Federal Court of Appeal | Cour d'appel fédérale

Date: 20201210

Docket: A-427-19

Citation: 2020 FCA 212

CORAM: **WEBB J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DOUGLAS JOST

Respondent

Heard by online video conference hosted by the Registry on November 9, 2020.

Judgment delivered at Ottawa, Ontario, on December 10, 2020.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: WEBB J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] After approximately 25 years of service, Douglas Jost retired from the Canadian Armed Forces (CAF). Although he was told that he could expect to receive his lump sum pension benefit within 8 to 12 weeks, he did not receive his pension payment until 29 weeks after his release from the CAF. Mr. Jost did not receive interest on the monies that were owing to him by the CAF, and he says that he was forced to go into debt and incur interest obligations in order to

cover his basic living expenses during the period immediately following his release. Mr. Jost alleges that other retirees from the CAF have experienced similar delays in receiving their pension benefits, and have suffered similar losses as a result.

[2] Mr. Jost commenced this proposed class action on his own behalf and on behalf of other retirees from the CAF. In a decision reported as 2019 FC 1356, the Federal Court certified this proceeding as a class action, finding that Mr. Jost's statement of claim disclosed reasonable causes of action for breach of fiduciary duty, breach of contract and negligence, and that the other requirements of the class proceedings rules with respect to certification had been met.

[3] The Attorney General of Canada appeals from the Federal Court's certification order, alleging that the Court made numerous errors in its legal analysis in determining that the statement of claim disclosed reasonable causes of action. The Attorney General further contends that the Federal Court's analysis of the remaining certification criteria is so bereft of detail that it is impossible to discern whether the Court applied the correct legal test or engaged in a proper balancing exercise. The Attorney General also submits that the form of the Federal Court's order fails to comply with the *Federal Courts Rules*.

[4] As will be explained below, I agree that the Federal Court committed several errors in assessing whether Mr. Jost had satisfied the test for certification set out in Rule 334.16 of the *Federal Courts Rules*, S.O.R./98-106. Consequently, I would allow the appeal.

I. The Statutory Scheme

[5] Members of the CAF earn pensions in return for their service. There are two pension plans for CAF members. Which plan applies depends on the individual's status in the CAF. The Regular Force Pension Plan ("Regular Plan") applies to those who serve on a full-time basis, whereas the Reserve Force Pension Plan ("Reserve Plan") applies to members who combine military service with a civilian career or academic studies. There is, however, an exception to this rule. Where a Reserve Force member is required to contribute to the Regular Plan, the member will no longer be eligible to participate in the Reserve Plan. This is colloquially referred to as the "once in/always in" rule.

[6] While members of the Regular Force have been entitled to pension benefits since 1901, no comparable benefit was available to members of the Reserve Force before 2007. That year, the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17 was amended to authorize the creation of a defined benefit pension plan for members of the Reserve Force.

[7] Prior to 2016, the Directorate of Canadian Forces Pension Services had primary responsibility for the administration of CAF pensions. However, on July 4, 2016, the Government of Canada transferred the administration of CAF pensions to Public Services and Procurement Canada as part of a government-wide pension modernization project. The bodies responsible for the administration of the CAF pension plans shall be referred to collectively in these reasons as "the Pension Administrator".

[8] When the Reserve Plan came into effect, Reserve Force members were required to contribute to the plan. To account for Reserve Force service predating March 1, 2007, the *Reserve Force Pension Plan Regulations*, S.O.R./2007-32, permitted members to "buy back" past service, thereby increasing the pension benefits to which they would be entitled under the Reserve Plan.

[9] In accordance with the Reserve Plan, in some instances the pension entitlement is payable upon release from the CAF (the "Immediate Pension Entitlements"). If the member has an option as to the type of benefit he or she may receive, the member must confirm their choice prior to the disbursement of funds. The Act does not stipulate a timeframe for the payment of pension benefits.

[10] Mr. Jost states in his statement of claim that there have been unreasonable and excessive delays in the processing of Immediate Pension Entitlements for CAF members since at least 2007. These deficiencies have been highlighted in reports by the Auditor General, the Veterans Ombudsman's office, and the Canadian Armed Forces Ombudsman, among others.

[11] Mr. Jost further asserts that former CAF members rely on the timely payment of their Immediate Pension Entitlements to secure the necessities of life, including housing, food, medication and the like in the period following their retirement.

II. Mr. Jost's Experience

[12] In the spring of 2015, Mr. Jost gave the CAF the required notice of his impending retirement. Prior to his retirement, he was advised by the Pension Administrator that he had the choice of receiving an Annual Allowance, a Deferred Annuity, or a Transfer Value (*i.e.* a lump sum). Mr. Jost elected to take the Transfer Value option, and he was informed by the Pension Administrator that the Transfer Value of his pension was $859,980.00. Mr. Jost asserts in his statement of claim that he was also told he would receive payment of the lump sum within 8 to 12 weeks, and that he made financial plans based upon this representation.

[13] Mr. Jost's release from the Reserve Force was effective on July 1, 2015. Some weeks later, he was advised by the Pension Administrator that the Transfer Value of his pension had been reduced to $726,904.96. In October of 2015, Mr. Jost was informed of a further reduction in the Transfer Value of his pension to $703,180.00. Counsel for the Attorney General explained at the hearing that the reductions in the Transfer Value of Mr. Jost's pension were likely attributable to a fluctuation in interest rates. There is, however, a suggestion in the record that at least some of the diminution in value of Mr. Jost's Transfer Value may have been attributable to the fact that he had not fully paid for the "buy back" of some of his pre-2007 service with the Reserve Force.

[14] Mr. Jost did not receive his Transfer Value payment from the Pension Administrator until January 20, 2016. This was six and a half months after his retirement date. He pleads that he was never compensated for the late payment or for the reduction in the Transfer Value of his pension

over the period of delay. Mr. Jost further asserts that he incurred debts and late payment fees over the period immediately following his retirement from the CAF, and that he suffered a marked loss in the daily enjoyment of his life "as a result of the financial ruin Canada's delay directly caused".

[15] Mr. Jost has also provided affidavits from a number of former members of the CAF who say that they experienced similar delays in the receipt of their Immediate Pension Entitlements. The delay in payment in several of these cases was over a year, with one individual alleging that he did not start receiving his pension benefits for some three and a half years after his release from the CAF.

III. This Proceeding

[16] Mr. Jost commenced this proposed class action on his own behalf, and on behalf of members forming part of the following class:

> All members of the Canadian Forces – Reserve Force Pension Plan and the Canadian Forces – Regular Force Pension Plan who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[17] The claims asserted in Mr. Jost's statement of claim were based on an alleged breach of fiduciary duty, breach of contract and negligence.

[18] A Federal Court judge, acting as the case manager of this action, determined that it was not plain and obvious that these claims were doomed to fail, with the result that the Court refused

to strike any of them. The Court further found that Mr. Jost had satisfied the remaining requirements for the certification of this action as a class proceeding, and that the motion for certification should thus be granted.

[19] However, while it accepted that an identifiable class existed, the Federal Court found that there was no evidence that any members of the Regular Force had experienced delays in receiving their pension benefits. Consequently, the Court amended the class definition to include only claims advanced by members of the Reserve Plan. The revised class definition certified by the Federal Court reads:

> All members of the Canadian Reserve Forces – Reserve Force Pension Plan – who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

IV. The Applicable Standard of Review

[20] The only question on this appeal is whether the Federal Court properly exercised its discretion in granting certification of this action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*.

[21] I agree with the parties that the standard of review applicable to the Federal Court's decision is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The determination of whether Mr. Jost's statement of claim discloses one or more causes of action involves questions of law, and is thus reviewable on the standard of correctness: *Canada v. John Doe*, 2016 FCA 191, [2016] F.C.J. No. 695 at paras. 30-32. However, the findings as to whether

Mr. Jost had satisfied the remaining requirements for certification involve questions of fact or mixed fact and law and are thus reviewable on the standard of palpable and overriding error: *John Doe*, above at para. 29.

V. The *Federal Courts Rules* Governing Class Actions

[22] Certification motions are governed by Rule 334.16(1) of the *Federal Courts Rules*, which states that a judge shall certify a proceeding as a class proceeding if the following five requirements are met:

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

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

(3) 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);

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

(5) there is a representative plaintiff or applicant who would fairly and adequately represent the interests of the class, among other requirements.

[23] It should be noted that the criteria set out in the *Federal Courts Rules* are substantially similar to the class action certification criteria applied in Ontario and British Columbia, with the result that the jurisprudence emanating from those jurisdictions is instructive: *Buffalo v. Samson Cree Nation*, 2010 FCA 165, 405 N.R. 232 at para. 8.

VI. General Principles Governing Class Proceedings

[24] Before addressing the Attorney General's arguments as to why the pleadings in this case do not disclose a reasonable cause of action, it is helpful to start with a review of the general principles governing class actions.

[25] As the Supreme Court has observed, class actions allow for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process. Class actions also enhance judicial economy, allowing a single action to decide large numbers of claims involving similar issues. Finally, class actions encourage behaviour modification on the part of those who cause harm: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 27; and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[26] The Supreme Court has also held that an overly restrictive approach to the application of class action certification legislation must be avoided, so that the benefits of class actions can be fully realized: *Western Canadian Shopping Centres*, above at para. 46; *Hollick*, above at para. 15.

[27] As this Court observed in *John Doe*, the focus at the certification stage is on the form of the action. The question at this point is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: above at paras. 23 and 24.

[28] The onus is on the plaintiff in a certification motion to establish an evidentiary basis for certification: *Hollick*, above at para. 25; *John Doe*, above at para. 24. That is, the plaintiff must show some basis in fact for each of the certification requirements, apart from the requirement that the pleadings disclose a reasonable cause of action. Each of the asserted causes of action will be addressed in turn.

VII. Did the Federal Court Err in Law in Determining that Mr. Jost's Statement of Claim Disclosed Reasonable Causes of Action?

[29] The first question for determination is whether it is "plain and obvious" that the pleadings do not disclose a reasonable cause of action, assuming the facts pleaded in Mr. Jost's statement of claim to be true: *Hollick*, above at para. 25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 at paras. 32-33; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 at para. 63. This is a low threshold: *Brake v. Canada (AG)*, 2019 FCA 274, 443 D.L.R. (4th) 507 at para. 70.

(a) The Alleged Breach of Fiduciary Duty

[30] Mr. Jost alleges in his statement of claim that Canada breached the fiduciary duty that it owes to members of the proposed class to act in their best interest. The Attorney General submits that the existence of a fiduciary duty has not been established in this case, and that Mr. Jost's claim for breach of fiduciary duty cannot stand in the face of binding authority from the Supreme Court that the Federal Court failed to address.

[31] The sum total of the Federal Court's analysis of Mr. Jost's claim for breach of fiduciary duty is contained in the following paragraph.

> [14] Mr Jost also alleges breach of a fiduciary duty to members of the proposed class based on Canada's undertaking to act in the best interest of class members. The AGC argues that the existence of a fiduciary duty has not been proved and the claim for such a duty will inevitably fail. Again, Mr Jost has pleaded the presence of the essential elements for a claim based on breach of a fiduciary duty, and it would not be appropriate on this motion to rule on the likelihood that those elements can or cannot be proved.

[32] Fiduciary duty is a legal doctrine originating in trust law. It requires that one party (the fiduciary) act with absolute loyalty toward another party (the beneficiary) in managing the latter's affairs: *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24, [2011] 2 S.C.R. 261 at para. 22.

[33] Fiduciary obligations have been found to arise in the context of relationships having specific characteristics. These include some discretion or power residing in the fiduciary, the ability of the fiduciary to unilaterally exercise that discretion or power in a way that will affect the beneficiary's interests, and the vulnerability of the beneficiary to the exercise of power: *Elder Advocates*, above at para. 27.

[34] The types of relationships that will give rise to a fiduciary duty are not closed. However, for a fiduciary duty to arise outside of previously established categories of fiduciary relationships, the purported fiduciary must clearly undertake to act in the best interests of the beneficiary, whether expressly, or by necessary implication: *Elder Advocates*, above at paras. 30-32, 36.

[35] There must also be a defined person or class of persons who are vulnerable to the fiduciary's control, as well as a legal or substantial practical interest on the part of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Elder Advocates*, above at para. 36.

[36] The Supreme Court has, however, also observed that the Crown's broad responsibility to act in the public interest means that situations where it will be found to owe a duty of loyalty to a particular person or group will be rare: *Elder Advocates*, above at para. 44.

[37] According to the Attorney General, the Supreme Court has previously held that a fiduciary duty does not attach to the relationship between the government and members of a public sector pension plan: *Professional Institute of the Public Service of Canada v. Canada (AG)*, 2012 SCC 71, [2012] 3 S.C.R. 660 at para. 142 [*PIPSC*].

[38] It is true that the Supreme Court concluded that a fiduciary duty did not arise on the facts of the *PIPSC* case. It is, however, important to note that *PIPSC* involved claims by various unions and associations seeking relief on behalf of their members that would require Canada to return some $28 billion in actuarial surpluses to government-run pension plans.

[39] It was in that context that the Supreme Court concluded that the Government of Canada did not owe a fiduciary duty to plan members with respect to the actuarial surpluses in the pension plans. In coming to this conclusion, the Supreme Court had particular regard to the requirement that the alleged fiduciary undertake, either expressly or impliedly, to act in

accordance with a duty of loyalty. The Court observed that it was "critical that the purported beneficiary be able to identify a forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue": *PIPSC*, above at para. 124. In the absence of any such undertaking on the part of the Government, the Court found that the fiduciary claim could not succeed: *PIPSC*, above at paras. 124-127.

[40] The Supreme Court reiterated in *PIPSC* that an alleged duty of loyalty founded on the exercise of government power was "inherently at odds" with the Government's duty to act in the best interests of Canadian society as a whole: above at para. 127. That said, the Court did not determine that a fiduciary relationship could never exist between the Government, as administrator of a pension plan, and the members of the plan. Indeed, the Court expressly stated that it was unnecessary to determine "the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the Plan or whether the relationship inherently carries with it some set of fiduciary obligations": *PIPSC*, above at para. 120.

[41] Given that the Supreme Court has expressly left the door open to the possibility that the administrator of a governmental pension plan may, in some cases, owe a fiduciary duty to plan members, and subject to the comments below, it cannot be said at this point that it is plain and obvious that Mr. Jost's fiduciary claim has no reasonable prospect of success.

[42] There is also jurisprudence from other courts that arguably supports Mr. Jost's argument that the Crown owes a fiduciary duty to members of the Reserve Plan.

[43] That is, the Ontario Court of Appeal determined that the Crown owed a fiduciary duty to disabled military veterans when administering pension funds that had been paid to veterans and were being administered on their behalf: *Authorson (Guardian of) v. Canada (AG)* (2000), 215 D.L.R. (4th) 496, 58 O.R. (3d) 417 (C.A.). *Authorson* involved a class action brought on behalf of veterans whose pensions and allowances were administered for them by the federal Department of Veterans Affairs because the veterans were incapable of doing it for themselves. Although the Ontario Court of Appeal's decision was subsequently overturned by the Supreme Court on other grounds, it is noteworthy that the Crown conceded before the Supreme Court that it did indeed act as a fiduciary *vis-à-vis* the veterans: *Authorson v. Canada (AG)*, 2003 SCC 39, [2003] 2 S.C.R. 40 at paras. 2, 8.

[44] The facts in *Authorson* are admittedly different from the facts in this case. In *Authorson*, the funds had already been paid to the pensioners and were being administered on their behalf. That said, the decision of the Ontario Court of Appeal nevertheless leaves open the possibility that the Crown may, in certain situations, be found to owe a fiduciary duty to members of government-administered pension plans. This further supports my finding that it is not plain and obvious that the fiduciary claims advanced here have no reasonable chance of success.

[45] There is, however, a fatal flaw with Mr. Jost's fiduciary claim, as it is presently drafted.

[46] As was noted earlier, the Supreme Court held in *Elder Advocates* that for a fiduciary duty to arise outside of previously established categories of fiduciary relationships, the purported fiduciary must clearly undertake to act in the best interests of the beneficiary or beneficiaries,

whether expressly or by necessary implication. Indeed, the lack of any such undertaking was central to the Court's finding that no fiduciary duty had been established in the *PIPSC* case: above at para. 142.

[47] The Federal Court characterized Mr. Jost's claim as "alleg[ing] breach of a fiduciary duty to members of the proposed class based on Canada's undertaking to act in the best interest of class members" [my emphasis]. In refusing to strike the fiduciary claim, the Federal Court further stated that Mr. Jost had "pleaded the presence of the essential elements for a claim based on breach of a fiduciary duty". With respect, that is simply not the case.

[48] There is no reference in Mr. Jost's statement of claim to any express or implied undertaking having been given by the federal Crown to act in the best interests of the proposed class members. Nor has Mr. Jost suggested that any such undertaking arises from the relevant legislation. It is therefore plain and obvious that the claim for breach of fiduciary duty cannot succeed as it is presently drafted.

[49] It will, however, be recalled that the Supreme Court has held that an overly restrictive approach to the application of class action certification legislation is to be avoided so that the benefits of class actions can be fully realized. Indeed, leave to amend a pleading in a proposed class proceeding will only be denied in the clearest cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment: *Barkley v. Tier 1 Capital Management*

Inc., 2018 ONSC 1956, [2018] O.J. No. 1572, at para. 68, aff'd 2019 ONCA 54, [2019] O.J. No. 354; *Jordan v. CIBC Mortgages Inc.*, 2019 ONSC 1178, [2019] O.J. No. 1170 at paras. 82-83.

[50] With these principles in mind, I am satisfied it is appropriate to grant leave to Mr. Jost to amend his statement of claim to plead the existence of an undertaking on the part of the Government of Canada to act in the best interests of members of the Reserve Plan.

(b) The Claim in Contract

[51] Mr. Jost also alleges in his statement of claim that by unreasonably delaying the calculation, processing and payment of class members' Immediate Pension Entitlements, Canada has breached its contractual obligations to members of the Reserve Plan.

[52] The entirety of the Federal Court's contractual analysis is contained in the following two sentences:

> [15] Similarly, the AGC argues that Mr Jost cannot prove any breach of contract as pleaded in the statement of claim. Again, this is a matter of evidence and proof; it is not plain and obvious at this stage that there is no reasonable basis for that claim.

[53] The Attorney General argues that in coming to this conclusion, the Federal Court erred in law by failing to follow the well-established principle that there is no contractual relationship between military personnel and the federal Crown.

[54] In support of this contention, the Attorney General relies on the Federal Court's decision in *Gallant v. R.*, [1978] F.C.J. No. 1122, 91 D.L.R. (3d) 695, where the Court held that the service of military personnel does not give rise to contractual relations with the Crown. The Federal Court further stated in *Gallant* that the Crown "is in no way contractually bound to the members of the Armed Forces", and that "a person who joins the Forces enters into a unilateral commitment in return for which the Queen assumes no obligations, and that relations between the Queen and Her military personnel, as such, in no way give rise to a remedy in the civil Courts": both quotes at para. 4. Consequently, Mr. Gallant's claim that he had been wrongfully dismissed from the CAF was struck.

[55] In *Sylvestre v. R.*, [1986] 3 F.C. 51, 30 D.L.R. (4th) 639 at para. 4, this Court cited the above noted extracts of *Gallant* with evident approval, finding that a statement of claim alleging wrongful dismissal from the CAF did not disclose a reasonable cause of action. This Court upheld a similar finding in *Campbell v. Canada*, [1979] F.C.J. No. 118 (T.D.), aff'd [1981] F.C.J. No. 414 (F.C.A.).

[56] The Federal Court has also applied the principle espoused in *Gallant* in a number of cases: see, for example, *Bissonnette v. R.*, 2007 FC 281 at paras. 7-8 (T.D.); *Cottle v. Canada (Minister of National Defence)*, [1998] F.C.J. No. 592 at paras. 51-52*; Gligbe v. Canada*, 2016 FC 467, [2016] F.C.J. No. 458 at paras. 13-16; *McClennan v. Canada (Minister of National Defence)*, 2002 FCT 244 at paras. 11, 17; *Donoghue v. Canada (Minister of National Defence)*, 2004 FC 733, [2004] F.C.J. No. 889 at para. 35. The Nova Scotia Supreme Court has also

adopted the reasoning in *Gallant* as a basis for striking a claim of constructive dismissal: *MacLellan v. Canada (AG)*, 2014 NSSC 280, [2014] N.S.J. No. 412 at paras. 58-59.

[57] The Attorney General further cites the Federal Court's decision in *Pilon v. Canada*, [1996] F.C.J. No. 1200, 119 F.T.R. 269 (T.D.) as authority for the proposition that there is no post-employment contractual relationship between a military reservist and the Crown that would govern the member's entitlement to employment benefits: at para. 9. I note, however, that what is in issue in this case is not just the entitlement of class members to an employment benefit, but also the time that it took to provide that benefit to members of the class and the losses that allegedly resulted from that delay.

[58] Mr. Jost attempts to distinguish the decision in *Gallant*, submitting that none of the class members are currently members of the CAF. They are, rather, members of a pension plan. Consequently, Mr. Jost submits that the existence of a contractual relationship between the members of the Reserve Plan and the Pension Administrator will turn on the presence of an offer, acceptance and consideration. Mr. Jost submits that these elements have been properly pleaded in his statement of claim, that evidence was adduced that supported the constituent elements pointing to the existence of a possible contract, and that the Federal Court correctly held that the existence of a contract is a matter of evidence and proof.

[59] In particular, Mr. Jost observes that in accordance with the *Reserve Force Pension Plan Regulations*, members of the Reserve Plan were offered the opportunity to "buy back" service predating the creation of the Reserve Plan in 2007, thereby increasing the pension benefits to

which they would be entitled. Nearly 14,000 Plan members accepted this offer and at least some of them paid the necessary amounts as consideration for these additional pension benefits.

[60] While it appears to be settled law that members of the CAF do not enjoy a contractual employment relationship with the Crown, neither side has directed us to any jurisprudence holding that the relationship between members of the CAF and the Pension Administrator can never be governed by contractual principles. Keeping in mind the low threshold that must be met to establish a reasonable cause of action, and given that pleadings ought not be struck out where the law has not been fully settled in the jurisprudence or a novel cause of action is presented, I conclude that it is not plain and obvious that Mr. Jost's claim in contract cannot succeed.

(c) The Claim in Negligence

[61] A claim in negligence requires the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and damages that flow from the breach of duty. In the Federal Court, the Attorney General only seriously disputed the first element of the test, namely whether the Government of Canada owes a duty of care to members of the Reserve Plan.

[62] The Attorney General contends that there are two reasons why Mr. Jost's claim that Canada was negligent in ensuring the timely and accurate payment of retirees' Immediate Pension Entitlements cannot succeed as pleaded. First, he contends that the alleged duty of care relates to policy decisions that are immune from tort liability. Second, he says that the statutory

scheme governing the Reserve Plan precludes recovery for interest or alleged decreases in the value of pension entitlements.

[63] The Federal Court did not accept these arguments, noting that the Attorney General was essentially arguing that Mr. Jost's negligence claim would ultimately fail on its merits, and that this was not a sufficient basis on which to conclude that no reasonably viable cause of action had been pleaded.

[64] In finding that it was not plain and obvious that Mr. Jost's claim in negligence had no reasonable prospect of success, the Federal Court found that the fact that the Reserve Plan is the product of a policy decision did not automatically relieve the Government of Canada from a duty of care to members of the plan. The Court further found that the Attorney General had failed to demonstrate that it was plain and obvious that the necessary elements of a cause of action in negligence could not be proven.

[65] The Attorney General's submissions in this Court were similarly focussed primarily on the first element of the test for negligence, namely whether the CAF owed a duty of care to members of the Reserve Plan. Acknowledging that he faced "more of an uphill struggle" with respect to the viability of Mr. Jost's negligence claim, many of counsel's submissions were once again directed to the merits of Mr. Jost's underlying claim. Examples of this focus included the explanation provided for the delays in paying out pension benefits to Plan members, information with respect to the numerous steps that are involved in ascertaining the extent of a Plan

member's entitlement, and the description of the problems that are encountered by the Pension Administrator in accessing members' service records.

[66] In support of the contention that it is plain and obvious that Canada does not owe a duty of care to members of the Reserve Plan, the Attorney General relied on the Supreme Court's decision in *Cooper v. Hobart,* 2001 SCC 79, [2001] 3 S.C.R. 537. There, the Supreme Court held that a two-stage test applies in determining whether a duty of care exists in a given case. The first question is whether the requirements of reasonable foreseeability and proximity have been met. If the Court concludes that a *prima facie* duty of care exists, it must then be determined whether there are residual policy reasons that militate against the imposition of a duty of care: at paras. 38-39.

[67] In determining whether it is plain and obvious that Canada does not owe a duty of care to members of the Reserve Plan, regard must be had to the substantial body of case law that has found the relationship between pension administrators and members of a pension plan to be sufficiently proximate as to give rise to a duty of care.

[68] For example, in *Hembruff v. Ontario Municipal Employees Retirement Board,* [2005] O.J. No. 4667, 78 O.R. (3d) 561, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 3, the Ontario Court of Appeal held that there was "ample authority for the proposition that a pension plan administrator owes a duty of care to members of the pension plan": at para. 65.

[69] In coming to this conclusion, the Ontario Court of Appeal relied on this Court's decision in *Spinks v. Canada* (1996), 134 D.L.R. (4th) 223, [1996] F.C.J. No. 352. This Court held in *Spinks* that a duty of care was owed by an employer to an employee, based, in part, on the fact that the employee "was in a position of complete reliance upon his employer for the pension information he needed": at para. 24. The same may be said here: members of the Reserve Plan are arguably in a position of complete reliance upon the Government of Canada for the timely and accurate payment of their pension benefits.

[70] The Ontario Court of Appeal similarly found there to be a duty of care in *Ault v. Canada (AG)*, 2011 ONCA 147, [2011] O.J. No. 845, a case involving the federal Crown and its duties under the Public Service Superannuation Plan. Citing its earlier decision in *Hembruff*, the Court held that there was "a special relationship between the administrator of a pension plan and the members of the plan", with the result that the plan administrator has an obligation to be mindful of plan members' interests when administering the plan. The Court further observed that there was "nothing novel" in finding that a plan administrator owed a duty of care to members of a pension plan: at para. 36.

[71] In light of this jurisprudence, I am not persuaded that it is plain and obvious that the Government of Canada, as a pension administrator, does not owe a duty of care to members of the Reserve Plan.

[72] Insofar as the second element of the *Cooper v. Hobart* test is concerned, the Attorney General argues that even if there is a relationship of sufficient proximity between the Pension

Administrator and members of the Reserve Plan as to give rise to a *prima facie* duty of care being owed to Plan members, there are residual policy reasons that militate against the imposition of a duty of care in this case.

[73] The Attorney General submits that the creation and administration of the Reserve Plan is the product of policy decisions made by Government of Canada, and that it is in the public interest that the amount of payments made under the plan be accurate. As a result, the Attorney General says, measures must be taken to ensure accuracy in the calculation of pension benefits, even if they take some time.

[74] There is, however, jurisprudence holding that courts should be reluctant to dismiss a proposed class action as disclosing no reasonable cause of action "based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments": *Haskett v. Equifax Canada Inc.*, 224 D.L.R. (4th) 419, [2003] O.J. No. 771 at para. 52; See also *Williams v. City of Toronto,* 2011 ONSC 6987, 346 D.L.R. (4th) 173 at para. 47.

[75] With this jurisprudence in mind, it cannot be said that it is plain and obvious at this point that there could be no duty of care owing to members of the Reserve Plan by the Government of Canada on the basis that the claim relates to policy decisions that are immune from tort liability.

[76] While the Attorney General's primary focus was on whether the Government of Canada owed a duty of care to Plan members, he also noted that damages are a constituent element of a

cause of action in negligence, and that Mr. Jost must therefore establish that the damages sought are recoverable. Given that the *Canadian Forces Superannuation Act* does not provide for the payment of interest in the circumstances described in Mr. Jost's statement of claim, the Attorney General submits that his claim for damages is thus doomed to fail.

[77] It is true that Mr. Jost seeks to recover interest for the period of delay as well as compensation for the diminution in the value of his pension payment. It is not necessary to determine his entitlement to interest at this stage, however, as he also seeks payment of other pecuniary and non-pecuniary damages that are alleged to have resulted from the CAF's conduct. It is not plain and obvious that these claims cannot succeed, and they are sufficient to satisfy the damages requirement of a cause of action in negligence.

[78] Finally, the Attorney General submits that the statute creating the Reserve Plan contains its own remedies. In particular, the Minister can take remedial action in situations where a person has failed to make a pension election as a result of erroneous advice or administrative error, and that persons who are dissatisfied with a decision affecting their benefits can request a reconsideration: *Canadian Forces Superannuation Act*, sections 92-93.

[79] The Federal Court concluded that the statutory remedies cited by the Attorney General were no substitute for the claim in negligence. I agree with that conclusion. It is not at all clear that all of Mr. Jost's claims could be addressed through the mechanisms provided for in sections 92 and 93 of the *Canadian Forces Superannuation Act*.

VIII. The Alleged Deficiencies in the Federal Court's Certification Order

[80] I have concluded that it is not plain and obvious that Mr. Jost's claims in contract and negligence do not disclose reasonable causes of action. I have further concluded that his claim for breach of fiduciary duty will disclose a reasonable cause of action, as long as his statement of claim is amended to plead the existence of an undertaking on the part of the Pension Administrator to act in the best interests of members of the Reserve Plan. I will next consider the Attorney General's arguments as to the alleged deficiencies in the Federal Court's certification order.

(a) The Identifiable Class

[81] As noted earlier, while the Federal Court did not accept the class definition originally proposed by Mr. Jost, it nevertheless found that his claim involved the following identifiable class:

> All members of the Canadian Reserve Forces – Reserve Force Pension Plan – who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[82] No appeal was taken by Mr. Jost with respect to the Court's narrowing of the class definition, and the Attorney General does not take issue with the revised class definition. However, as will be explained later, the amendment to the class definition is important as it relates to the suitability of Mr. Jost as the representative plaintiff in this case.

(b) The Common Issues

[83] Rule 334.17(1)(*e*) of the *Federal Courts Rules* provides that "[a]n order certifying a proceeding as a class proceeding shall […] set out the common questions of law or fact for the class".

[84] Although the Federal Court stated in its Reasons for Order that the "common issues" element of the test for certification had been satisfied in this case, its discussion of what those common issues actually were was very general in nature. The Court noted that it had concluded that common legal issues such as negligence, breach of fiduciary duty and breach of contract represented reasonable causes of action, and that they were common to the proposed members of the class, as "the legal and factual foundation of the claims will be common to class members".

[85] While Mr. Jost evidently provided the Federal Court with a three-page list of what he said constituted the 14 common issues that arise in this case, nowhere is this list (or the issues referred to therein) referred to in the Federal Court's Reasons. More importantly, the certification order does not identify <u>any</u> common questions of law or fact for the class, nor does it adopt Mr. Jost's list of common issues by reference.

[86] To be appropriate for certification as a class action, a case must raise issues of fact or law that are common to all class members: *Western Canadian Shopping Centres*, above at para. 39. Indeed, the commonality of issues has been described as lying at the heart of a class proceeding: *Manuge v. Canada*, 2008 FC 624, [2009] 1 F.C.R. 416 at para. 26; and *Campbell v. Flexwatt*

Corp., [1998] 6 W.W.R. 275, 44 B.C.L.R. (3d) 343 (B.C.C.A.) at para. 52, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 13. Moreover, the class definition will often depend in part upon the identification of common issues, and *vice versa*: *Cloud v. Canada (AG)*, (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667 (Ont. C.A.) at para. 48, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50.

[87] Common issues require precise definition for inclusion in a certification order, and they are usually framed in the form of questions to be answered in the course of the litigation. By way of example, in *Harrington v. Dow Corning Corp.*, [1996] B.C.J. No. 734, 22 B.C.L.R. (3d) 97, aff'd 2000 BCCA 605, one of the questions certified by the British Columbia Supreme Court was "[a]re silicone gel breast implants reasonably fit for their intended purpose?": at para. 41. Similarly, in *Manuge*, above, the Federal Court certified a number of questions including, amongst others, "[d]oes 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?", "[h]as the Crown [been] unjustly enriched and is an Order for restitution appropriate?" and "[i]s the Crown liable for general damages for discrimination, breach of fiduciary duties and bad faith?".

[88] The Federal Court thus erred in failing to identify any common questions of law or fact for the class in its certification order as required by Rule 334.17(1)(*e*) of the *Federal Courts Rules*.

(c) Did the Federal Court Err in Finding a Class Proceeding to be the Preferable Procedure to be Followed in this Case?

[89] Rule 334.16(1)(*d*) of the *Federal Courts Rules* requires that a motions judge be satisfied that a class proceeding "is the preferable procedure for the just and efficient resolution of the common questions of law or fact" raised in a given case. In answering this question, Rule 334.16(2)(*a*) directs that the judge consider all relevant matters, including, amongst other things, whether the questions of fact or law that are common to the class members predominate over questions affecting only individual members of the class.

[90] In finding that a class proceeding was indeed the preferable procedure in this case, the Federal Court stated:

> [25] The AGC submits that many issues require individual assessment of any liability on the part of the Crown. It would be preferable, according to the AGC, for those claims to be determined one by one instead of by way of a class action. The issues are too complex and difficult to be determined together, says the AGC.
>
> [26] I disagree with the AGC's submissions. The complexities in the law and the facts exist whether this matter proceeds as a class action or as a multitude of individual claims. The AGC has not identified any alternative remedy that would be more efficient or that would provide equivalent relief.

[91] The Attorney General contends that the sparse reasons of the Federal Court, offering nothing more than a conclusory dismissal of the Attorney General's submissions, do not engage in the balancing exercise required by the Supreme Court's jurisprudence. While this may be true, there is a more fundamental problem with the Federal Court's analysis.

[92] As the Supreme Court stated in *Hollick*, above at para. 28, lower courts should not take an overly restrictive approach to questions as to the preferable procedure at the certification stage. The Court noted that the preferability requirement could be met, even in cases where there were substantial issues requiring an individualized assessment, as long as the resolution of the common issues would significantly advance the action: at para. 30.

[93] However, as the Ontario Court of Appeal observed in *Cloud*¸ the determination of whether the resolution of the common issues will significantly advance the action can only be carried out in light of the specific common issues of fact or law that have been identified by the Court. The Court observed that "without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made": above at para. 77.

[94] In the absence of any common issues of fact or law having been identified by the Federal Court in its certification order, it is impossible to determine whether a class proceeding is the preferable procedure for resolving any common issues of fact or law that may in fact be raised by this case: *Buffalo*, above at paras. 5, 8.

(d) Did the Federal Court Err in Finding that Mr. Jost was a Suitable Representative Plaintiff?

[95] The final requirement for the certification of a class proceeding set out in the *Federal Courts Rules* is that there be a representative plaintiff who can satisfy the Court that he or she would fairly and adequately represent the interests of the class.

[96] The Attorney General argued before the Federal Court that Mr. Jost was not an appropriate representative plaintiff because he received his benefits in a timely way. The Court rejected this argument, noting that "Mr. Jost has alleged a significant delay in the payment of his pension benefits", and that he had "demonstrated an intention to pursue this action vigorously through able counsel on his own behalf and for the benefit of others similarly situated".

[97] There is, however, a concern with having Mr. Jost act as representative plaintiff in this case that was not addressed by the Federal Court. This relates to the fact that Mr. Jost is not a member of the class that was described in the Federal Court's certification order.

[98] It will be recalled that the proposed class in Mr. Jost's statement of claim was defined as being comprised of:

> All members of the Canadian Forces – Reserve Force Pension Plan and the Canadian Forces – Regular Force Pension Plan who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[99] I do not understand there to be any dispute that Mr. Jost came within the class that was described in his statement of claim.

[100] However, as was previously noted, the Federal Court found that there was no evidence that any members of the Regular Force had experienced delays in receiving their pension benefits. Consequently, the Court amended the class definition to exclude claims advanced by members of the Regular Force, with the revised class definition certified by the Federal Court reading:

> All members of the Canadian Reserve Forces – Reserve Force Pension Plan – who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[101] It will also be recalled that the "once in/always in" rule provides that where a Reserve Force member has previously contributed to the Regular Plan, the member will no longer be eligible to participate in the Reserve Plan. Mr. Jost served in the Regular Force prior to joining the Reserve Force, he contributed to the Regular Plan, and he qualified for a pension benefit under the Regular Plan. As a result, he was ineligible to participate in the Reserve Plan: see the *Reserve Force Pension Plan Regulations*, subsection 4(4). Because the class as it is currently defined is limited to members of the Reserve Plan, it appears that Mr. Jost is not a member of the certified class.

[102] As noted, this issue was not addressed by the Federal Court and, as will be explained below, I am satisfied that the Federal Court committed a palpable and overriding error in finding Mr. Jost to be a suitable representative plaintiff.

[103] Mr. Jost's suitability as a representative plaintiff in this case depends on whether someone who is not a member of a certified class can in fact be a suitable representative plaintiff. Neither side has directed the Court to any Federal Court or Federal Court of Appeal decisions that are directly on point with respect to this issue. However, a review of the *Federal Courts Rules* suggests that a representative plaintiff should indeed be a member of the relevant class.

[104] In particular, Rule 334.12(1) provides that "a member of a class of persons may commence an action or an application on behalf of the members of that class". Rule 334.12(2)

then states that "[t]he member shall bring a motion for the certification of the proceeding as a class proceeding and for the appointment of the member as representative plaintiff or applicant". Rule 334.12(3) provides that "[t]he representative of a class shall be a person who may act as a plaintiff or an applicant under these Rules". These provisions certainly suggest that a proposed class proceeding has to be commenced by a member of the relevant class of persons.

[105] The conclusion that a representative plaintiff needs to be a member of the relevant class is buttressed when regard is had to Rule 334.16(1)(*e*)(iii) of the *Federal Court Rules* – the Rule dealing with certification motions. This Rule provides that "a judge shall, by order, certify a proceeding as a class proceeding if […] there is a representative plaintiff or applicant who […] does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members". The use of the phrase "other class members" once again suggests that the representative plaintiff must him- or herself be a member of the class in question.

[106] Ontario uses similar language to Rule 334.16(1)(*e*)(iii) in its class proceedings legislation: see subparagraph 5(1)(*e*)(iii) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. The Ontario provision has been interpreted as requiring that the proposed representative plaintiff be a member of the class.

[107] An example of this is found in *Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4th) 320, [1999] O.J. No. 1298 (Ont. C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 336. The respondents in *Stone* sought to have a proposed class action dismissed on

the basis of a statutory limitation period. The representative plaintiff was shown not to have a valid claim because of the expiry of the limitation period, and the action was accordingly dismissed.

[108] The Ontario Court of Appeal subsequently dismissed the plaintiff's appeal, stating that the *Class Proceedings Act, 1992*, contemplated that a representative plaintiff be a member of the relevant class, and "not simply a nominee with no stake in the potential outcome": at paras. 9-10.

[109] It is true that some provinces allow representative plaintiffs to act even though they are not themselves members of the relevant class. In such cases, however, this ability is made clear in the relevant class proceedings legislation. For example, in British Columbia, the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 provides that the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding. However, the statute goes on to state that the Court may only do so if it is necessary to avoid a substantial injustice to the class: subsection 2(4). Similar provisions are found in the Newfoundland *Class Actions Act*, S.N.L. 2001, c. C-18.1, subsection 3(4); the Saskatchewan *Class Actions Act*, S.S. 2001, c. 12.01, subsection 4(4); and the Alberta *Class Proceedings Act*, S.A. 2003, c. C-16.5, subsection 2(4).

[110] Given the wording of the *Federal Courts Rules*, and in the absence of any express provision allowing a person who is not a member of a class to act as the representative plaintiff in a class proceeding, I am satisfied that it was a palpable and overriding error for the Federal Court to find that Mr. Jost was a suitable representative plaintiff in this case.

[111] It is evident from the affidavits in the record that there are a number of individuals who do come within the class definition. Class counsel asks that if the Court were to determine that Mr. Jost is not a suitable representative plaintiff on the basis that he was not a member of the certified class, that leave be granted to substitute a different individual as the representative plaintiff. I am of the view that this is an appropriate request, and I would accordingly grant leave to amend the statement of claim to substitute a different individual to serve as the representative plaintiff or, in the alternative, to redefine the class description in a way that would include Mr. Jost.

(e) The Form of the Federal Court's Order

[112] There are further errors on the part of the Federal Court, which relate to the content of its certification order.

[113] Rule 334.17(1) of the *Federal Courts Rules* states that an order certifying a proceeding as a class proceeding shall include six items. That is, the certification order shall:

(i) describe the class;

(ii) state the name of the representative plaintiff or applicant;

(iii) state the nature of the claims made on behalf of the class;

(iv) state the relief claimed by or from the class;

(v) set out the common questions of law or fact for the class; and

(vi) specify the time and manner for class members to opt out of the class proceeding.

[114] The Federal Court's order in this case states in its entirety that:

> The motion for certification is granted for the following class:
>
> > All members of the Canadian Reserve Forces – Reserve Force Pension Plan – who were entitled upon release to an Immediate Annuity, Transfer Value, Annual Allowance or Bridge Benefit between March 1, 2007 and present.

[115] Thus while the Federal Court described the class in its certification order as required by Rule 334.17(1)(*a*), it erred in failing to comply with the requirements of Rule 334.17(1)(*b*) through (*f*).

IX. Conclusion

[116] For these reasons, I would allow the appeal and set aside the Federal Court's November 4, 2019 certification order. I would grant leave to Mr. Jost to serve and file an amended statement of claim within 30 days of the date of this judgment. The certification motion should then be brought back on before the case management judge for redetermination.

X. Costs

[117] The Attorney General seeks his costs of this appeal in his memorandum of fact and law. There is no requests for costs in Mr. Jost's memorandum.

[118] I note that Rule 334.39(1) of the *Federal Courts Rules* provides that "no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a

class proceeding or to an appeal arising from a class proceeding", unless certain exceptions apply. These include cases where the conduct of a party "unnecessarily lengthened the duration of the proceeding", where "any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution", and where there are "exceptional circumstances [that] make it unjust to deprive the successful party of costs".

[119] The issue of costs was not addressed at the hearing of the appeal. If the Attorney General remains of the view that an award of costs in his favour is appropriate in this case, he shall have 10 days from the date of this judgment in which to provide submissions in writing that are not to exceed 5 pages in length. The respondent shall have a further 10 days in which to respond with submissions in writing that are again not to exceed 5 pages in length, and the Attorney General shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Judith Woods J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-427-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. DOUGLAS JOST
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	NOVEMBER 9, 2020
REASONS FOR JUDGMENT BY:	MACTAVISH J.A.
CONCURRED IN BY:	WEBB J.A. WOODS J.A.
DATED:	DECEMBER 10, 2020

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