Federal Court  Cour fédérale

Date: 20230628

Docket: T-1415-21

Citation: 2023 FC 900

Ottawa, Ontario, June 28, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ROBERT MARCUS HIRSCHFIELD

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff, Robert Marcus Hirschfield, brings this motion seeking an order to certify this action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"). The action relates to the Defendant's alleged improper administration, operation and management of pension benefits under the *Pension Act*, RSC, 1985, c P-6 (the "Act") owed to members and former members of the Canadian Armed Forces

("CAF") and the Royal Canadian Mounted Police ("RCMP") and their spouses, common law partners, dependants, survivors and orphans.

II. Background

A. *The Parties*

[2] The Plaintiff, Robert Marcus Hirschfield, is a resident of Saskatchewan. Mr. Hirschfield served the RCMP as a Constable for nine years before he was injured in a motor vehicle accident while on duty on February 14, 2013.

[3] The Minister of Veterans Affairs administers the relevant portions of the Act. The Defendant, His Majesty the King, is named in right of the Government of Canada and the Minister ("Canada"), pursuant to the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 (see also the Practice Direction issued by the Chief Justice on September 9, 2022: *Practice Direction – Designation* "*His Majesty the King*"*, September 9, 2022*).

B. *The Disability Pension Scheme*

[4] Veterans Affairs Canada ("VAC") is the government department that administers disability pensions under the Act. Statutory pension is available to members and veterans of the CAF and their survivors and dependants who submitted disability benefit applications on or before April 1, 2006 or who submitted a disability pension application after April 1, 2006 but who are nevertheless entitled under the terms of section 3.1 of the Act. The pension benefits are

also available to members and veterans of the RCMP as well as their survivors and dependents through operation of the Act, in conjunction with the *Royal Canadian Mounted Police Superannuation Act*, RSC, 1985, c R-11, the *Royal Canadian Mounted Police Pension Continuation Act*, RSC 1970, c R-10 and a memorandum of understanding between the RCMP and VAC.

[5] Section 2 of the Act recognizes Canada's obligation to provide for members of the CAF who have been disabled or died while serving Canada and states that provisions of the Act are to be liberally construed to fulfil this obligation.

[6] Section 35 of the Act provides that disability pension amounts are calculated commensurate with the extent of the disability. Subsection 35(4) states no deduction may be made to a disability pension because a pensioner "undertook work or perfected themself in some form of industry".

[7] Sections 25 and 26 of the Act operate to reduce pension benefits owed to pensioners; there are two types of monthly statutory pensions that can be reduced: a disability pension and a pension for death. The disability benefits are owed to the living, eligible members of the CAF and RCMP whereas the death benefits is payable to eligible survivors and dependents. Deductions to both benefits (collectively the "Disability Benefits") are at issue in this case.

[8] Sections 25 and 26 of the Act operate to prevent double recovery when a pension recipient collects payment from a third party in respect of the same death or disability for which the pension benefits are payable.

[9] Section 25 of the Act directs the Minister to reduce a recipient's Disability Benefits if that recipient has received compensation "in respect of the same death or disability for which the pension is payable". Paragraphs 25(a) and (b) set out the different mediums of compensation that operate to reduce the Disability Benefits; paragraph 25(a) includes "an amount arising from a legal liability to pay damages" and paragraph 25(b) includes compensation that "is payable to or in respect of the pensioner" under legislation, such as provincial workers' compensation statutes:

25 The Minister shall reduce a pension by a monthly amount determined under section 26 if, in respect of the same death or same disability for which the pension is payable,	**25** Le ministre soustrait de la pension le montant mensuel calculé conformément à l'article 26 si, s'agissant du même décès ou de la même invalidité, selon le cas :
(a) an amount arising from a legal liability to pay damages is collected by or in respect of the pensioner; or	**a)** une somme découlant d'une obligation légale de payer des dommages-intérêts est recouvrée par le pensionné ou à son égard;
(b) compensation is payable to or in respect of the pensioner under	**b)** une indemnité est payable à celui-ci ou à son égard au titre:
(i) the Merchant Seamen Compensation Act,	**(i)** de la Loi sur l'indemnisation des marins marchands,
(ii) the Government Employees Compensation Act,	**(ii)** de la Loi sur l'indemnisation des agents de l'État,
(iii) any provincial workers' compensation legislation,	**(iii)** de toute loi provinciale d'indemnisation des
(iv) a compensation plan	

established by any other legislation of a similar nature, whether legislation of Canada, a province or another jurisdiction, other than

(A) a compensation plan to which the pensioner has contributed, or

(B) a compensation plan that provides a payment or payments that are in substance a continuation of the pay or benefits of a member of the forces, or

(v) a compensation plan of a similar nature established by the United Nations or by or under an international agreement to which Canada is a party, other than

(A) a compensation plan to which the pensioner has contributed, or

(B) a compensation plan that provides a payment or payments that are in substance a continuation of the pay or benefits of a member of the forces.

travailleurs,

(iv) d'un programme d'indemnisation établi au titre de toute autre loi — au Canada ou ailleurs — de même nature, exception faite du programme auquel le pensionné a contribué ou qui prévoit tout paiement équivalant en réalité au maintien d'un traitement ou des avantages d'un membre des forces,

(v) de tout programme d'indemnisation semblable établi par les Nations Unies ou en vertu d'une entente internationale à laquelle le Canada est partie, exception faite du programme auquel le pensionné a contribué ou qui prévoit tout paiement équivalant en réalité au maintien d'un traitement ou des avantages d'un membre des forces.

[10] Section 26 of the Act sets out the methodology under which an amount is deducted from the Disability Benefits. Subsection 26(1) defines the compensation referred to in paragraphs 25(a) and 25(b), less taxes, as the "compensatory amount":

compensatory amount means the amount remaining, after subtracting any taxes, of the

montant compensatoire Le solde — net de tout impôt — du montant visé à l'alinéa 25a)

amount collected referred to in paragraph 25(a) or of the compensation payable referred to in paragraph 25(b). (*montant compensatoire*)	ou de l'indemnité visée à l'alinéa 25b). (*compensatory amount*)

[11] A "compensatory amount" that is not paid monthly – that is, it is either paid in lump sum or in non-monthly instalments – is further converted into a "monthly value":

monthly value means (a) in respect of a compensatory amount that is payable in a lump sum, the monthly amount that, in the Minister's opinion, would result from converting that lump sum to a life annuity payable monthly; or (b) in respect of a compensatory amount that is payable in instalments other than monthly instalments, the monthly amount that would result from converting those instalments to monthly instalments. (*valeur mensuelle*)	***valeur mensuelle*** L'équivalent mensuel d'un montant compensatoire découlant, selon le ministre, de la conversion d'une somme forfaitaire en une rente viagère payable mensuellement ou découlant de la conversion de versements en versements mensuels. (*monthly value*)

[12] Subsections 26(2) and 26(3) of the Act provide differing mechanisms for deducting the "monthly value" of the "compensatory amount" from a pension depending on the source of compensation:

26… **(2)** Except as provided by subsection (3), the amount by	**26…** **(2)** La réduction visée à l'article 25 équivaut à la

which the pension shall be reduced for the purpose of section 25 is the lesser of **(a)** the pension, and **(b)** one half of the monthly value of the compensatory amount. **(3)** If the compensatory amount is an amount referred to in paragraph 25(a) collected from Her Majesty in right of Canada, or is compensation referred to in subparagraph 25(b)(v), the amount by which the pension shall be reduced for the purpose of section 25 is the lesser of **(a)** the pension, and **(b)** the monthly value of the compensatory amount.	pension ou, si elle est moindre, la moitié de la valeur mensuelle du montant compensatoire. **(3)** Toutefois, elle équivaut à la pension ou, si elle est moindre, à la valeur mensuelle du montant compensatoire si celui-ci est une somme visée à l'alinéa 25a) et reçue de Sa Majesté du chef du Canada ou l'indemnité visée au sous-alinéa 25b)(v).

[13] Subsections 26(4) and 26(5) of the Act provide for recalculation and, if applicable, the generation of an overpayment amount when the pension amount or the monthly value of the compensatory amount changes.

C. *The Claim*

[14] The Plaintiff commenced this proposed class proceeding by Statement of Claim filed on September 16, 2021. The Plaintiff alleges that Canada has failed to reasonably operate, administer and manage the above-described Disability Benefits scheme under the Act.

[15] Specifically, the Plaintiff takes issue with the manner in which Canada has administered pension benefits where a "compensatory amount" is calculated when a pensioner receives compensation covered by section 25 of the Act. That compensation may consist of either pecuniary or non-pecuniary amounts or both. Pecuniary amounts are amounts that compensate for monetary loss that a plaintiff has suffered or will suffer whereas non-pecuniary amounts compensate for unquantifiable loss, such as pain and suffering and the loss of amenities and expectations of life (*Arnold v Teno*, [1978] 2 SCR 287 at 332).

[16] The Plaintiff argues that the relevant law establishes that the Disability Benefits are non-pecuniary in nature and, therefore, in order to prevent double recovery, only non-pecuniary awards may be deducted from them. However, according to the Plaintiff, VAC has an ongoing practice of improperly deducting both pecuniary and non-pecuniary amounts.

[17] In support of this argument, the Plaintiff relies on this Court's decision in *Manuge v Canada*, 2012 FC 499 [*Manuge*]. The dispute in *Manuge* related to the interaction between the Disability Benefits and a provision of the Canadian Forces Service Income Security Insurance Plan ("SISIP") Policy. The central issue was whether the Disability Benefits were "monthly income benefits" as that phrase was used under the SISIP Policy. The Court held that they were not:

> [27] … [the Disability Benefits are] not intended to be a form of income replacement. Instead, it is designed to compensate for the loss of amenities of life and for the personal limitations and sacrifices that arise from disabling injuries.
>
> …

> [38] … They are not an indemnity for lost income. Rather, they represent compensation for impairments to the activities in daily living including loss of function and for reductions in the quality of life.
>
> (*Manuge* at paras 27, 38)

[18] Subsequent cases from Veterans Review and Appeal Board Canada ("VRAB") have adopted the reasoning from *Manuge* and applied it in the context of section 25 and 26 deductions to the Disability Benefits (see for instance, *100003426951 (Re)*, 2018 CanLII 50584 (CA VRAB); *100003948363 (Re)*, 2019 CanLII 140745 (CA VRAB); *100004381267 (Re)*, 2021 CanLII 140588 (CA VRAB)). In these cases, and others like them, the VRAB has not included pecuniary amounts when calculating the "compensatory amount" under section 26 of the Act.

[19] At the operational level, however, VAC has continued to deduct pecuniary amounts from the Disability Benefits.

[20] The Plaintiff claims that Canada's conduct, and the conduct of its servants in the operation and administration of benefits under the Act, constitutes systemic negligence, breach of fiduciary duty, and unjust enrichment.

[21] The Plaintiff moves to certify this action as a class proceeding. The Plaintiff proposes the following class:

> All members and former members of the Canadian Armed Forces and the Royal Canadian Mounted Police, and their spouses, common law partners, dependants, survivors, and orphans who, at any time between May 14, 1953 and the present, received a pension under the *Pension Act* where that pension:

a. was reduced by a monthly amount pursuant to sections 25 and 26 of the *Pension Act* or their predecessor provisions; and

b. in calculating that reduction under subsection 26(2) or 26(3) of the *Pension Act* or their predecessor provisions, the Minister of Veterans Affairs (or their predecessor) included in the "compensatory amount" amounts collected by or in respect of the pensioner for Economic Compensation in respect of the same death or same disability for which the pension is payable.

"Economic Compensation" excludes non-pecuniary damages.

[Collectively the "Class Members" or the "Class"]

[22] Just prior to the hearing date for this motion, on May 10, 2023, the Plaintiff submitted an Amended Notice of Motion and Amended Statement of Claim. The amendments mostly consisted of routine clarifications with which the Defendant takes no issue. However, the Plaintiff also proposed an amendment to modify the above class definition to include estate claims dating back to 1953. The Defendant objected to this amendment on the basis that it was prejudicial and legally and procedurally improper. The Defendant suggested that if the Plaintiff wished to make this amendment, he might attempt to do so by bringing a motion at a later date when the Defendant will have a full and fair opportunity to respond.

[23] On May 12, 2023, I issued a direction that the Court is not prepared to accept the Plaintiff's proposed amendments to the class definition to include eligible estates at this late date on the eve of the hearing, given the prejudice to the Defendant and uncertainty in the record.

[24] This hearing will proceed based on the Plaintiff's original proposed class definition (as reproduced above).

III. Issue

[25] The sole issue is whether this proceeding should be certified as a class proceeding pursuant to Rule 334.16(1) of the Rules.

IV. Analysis

[26] In order to be certified as a class proceeding, a proceeding must meet each of the requirements of Rule 334.16(1) of the Rules:

A. the pleadings disclose a reasonable cause of action;

B. there is an identifiable class of more than one person;

C. the claims raise common questions of fact and law;

D. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions; and

E. there is an appropriate representative plaintiff.

[27] The Plaintiff must provide "some basis in fact" for each requirement other than the requirement that the pleadings disclose a cause of action (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 99 [*Pro-Sys*]). This stage is concerned with form and whether

the action can proceed as a class action (*Hollick v Toronto (City)*, 2001 SCC 68 at para 16 [*Hollick*]).

A. *Reasonable Cause of Action*

[28] A plaintiff's burden to show that the pleadings disclose a reasonable cause of action is relatively light. A plaintiff satisfies this element of the test if, assuming all pleaded facts to be true, the claim is not plain and obvious to fail (*Pro-Sys* at para 63).

[29] The Court is not obliged to accept as true a plaintiff's misstatements of law or mere speculation (*Berenguer v SATA Internacional – Azores Airlines, S.A.*, 2021 FC 394 at para 13; *Canada (Attorney General) v Scow*, 2022 BCCA 275 at para 78).

[30] However, given the relatively low burden at this stage and recognizing that the law is not static, certification is not to be refused on the basis that the Plaintiff advances a novel legal argument provided that it is at least an arguable position (*Canada* (*Attorney General) v Nasogaluak*, 2023 FCA 61 at para 19 [*Nasogaluak*]).

[31] The Plaintiff pleads three causes of action: systemic negligence, breach of fiduciary duty and unjust enrichment.

[32] The Defendant disputes each of these claims individually, and generally takes issue with the Plaintiff's characterization of the pension reduction scheme at the centre of this case and underlying each claim.

[33] According to the Defendant, there is no requirement that VAC offset only non-pecuniary damages from the Disability Benefits. The Defendant points to the Supreme Court of Canada's holding in *Gurniak v Nordquist,* 2003 SCC 59 [*Gurniak*], which rejected an implicit statutory "matching" requirement that compensation received under a head of damage in tort be "matched" against a particular claim for damages under a statutory scheme. Further, the Defendant notes that *Manuge,* on which the Plaintiff relies, was decided in a different contractual context and argues that it is irrelevant to the present case. The Defendant submits that the VRAB cases relying on the "matching" principle to deduct only non-pecuniary losses from sections 25 and 26 of the Act are incorrectly decided and the Plaintiff's reliance on them is misplaced.

[34] I disagree with the Defendant; while the Supreme Court in *Gurniak* held that there is no requirement to match heads of damages received in tort or other compensation to the particular nature of statutory compensation under the British Columbia legislation at issue, that is not dispositive of this case. The Plaintiff must be permitted to advance a novel and arguable claim with respect to the statutory scheme under the Act at play here. Each statute must be assessed in line with its distinct text, context and purpose. The text, context and purpose of the Act may well differ from the legislation at play in *Gurniak*.

[35] The central issue in *Gurniak* was whether a provision of the then British Columbia *Insurance (Motor Vehicle) Act*, RSBC 1996, c 231 (the "BC Insurance Act") adopted a matching mechanism. The provision read as follows:

> 25(1) In this section and in section 26, "benefits" means a payment that is or may be made <u>in respect of bodily injury or death under a plan established under this Act</u>, other than a payment pursuant to a contract of third party liability insurance or an obligation under a

> plan of third party liability insurance, and includes accident insurance benefits similar to those described in Part 6 of the Insurance Act that are provided under a contract or plan of automobile insurance wherever issued or in effect.
>
> (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the claim, is deemed to have released the claim to the extent of the benefits.
>
> [Emphasis Added]

[36] In holding that there was no "matching" requirement, the Supreme Court of Canada expressly overturned two cases from the British Columbia Court of Appeal: *Jang v Jang*, 1991 CanLII 2015 (BCCA) [*Jang*] and *Dhanwant v Buksh*, 1997 CanLII 3403 (BCCA) [*Buksh*].

[37] *Jang* and *Buksh* adopted "matching" requirements similar to what the Plaintiff advances here. In *Jang*, the British Columbia Court of Appeal held that there was no obligation to deduct homemaker disability benefits received by Ms. Jang from her tort award for non-pecuniary losses. In *Buksh*, there was no match between death benefits received pursuant to regulations and a tort damages award.

[38] In overturning *Jang* and *Buksh*, the Supreme Court made the following remarks:

> [46] ... Importing a "matching" requirement into s. 25(2), beyond the matching required in the analysis of similarity, would risk undermining the legislature's intent to prevent double recovery in a manner that is simple, expedient and, on the whole, effective.
>
> (*Gurniak* at para 46)

[39] The Supreme Court expressly rejected the notion of imparting a "judicial gloss" or engaging in a "contrived reading" of the legislation (*Gurniak* at paras 36, 44).

[40] The decision in *Gurniak* ultimately must be viewed in light of the specific statutory scheme in issue. It remains reasonably arguable that the Supreme Court's holding in *Gurniak*, with respect to section 25 of the BC Insurance Act, does not apply with equal force to the benefits offset in section 25 of the Act, given its unique text, context and purpose. As discussed further below, the factual allegations of systemic negligence and breach of fiduciary duty in the failure to have in place reasonable and effective management and operational procedures are not doomed to fail as being plainly and obviously without merit. As well, the allegations of unjust enrichment are not plainly and obviously without merit.

[41] Furthermore, there is this Court's decision in *Manuge*. In *Manuge*, the Court was tasked with interpreting provisions of the SISIP Policy, which provided compensation offset by "monthly income benefits". This Court found that the Disability Benefits were not "monthly income benefits" for purposes of that insurance contract. In so finding, the Court found that the Disability Benefits are non-pecuniary in nature.

[42] While the holding in *Manuge* that the Disability Benefits are non-pecuniary does not necessarily lead to the conclusion that the provisions of the Act at play here introduce an implied matching requirement between pecuniary and non-pecuniary damages, it does in *some* capacity support the Plaintiff's argument. Indeed, the VRAB has interpreted *Manuge* as standing for the very position advanced by the Plaintiff and has administered the Disability Benefits accordingly,

only to then have the VAC adopt a contradictory position and, in some cases, ask for the repayment of overpaid funds.

[43] Consequently, I find that it is not plain and obvious that the Plaintiff's actions will fail because of *Gurniak.*

(1) Systemic Negligence

[44] The Plaintiff pleads for a claim in systemic negligence. The required elements for a negligence claim are:

A. a duty of care owed by the defendant to the plaintiff;

B. a breach by the defendant of the standard of care; and

C. damages caused, in fact and law, by the defendant's breach

(*Cooper v Hobart*, 2001 SCC 79 at paras 32-34, 38-39 adopting and refining the test from *Anns v Merton London Borough Council*, [1978] AC 728 (UK HL)).

[45] At the certification stage, it is the plaintiff's burden to plead material facts with respect to each element and establish that it is not plain and obvious that the claim will fail.

[46] The Defendant argues that the Plaintiff has not pleaded for a claim of negligence at all; instead, the Plaintiff's claim is for breach of statute, which is not a cause of action (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62).

[47] I do not agree with this characterization of the Plaintiff's claim. The Plaintiff has pleaded more than just breach of statute. Once a decision to act has been made, the government may be liable in negligence for the manner in which it implements that decision (see *Holland v Saskatchewan*, 2008 SCC 42 at para 14, citing from *Wellbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957 at 970). The Plaintiff has pleaded the following facts at paragraph 69 of his Statement of Claim:

A. the Defendant's continued reduction of the Plaintiffs and other Class Members' monthly disability and death pension benefits to offset pecuniary damages which recklessly, negligently, carelessly, or willfully disregarded the Defendant's own knowledge that such reductions were improper;

B. the Defendant's failure to reimburse the Plaintiff and other Class Members for its improper reduction of their monthly disability pension benefits;

C. the Defendant's failure to properly train, manage, and oversee its staff, such that the Plaintiff and other Class Members were subjected to changing, inconsistent, contradictory and ultimately incorrect reductions to their pension benefits by agents and servants of the Defendant;

D. the Defendant’s improper assignment, charge, attachment, anticipation, commutation, or security pledge of the pension benefits of the Plaintiff and other Class Members by including pecuniary damages in the reduction of their disability pension payments;

E. the Defendant’s implementation of the [Act] in a manner that failed to fulfill the obligation of the people and the Government of Canada to provide fulsome compensation to members and former members of the forces who have been disabled or have died as a result of military service and to their dependants;

F. the Defendant’s willful concealment of its wrongful and illegal conduct from the Plaintiff and other Class Members who were physically and mentally disabled and in reliance on the Defendant to act in their best interests as beneficiaries when implementing a complex statutory scheme; and

G. the Defendant's aggressive approach to reducing pension benefits to offset pecuniary damages.

[48] The pleadings amount to more than just claims of breach of statute; rather, the Plaintiff has alleged negligence in the manner in which the Defendant has implemented, administered and operated the disability pension scheme, not solely on the basis that the Defendant has breached the relevant provisions of the Act.

[49] The Plaintiff’s systemic negligence claim is not plain and obvious to fail.

(2) Breach of Fiduciary Duty

[50] To establish an *ad hoc* fiduciary duty, the Plaintiff must show:

A. the alleged fiduciary has undertaken to act in the best interests of the alleged beneficiaries;

B. a defined class of persons vulnerable to a fiduciary's control; and

C. a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected.

(*Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36 [*Elder Advocates*])

[51] An elevated standard is necessary when it is alleged that the Crown is a fiduciary, in light of the Crown's duty to act in the best interests of society as a whole (*Elder Advocates* at para 44). If a Crown undertaking is alleged to flow from a statute, the legislation must clearly support this (*Elder Advocates* at para 45).

[52] Nonetheless, the Federal Court of Appeal held in *Canada (Attorney General) v Jost*, 2020 FCA 212 [*Jost*] that a plaintiff's claim for breach of fiduciary duty was not plain and obvious to fail. The Court of Appeal commented at paragraph 40:

> [40] The Supreme Court reiterated in [*Professional Institute of the Public Service of Canada v Canada (AG)*, 2012 SCC 71] 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.

[53] The Defendant argues that it is plain and obvious that there is no fiduciary duty owed by Canada to the Class Members and distinguishes the holding in *Jost*, because in *Jost* the pensioners had financially contributed to the pension plan and acquired vested rights.

[54] While the nature of the Disability Benefits pension may be different from that in *Jost*, it is not plain and obvious that there is no fiduciary duty owed by the Defendant to the proposed Class Members. The Plaintiff has pleaded that the Defendant has undertaken to act in the best interests of the proposed Class Members through the implementation and administration of the Act. Moreover, the Plaintiff has pleaded to the vulnerability of the proposed Class Members - many of whom potentially suffer from debilitating physical and mental disabilities - to the Defendant's administration of the Act.

[55] As well, the Federal Court of Appeal's observations in *Jost* that case law arguably supports a fiduciary duty owed by Canada to disabled military veterans when administering pension funds are equally applicable here:

> [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), 2002 CanLII 23598 (ON CA), 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.
>
> (*Jost* at para 43)

[56] The Plaintiff has pleaded sufficient material facts to support the claim that a breach of such a duty occurred. If the Plaintiff is correct that the Defendant could not deduct pecuniary income from the Disability Benefits, it follows that there may be a breach of fiduciary duty. Paragraph 82 of the Plaintiff's Statement of Claim makes precisely the same factual allegations as paragraph 69 does with respect to the claim for systemic negligence. These allegations go beyond a mere claim for breach of statute and allege a breach in fiduciary duty owing to Canada's improper operation and administration of the Act.

[57] Thus, the claim for breach of fiduciary duty is not plain and obvious to fail.

(3) Unjust Enrichment

[58] The elements for a claim of unjust enrichment are:

A. an enrichment of or benefit to the defendant;

B. a corresponding deprivation of the plaintiff; and

C. the absence of juristic reason for the enrichment.

(*Kerr v Baranow*, 2011 SCC 10 at para 32)

[59] The Supreme Court has articulated a "straightforward economic approach" with respect to the first two elements (*Garland v Consumers' Gas Co*, 2004 SCC 25 at paras 31-37 [*Garland*], citing from *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762). Where funds transferred from a plaintiff to a defendant or where the defendant withholds amounts owing, these elements will be satisfied.

[60] The Plaintiff has pleaded sufficient facts to disclose a reasonable cause of action for the first two elements of unjust enrichment. The Plaintiff has alleged that Canada was enriched by spending less on the provision of Disability Benefits to Class Members than it would have spent if it did not deduct pecuniary compensation from the Disability Benefits. Furthermore, the Plaintiff has also alleged that the Defendant has, in at least some cases, wrongly attempted to recoup overpaid funds from the proposed Class Members. This is enough to establish that it is not plain and obvious that the pleadings fail to disclose an enrichment to the Defendant and a corresponding deprivation to the Plaintiff (see also *Manuge v Canada*, 2008 FC 624 at paras 39-42).

[61] Moreover, there is precedent for certification of a claim for unjust enrichment in this context. In an action similar to the one presented here, a claim for unjust enrichment was

certified by Justice Kane in *Manuge v Canada*, Court File T-119-19, unreported Order dated December 23, 2020 [*Manuge 2020*]. That case similarly concerned the improper administration of benefits under the Act, alleging miscalculated benefit adjustment rates resulting in underpayments to class members by operation of section 75 of the Act. While *Manuge 2020* was certified on consent, the Court was still required to be satisfied that the requirements of Rule 334.16(1) of the Rules were met prior to granting certification (*Varley v Canada (Attorney General)*, 2021 FC 589 at para 4).

[62] Likewise, the Plaintiff's pleadings meet the third element of the test. It is not plain and obvious that there is a juristic reason for the enrichment. The operation of a statutory provision would provide such a reason (*Gladstone v Canada (Attorney General)*, 2005 SCC 21 at para 18, citing from *Garland* at paras 44-46). However, there is no general exception that the government is exempt from a claim of unjust enrichment (*Elder Advocates* at paras 83-96). It remains unclear at this preliminary stage as to what the proper interpretation of the relevant provisions of the Act is, and whether these provisions operate to provide a juristic reason for the enrichment.

B. *Identifiable Class*

[63] The Defendant opposes the proposed Class definition only so far as to request that the modifier "living" be added to the proposed Class to expressly exclude potential deceased Class Members. The Defendant argues that deceased individuals lack the right to sue and should, therefore be excluded from the Class definition (*Raiz v Vaserbakh*, 1986 CarswellOnt 603 at para 3, [1986] O.J. No. 1920 (Civ Dist Ct); *Tacan v Canada*, 2001 FCT 574 at paras 14-16).

[64] I find it unnecessary to conclude on this issue at this stage. As mentioned above, the Plaintiff's proposed amendments including eligible estates dating back until 1953 are contested by the Defendant. The Defendant has proposed that the Plaintiff can bring a motion to amend the class certification at a later date. This motion is to proceed without the amendment to include these estates.

[65] The current proposed Class does not include estates dating back to 1953, but otherwise meets the requirements of Rule 334.16(1) of the Rules.

C. *Common Questions of Fact and Law*

[66] The Plaintiff proposes the following common questions of fact and law, which have generally been agreed to by the Defendant if the proceeding is to be certified:

A. Did the Defendant, as the sponsor and administrator of the *Pension Act*, owe a duty of care to the Class when calculating the reduction of pensions by a monthly amount pursuant to sections 25 and 26 of the *Pension Act* and their predecessor provisions?

B. If the Defendant owed the Class a duty of care, did the Defendant breach the requisite standard of care?

C. If the Defendant breached the standard of care, did the Class suffer damages as a result?

D. Did the Defendant, as the sponsor and administrator of the *Pension Act*, owe a fiduciary duty to the Class when calculating the reduction of pensions by a monthly amount pursuant to sections 25 and 26 of the *Pension Act* and their predecessor provisions?

E. If the Defendant owed a fiduciary duty to the Class, did the Defendant breach its fiduciary duty?

F. Was the Defendant enriched by including – in the "compensatory amount" used to calculate the reduction of the pension amounts payable to Class Members under sections 25 and 26 of the *Pension Act* and their predecessor provisions – amounts they collected for pecuniary damages or losses from a legal liability to pay damages in respect of the same death or same disability for which the pension was payable, or for compensation payable under paragraph 25(b) of the *Pension Act*?

G. If the Defendant was enriched, did the Class suffer a corresponding deprivation?

H. If the Defendant was enriched and the Class suffered a corresponding deprivation, was there a juristic reason for this enrichment and corresponding deprivation?

I. Should the Defendant be required to pay restitution to the Class?

J. Is the Class entitled to an award for interest?

K. Does the conduct of the Defendant merit an award of punitive damages and, if so, in what amount?

[67] The proposed common questions relate to the pleaded causes of action in systemic negligence, breach of fiduciary duty and unjust enrichment, and the nature or quantum of the remedies that would flow from a breach thereof.

[68] The common questions in this case rise and fall with their respective causes of action. Having found the causes of action are not plain and obvious to fail, I find the Plaintiff's common questions are appropriate for certification.

D. *Preferable Procedure*

[69] Rule 334.16(2) of the Rules provides a non-exhaustive list of factors that must be considered in determining whether a class proceeding is preferable.

[70] In addition, the Plaintiff bears the burden to show there is some basis in fact that:

A. a class proceeding would be a fair, efficient and manageable method of advancing the claim; and

B. it would be preferable to any other reasonably available means of resolving the class members' claims.

(*AIC Limited v Fischer*, 2013 SCC 69 at para 48 [*AIC*])

[71] The Defendant argues that there is a reasonably available and preferable alternative in this case. The Defendant points to the VRAB as a suitable alternative that provides access to justice and promotes judicial economy. In addition, the Defendant points to the potential for double recovery. The proposed Class Members could theoretically succeed before this Court on a claim for systemic negligence or breach of fiduciary duty. However, because restitution is unavailable as a remedy in such cases, the Class Members could still seek compensation for amounts owing under the Act from the VRAB.

[72] I disagree with the Defendant. The Plaintiff has established some basis in fact that a class proceeding is preferable in terms of judicial economy and access to justice.

[73] The Defendant has advanced conflicting arguments in respect of the VRAB, which help illustrate why a class proceeding is preferred in this case, particularly to advance access to justice. First, despite suggesting the VRAB as a preferable venue for resolving the claims, the Defendant has also argued that the VRAB has routinely decided claims incorrectly, based on overruled case law. If, as the Defendant suggests, the VRAB is issuing erroneous rulings relying on defunct jurisprudence, it can hardly serve as a venue that promotes access to justice.

[74] Second, the Defendant's argument with respect to "double recovery" illustrates how the Plaintiff's claims – at least those in systemic negligence and breach of fiduciary duty – differ from the claims he would be able to advance before the VRAB. While it is true that an

alternative process need not address the Plaintiff's precise legal claim or provide identical remedies, the process ought nonetheless to resolve the Plaintiff's claims effectively (*AIC* at para 19; see also *Hollick* at para 33 and *Rumley v British Columbia*, 2001 SCC 69 at para 38). The alleged conduct for which the Plaintiff seeks compensation in the present case differs materially from the conduct for which the Plaintiff could receive compensation before the VRAB.

[75] For these reasons, the VRAB is not an adequate alternative. I am satisfied that a class proceeding is the preferable procedure.

E. *Representative Plaintiff*

[76] Rule 334.16(1)(e) of the Rules specifies the characteristics of a plaintiff suitable to serve as a representative plaintiff:

…	…
(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui:
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce

fact, an interest that is in conflict with the interests of other class members, and	qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[77] I find Mr. Hirschfield an appropriate representative plaintiff.

[78] On May 31, 2015, in light of the injuries he suffered in the February 2013 car accident, Mr. Hirschfield was granted a monthly Disability Benefits pension for $865.69 and received a $15,775 lump sum payment for Disability Benefits owed to him in arrears. At the time, Mr. Hirschfield was pursuing a civil claim stemming from the collision.

[79] On December 28, 2017, Mr. Hirschfield settled the claim for a total of $750,000, broken down as follows:

A. $201,000 for loss of housekeeping and cost of care;

B. $7,000 for special damages for past expenses personally incurred for travel;

C. $184,000 for general damages for pain and suffering;

D. $358,000 for loss of earning capacity; and

E. $41,000 in costs and disbursements.

[80] On April 19, 2018, VAC advised Mr. Hirschfield that it would be reducing his Disability Benefits based on this settlement. In calculating the Section 26 “monthly value” of Mr. Hirschfield’s settlement amount, VAC assessed a “compensatory amount” of $542,000; this amount consists of the amount awarded for general damages for pain and suffering and the amount for loss of earning capacity. As the amount for loss of earning capacity is a pecuniary amount, under the Plaintiff’s view, this amount was improperly included when calculating a compensatory amount. The VAC further informed Mr. Hirschfield that it had overpaid him by $43,743.80 for the period of February 22, 2013 to April 30, 2018.

[81] Mr. Hirschfield is a member of the proposed Class and, in light of his factual situation, he is well situated to represent fairly and adequately the interests of the Class Members. There is no indication that his interests would run contrary to those of the Class Members with respect to any of the proposed common questions.

[82] Additionally, I am satisfied Mr. Hirschfield understands his responsibilities as the representative Plaintiff and that counsel has submitted a satisfactory litigation plan, which may be amended as required over the course of these proceedings.

V. Conclusion

[83] The motion to certify is granted.

JUDGMENT in T-1415-21

THIS COURT'S JUDGMENT is that:

1. The motion to certify this proceeding as a class proceeding under Rule 334.16(1) of the Rules is granted.

2. Robert Marcus Hirschfield is appointed as the representative Plaintiff.

3. The Class is defined as follows:

   All members and former members of the Canadian Armed Forces and the Royal Canadian Mounted Police, and their spouses, common law partners, dependants, survivors, and orphans who, at any time between May 14, 1953 and the present, received a pension under the *Pension Act* where that pension:

   a. was reduced by a monthly amount pursuant to sections 25 and 26 of the *Pension Act* or their predecessor provisions; and

   b. in calculating that reduction under section 26(2) or 26(3) of the *Pension Act* or their predecessor provisions, the Minister of Veterans Affairs (or their predecessor) included in the "compensatory amount" amounts collected by or in respect of the pensioner for Economic Compensation in respect of the same death or same disability for which the pension is payable.

   "Economic Compensation" excludes non-pecuniary damages.

4. The nature of the claims made on behalf of the Class concern allegations that the Defendant breached its fiduciary duty to the Plaintiff and other Class Members, was systemically negligent and negligently implemented a statutory scheme, and was unjustly enriched.

5. The relief claimed by the Class is as follows:

   a. Declarations;

   b. Arrears of payments and other losses to the Plaintiff and other Class Members resulting from the Defendant's systemic negligence and breach of fiduciary duty;

   c. General damages;

d. Special damages;

e. Exemplary, aggravated and punitive damages

f. Restitution by the Defendant of its ill-gotten gains equivalent to the difference between the disability or death pension amounts owed to the Plaintiff and other Class Members under the Pension Act and the disability or death pension amounts received by them under the Pension Act, including restitution of any amounts paid to the Defendant by the Plaintiff and other Class Members for "reimbursement" of amounts allegedly owing by them to the Defendant;

g. Damages equal to the costs of administering notice and the plan of distribution;

h. Pre-judgment and post-judgment interest; and

i. Costs of this action.

6. The following common question of law or fact are certified:

a. Did the Defendant, as the sponsor and administrator of the Pension Act, owe a duty of care to the Class when calculating the reduction of pensions by a monthly amount pursuant to sections 25 and 26 of the Pension Act and their predecessor provisions?

b. If the Defendant owed the Class a duty of care, did the Defendant breach the requisite standard of care?

c. If the Defendant breached the standard of care, did the Class suffer damages as a result?

d. Did the Defendant, as the sponsor and administrator of the Pension Act, owe a fiduciary duty to the Class when calculating the reduction of pensions by a monthly amount pursuant to sections 25 and 26 of the Pension Act and their predecessor provisions?

e. If the Defendant owed a fiduciary duty to the Class, did the Defendant breach its fiduciary duty?

f. Was the Defendant enriched by including – in the "compensatory amount" used to calculate the reduction of the pension amounts payable to Class Members under sections 25 and 26 of the Pension Act and their predecessor provisions – amounts they collected for pecuniary damages or losses from a legal liability to pay damages in respect of the same death or same disability for which the pension was payable, or for compensation payable under paragraph 25(b) of the Pension Act?

g. If the Defendant was enriched, did the Class suffer a corresponding deprivation?

h. If the Defendant was enriched and the Class suffered a corresponding deprivation, was there a juristic reason for this enrichment and corresponding deprivation?

i. Should the Defendant be required to pay restitution to the Class?

j. Is the Class entitled to an award for interest?

k. Does the conduct of the Defendant merit an award of punitive damages and, if so, in what amount?

7. Murphy Battista LLP is appointed class counsel.

8. The time and manner for Class Members to opt out of this class proceeding will be determined by further Order of this Court.

9. No costs are payable for this motion for certification in accordance with Rule 334.39 of the Rules.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1415-21
STYLE OF CAUSE:	ROBERT MARCUS HIRSCHFIELD v HIS MAJESTY THE KING
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	MANSON J.
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APPEARANCES:

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