

Date: 20071018

Docket: A-401-06

Citation: 2007 FCA 330

**CORAM: RICHARD C.J.
NADON J.A.
SHARLOW J.A.**

BETWEEN:

**TERRY LYNN LEBRASSEUR and
JOSEPH ALAIN LEBRASSEUR**

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 9, 2007.

Judgment delivered at Ottawa, Ontario, on October 18, 2007.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**RICHARD C.J.
NADON J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal of the judgment of Justice Mactavish dated July 6, 2006 (2006 FC 852) allowing the motion of the respondent (the Crown) under Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106, to strike the appellants' statement of claim on the basis that it discloses no reasonable cause of action.

[2] Rule 221(1)(a) reads as follows:

221. (1) On motion, the Court may, at any 221. (1) À tout moment, la Cour peut, sur

time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be, [...]

and may order the action be dismissed or judgment entered accordingly.

requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable; [...]

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[3] It is undisputed that Justice Mactavish stated the correct test for the application of Rule 221(1)(a) (see paragraph 14 of her reasons). A statement of claim cannot be struck under Rule 221(1)(a) unless it is plain and obvious that the action cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[4] The appellant Constable Terry Lynn Lebrasseur is a member of the RCMP. The appellant Joseph Alain Lebrasseur is her husband. In August of 2003, Constable Lebrasseur and Mr. Lebrasseur filed a statement of claim seeking damages against the Crown on a number of grounds, including negligent and intentional infliction of nervous shock, public misfeasance, bad faith and breach of the duty of fairness, breach of fiduciary duty, and constructive dismissal. An amended statement of claim was filed in December, 2005.

[5] The factual basis of Constable Lebrasseur's claim consists of allegations of harassment and other wrongful acts of senior RCMP officers, including her direct superiors. The allegations begin with an unjustified reprimand in May of 2001, and include an attempt to transfer her against her wishes, significant negative changes in her assigned duties and working conditions, and disdainful

and belittling treatment. These events ultimately led to her taking sick leave starting in August of 2001 because of a mental illness. Constable Lebrasseur has never returned to her duties with the RCMP. She seeks compensation for lost economic opportunity, lost health benefits and loss of pension income, as well as aggravated damages. Mr. Lebrasseur asserts a derivative claim under the *Family Law Act*, R.S.O. 1990, c. F.3.

[6] In 2004, Constable Lebrasseur applied for a disability pension under section 32 of the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11, and subsection 35(1) of the *Pension Act*, R.S.C. 1985, c. P-6, which read as follows:

***Royal Canadian Mounted Police
Superannuation Act***
R.S.C. 1985, c. R-11

32. Subject to this Part, an award in accordance with the *Pension Act* shall be granted to or in respect of [...]

(b) any person who served in the Force at any time after March 31, 1960 as a contributor under Part I of this Act and who has suffered a disability, either before or after that time, or has died,

in any case where the injury or disease or aggravation thereof resulting in the disability or death in respect of which the application for the award is made arose out of, or was directly connected with, the person's service in the Force.

[...]

***Loi sur la pension de retraite de la
Gendarmerie royale du Canada***
L.R., 1985, ch. R-11

32. Sous réserve des autres dispositions de la présente partie, une compensation conforme à la *Loi sur les pensions* doit être accordée, chaque fois que la blessure ou la maladie — ou son aggravation — ayant causé l'invalidité ou le décès sur lequel porte la demande de compensation était consécutive ou se rattachait directement au service de l'intéressé dans la Gendarmerie, à toute personne, ou à l'égard de celle-ci : [...]

b) ayant servi dans la Gendarmerie à tout moment après le 31 mars 1960 comme contributeur selon la partie I de la présente loi, et qui a subi une invalidité avant ou après cette date, ou est décédée.

[...]

Pension Act

R.S.C. 1985, c. P-6

35. (1) [...] the amount of pensions for disabilities shall [...] be determined in accordance with the assessment of the extent of the disability resulting from injury or disease or the aggravation thereof, as the case may be, of the applicant or pensioner.

Loi sur les pensions

L.R., 1985, ch. P-6

35. (1) [...] le montant des pensions pour invalidité est [...] calculé en fonction de l'estimation du degré d'invalidité résultant de la blessure ou de la maladie ou de leur aggravation, selon le cas, du demandeur ou du pensionné.

[7] The initial decision of the Veterans Review and Appeal Board Canada on June 1, 2005 was to award a 3/5 pension. After further review in 2006, that was changed to a 5/5 pension. The pension was awarded on the basis that Constable Lebrasseur was disabled by a mental illness caused by the acts of senior RCMP officers in and after May of 2001.

Section 9 of the *Crown Liability and Proceedings Act*

[8] The Crown filed a notice of motion in the Federal Court for an order striking the amended statement of claim and dismissing the action on the basis that it is barred by section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which reads as follows:

9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

9. Ni l'État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État.

[9] Justice Mactavish concluded that all of the claims in the amended statement of claim are barred by section 9 of the *Crown Liability and Proceedings Act* because they are based substantially on the same factual allegations as the pension awarded to Constable Lebrasseur (citing *Prentice v.*

Canada (Royal Canadian Mounted Police), 2005 FCA 395, *Dumont v. Canada*; *Drolet v. Canada*, 2003 FCA 475, and *Sarvanis v. Canada*, [2002] 1 S.C.R. 921). For that reason, she granted the Crown's motion, struck the statement of claim and dismissed the action. It is argued for Constable Lebrasseur and Mr. Lebrasseur that Justice Mactavish erred in law in granting the motion.

[10] The leading case on the interpretation of section 9 of the *Crown Liability and Proceedings Act* is *Sarvanis (supra)* (see paragraphs 19 to 30, per Justice Iacobucci, writing for the Court). For the purposes of this case, the key passages are found in paragraphs 28 and 29, which read as follows (emphasis in original):

[28] In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.

[29] This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.

[11] Mr. Sarvanis suffered a disabling injury while he was a prison inmate. His disability entitled him to a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8. Mr. Sarvanis also filed a statement of claim seeking damages from the Crown on the basis that his injury was caused by the negligence of prison officials. Justice Iacobucci, writing for the Supreme Court of Canada,

found that his claim for damages was not barred by section 9 of the *Crown Liability and Proceedings Act* because his entitlement to a disability pension was based on his past contributions plus his disability. The acts of the prison officials that formed the basis of his tort claim were not relevant to his pension entitlement.

[12] This case is quite different. Here, the wrongful acts of senior RCMP officers caused the disabling illness that entitled Constable Lebrasseur to a pension, and she is claiming damages based substantially on the same acts. As I read *Sarvanis*, particularly the last sentence of paragraph 29, section 9 of the *Crown Liability and Proceedings Act* asks whether the factual basis of Constable Lebrasseur's pension award and the factual basis of the claims for damages in the amended statement of claim are the same. If the answer is yes, the claim for damages is barred.

[13] In this case, Justice Mactavish asked the correct question and answered it correctly. I agree with her that section 9 of the *Crown Liability and Proceedings Act* bars the claims of Constable Lebrasseur and Mr. Lebrasseur in so far as they are based on the same events.

Leave to amend

[14] Constable Lebrasseur and Mr. Lebrasseur argued that, even if section 9 of the *Crown Liability and Proceedings Act* bars their claims as now framed, they should be given leave to amend to assert independent claims based on allegations of events that occurred after the facts upon which the pension award was based. Their position is that Constable Lebrasseur's pension claim is based on events that occurred between May of 2001 and August of 2001 when her sick leave commenced,

while some of the allegations in the statement of claim refer to further acts of harassment that occurred in and after September of 2001.

[15] Justice Mactavish rejected this argument because she found it impossible to identify any independent claims in the amended statement of claim based on events after those alleged in Constable Lebrasseur's pension application. I agree with Justice Mactavish that the amended statement of claim lacks clarity in relation to the specific timing of events that form the basis of the claims. That is a sufficient reason for declining to disturb her refusal of leave to amend.

[16] However, this should be without prejudice to the right of Constable Lebrasseur and Mr. Lebrasseur to file a new statement of claim containing claims that are not barred by section 9 of the *Crown Liability and Proceedings Act* because they are not based on the same facts as Constable Lebrasseur's pension award.

[17] In light of the possibility of a new statement of claim being filed, it is necessary to consider the second reason given by Justice Mactavish for refusing leave to amend. Her second reason essentially accepts the argument of the Crown that, even if one or more of Constable Lebrasseur's claims are not barred by section 9 of the *Crown Liability and Proceedings Act*, the Federal Court should decline jurisdiction because the alleged wrongful acts of the senior RCMP officers are the proper subject of a grievance under Part III of the *Royal Canadian Mounted Police Act*, R.S.C.

1985, c. R-10 (sections 31 to 36). Subsection 31(1) reads as follows:

31. (1) Subject to subsections (2) and (3), where any member is aggrieved by any

31. (1) Sous réserve des paragraphes (2) et (3), un membre à qui une décision, un acte

decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre procédure pour corriger ce préjudice.

Justice Mactavish agreed with the Crown on this point, citing *Vaughan v. Canada*, [2005] 1 S.C.R. 146 and *Prentice (supra)*.

[18] As I read *Vaughan*, it stands for the proposition that, where an individual has recourse to a statutory grievance scheme such as Part III of the *Royal Canadian Mounted Police Act* to seek a remedy for a complaint arising from a workplace event, the Courts generally should decline to deal with claims for damages arising out of the same event, even if the statutory grievance scheme does not expressly oust the jurisdiction of the courts. Although the courts retain the discretion to hear such claims, they should exercise that discretion only in exceptional cases. The scope of the exception remains undefined, although it is suggested that an exception might be found if the integrity of the grievance procedure has been compromised (which may occur, for example, in certain cases where a whistleblower is alleging employer retaliation). The claims in issue in *Vaughan* were held not to be within the exception. A similar conclusion was reached by this Court in *Prentice*.

[19] The record in this appeal contains no evidence that impugns the integrity of the grievance procedure in Part III of the *Royal Canadian Mounted Police Act*. Also, it is not clear what

grievances, if any, Constable Lebrasseur has already made or might have made, and what remedies might have been obtained. The result is that the record contains no basis for determining whether there is any room in this case for the exercise of the residual discretion of the Federal Court to hear Constable Lebrasseur's claims despite the statutory grievance procedure in Part III of the *Royal Canadian Mounted Police Act*. Contrary to the suggestions of counsel for Constable Lebrasseur and Mr. Lebrasseur, it seems to me that the onus of establishing the facts in this regard rests on them, not on the Crown. This conclusion does not affect the outcome of this appeal, but it may constrain the scope of any claims that may be set out in any new statement of claim that Constable Lebrasseur and Mr. Lebrasseur may choose to file.

[20] I would dismiss this appeal with costs, without prejudice to the right of Constable Lebrasseur and Mr. Lebrasseur to file a new statement of claim as explained in these reasons.

“K. Sharlow”

J.A.

“I agree
J. Richard C.J.”

“I agree
M. Nadon J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-401-06

**(APPEAL FROM A JUDGMENT OR ORDER OF THE FEDERAL COURT DATED
JULY 6, 2006, DOCKET NUMBER T-1433-03)**

STYLE OF CAUSE: TERRY LYNN LEBRASSEUR AND JOSEPH
ALAIN LEBRASSEUR v. HER MAJESTY
THE QUEEN IN RIGHT OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 9, 2007

REASONS FOR JUDGMENT BY: Sharlow J.A.

CONCURRED IN BY: Richard C.J.
Nadon J.A.

DATED: October 18, 2007

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