emphasizes the fact that his efforts and his fight have already advanced the law. He also cites his grievance and his complaints to the Ombudsman as leading to the subsequent amendment of section 16.16 of the QR&O to remove the commanding officer's discretion to ignore recommendations regarding medical leave. He notes that it was in that very action that it was first judicially recognized that the Armed Forces Grievance Authority is not a court of competent jurisdiction for the purposes of section 24 of the *Charter*. That may be the case, but those issues are now resolved, as the plaintiff himself notes. The public importance of certain past actions does not necessarily guarantee the public importance of pursuing resulting litigation to the end. That is, among other things, what is seen in the Supreme Court decision in *Little Sisters*, in which, despite the recognized importance of the first litigation involving the plaintiff, the subsequent resulting litigation was not recognized as representing the interest needed to award interim costs.

[57] This case would only present public interest if Mr. Bernath were able to establish during the proceedings a causal link between the circumstances that affected him and the alleged systematic conduct, as it is only with that condition that the Court would be led to decide the issue of whether the conduct infringed on the *Charter* rights. However, as the evidence on record fails to establish

that causal link, it is clear that the public importance of the case has not been established “regardless of the ultimate holding on the merits”, as required in *Little Sisters*.

Conclusion

[58] As the plaintiff has failed to meet the conditions for awarding interim costs, his motion must be dismissed.

[59] The respondent asked that he be awarded costs. I do not question the plaintiff’s sincerity in his efforts and in his belief that his case has merit and is of public interest. If the plaintiff’s motion had only failed on those aspects, I would have ordered that costs abide by the result of the case. However, the evidence submitted by the plaintiff on the issue of his capacity to fund the proceeding was clearly insufficient and the plaintiff should have realized that those problems were fatal. For that reason, costs for the motion are awarded to the respondent.

ORDER

THE COURT ORDERS THAT:

1. The plaintiff's motion is dismissed, with costs to the respondent.

"Mireille Tabib"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1683-02
STYLE OF CAUSE:	PATRICK BERNATH v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 9, 2009
REASONS FOR ORDER:	MADAM PROTHONOTARY TABIB
DATED:	APRIL 2, 2009

APPEARANCES:

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PIERRE SALOIS ANTOINE LIPPÉ	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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