**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *MacLellan v. Canada (Attorney General)*, 2014 NSSC 280

**Date:** 2014-07-17
**Docket:** Hfx. No. 355119
**Registry:** Halifax

**Between:**

JOHN CYRIL MACLELLAN

Plaintiff/Respondent

v.

ATTORNEY GENERAL OF CANADA representing the Department of National Defence and LIEUTENANT COLONEL DAVID T. LEWIS

Defendants/Moving parties

-AND-

**Docket:** Hfx. No. 392048

**Between:**

JOHN CYRIL MACLELLAN

Plaintiff/Respondent

v.

HER MAJESTY, QUEEN ELIZABETH II, IN THE RIGHT OF THE DOMINION OF CANADA, CAPTAIN (N) DARREN GARNIER, COMMANDER GARRETT REDDY, MAJOR PATRICK KAVANAGH, MAJOR PREM RAWAL

Defendants/Moving Parties

**Judge:** The Honourable Justice Arthur J. LeBlanc

**Heard:** December 3, 10 and 11, 2013; January 8, 2014, in Halifax,

Nova Scotia

**Counsel:** M. Kathleen McManus and Susan R. Taylor for the Defendants/Moving Parties
Kevin A. MacDonald for the Plaintiff/Respondent

## INTRODUCTION

[1] This is a motion by the defendants in two related proceedings commenced by the same plaintiff, seeking orders setting aside the Amended Statements of Claim on the basis of summary judgment on the pleadings, declining jurisdiction due to the existence of alternative statutory mechanisms, or staying the proceedings pursuant to compensation legislation.

[2] The subject matter of the proceedings involves the plaintiff's allegations of various types of wrongdoing by superior officers in the Canadian Forces (specifically, the Cadet Instructor Cadre), allegedly leading to the loss of his position as second-in-command at the Regional Gliding School (Atlantic) and, eventually, to his release from the CF.

## THE PLEADINGS

### *The first action: Hfx No. 355119*

[3] In the first action (which I will abbreviate as Action 119), the named defendants are the Attorney General of Canada, representing the Department of National Defence, and Lt. Col. David T. Lewis.

[4] The plaintiff served in the Air Cadets in his youth. After leaving the Cadets at the age of 19, he was commissioned into the Armed Forces as a Reserve Cadet Instructor List Officer. The Reserve Cadet Instructor List was later re-named the Cadet Instructor Cadre (CIC). Between 1973 and 1985 he served during most summers as an instructor at the Air Cadet Gliding School, now known as the Regional Gliding School (Atlantic), located first in Greenwood, NS, then, since 1985, in Debert, NS (hereafter "the Gliding School"). Beginning in 1985, the plaintiff served full-time as Deputy Regional Cadet Air Operations Officer. In the summers he also served as Deputy Commanding Officer of the Gliding School.

[5] In the spring of 2007, the defendant Lt. Col. David T. Lewis became the plaintiff's commanding officer. The plaintiff alleges that in late 2009 Lt. Col. Lewis's "attitude and approach towards him changed noticeably for the worse." Meanwhile, he says, the terms of his renewable three-year contract were altered so that after two three-year terms, the position would be put out for competition. The plaintiff claims that it was an express or implied term of his employment contract that he would retain the position "if his job performance was acceptable." He says he expected that the terms of reference would remain "consistent with the existing requirements" and that, in view of his positive personnel evaluations, be would be the successful candidate. However, he says, Lewis had decided, "maliciously and

without … cause" to replace him with a younger officer who would be "beholden" to him, and enlisted others in a "discriminatory scheme" to bring this about.

[6] In order to advance this "nefarious plot," the claim continues, Lewis "knowingly made artificial changes" to the terms of reference for the position and misled the chain of command "as to the requirement for such changes…" He "unilaterally and without valid cause" changed the terms of reference, knowing that the result would be to exclude the plaintiff, and misled the chain of command by "falsely stating or implying that MacLellan had purposely let his qualifications lapse" and was therefore no longer qualified for the position.

[7] The plaintiff pleads that he became aware of the changes to the terms of reference when he saw the job posting in January 2010. The posting contained "a requirement that the applicant be a Tow Standards Pilot and Glider Instructor Standards Pilot," both qualifications that the plaintiff did not meet. By design, the plaintiff alleges, the position went to a younger officer, Captain Curtis Cooper, (who was 40 years of age when the plaintiff was 57). He alleges that Capt. Cooper expressed concern to Lt. Col. Lewis about being involved; Lt. Col. Lewis allegedly told him, "[i]n effect," that the plaintiff "was not doing a good job as 2IC [second-in-command] and … was always behind in his paperwork," all of which the plaintiff says was false and malicious. Despite being expressly informed by a

former commanding officer that the revisions to the terms of reference were not justified, Lt. Col. Lewis did not change them and Capt. (apparently now Major) Cooper was installed in the position.

[8] As such, the plaintiff pleads that he was denied the chance to compete to retain the 2IC position, leaving him without a job, as well as being denied possible promotion to major.

[9] The plaintiff obtained counsel, who wrote to Lt. Col. Lewis's commanding officer (CO), Cdr. Garrett L. Reddy, on 10 March 2010. In the letter, plaintiff's counsel asserted that the terms of reference had been "artificially" modified to exclude him from the position. Counsel added that the plaintiff was prepared to accept a suitable position or a buy-out, failing which, he would bring a human rights complaint and commence a civil action. According to the plaintiff, the outcome of this correspondence was an investigation whose findings were embodied in a briefing note by Cdr. Reddy, dated 23 March 2010. Cdr. Reddy wrote that, contrary to his previous understanding, the plaintiff met the qualifications, and that he had been not been treated "in a fair and equitable manner."

[10] The plaintiff was subsequently offered a three-year contract as Unit Flight Safety Officer (FSO). He accepted the position when the CO approached him directly, contrary to a request in the letter that communication be through his counsel. He says he felt pressured by the contract offer and accepted, without benefit of counsel and without considering various implications of accepting. He says he was never asked to sign a release of his claims.

[11] The plaintiff goes on to claim that subsequent "malicious and abusive" conduct by his superiors vitiated his employment agreement. He says the Crown and its agents breached "contractual duties of good faith and fair dealing" by failing to conduct negotiations through his counsel; he also claims that these discussions violated legal ethics rules.

[12] According to the statement of claim, while the plaintiff was Unit Flight Safety Officer, Lt. Col. Lewis retaliated against him by, among other things, making false accusations and inaccurate reports to the CO, and by attempting to isolate and undermine him professionally. This conduct, he alleges, culminated in a verbal assault at the Debert airfield on 24 July 2010, after the plaintiff had allegedly failed to arrange certain necessary permits for cadets to fly solo. The plaintiff says this was not part of his duty, but he did it as a courtesy, and that any issues had been resolved before Lt. Col. Lewis confronted him. Given that this

incident occurred in public on the airfield and was witnessed by pilots, the plaintiff was of the view that it was a flight safety incident. The plaintiff subsequently reported the incident to other officers, including the Executive Officer of the Regional Cadet Support Unit at Shearwater. The matter was not pursued, however, and Lt. Col. Lewis subsequently filed a disciplinary complaint which led to a charge of insubordination.

[13] The plaintiff says there was no jurisdiction for the Court Martial, and that the military prosecutor was party to what amounted to a "cover-up" of Lt. Col. Lewis's conduct. He also took the position that the Court Martial was an abuse of process. He says the alleged malice and misconduct by Lt. Col. Lewis was made known to the military lawyers and to the CO by his counsel, but that they "chose to ignore all of the evidence and Notice Letters and continued to support the abuser."

[14] Through counsel, the plaintiff subsequently notified counsel at the Department of Justice that "it was not appropriate for health and safety reasons that Captain MacLellan remain under the supervision of the abusive LCol Lewis." However, he states, rather than investigating, the CO reassigned him without justification, which he says constitutes defamation. The plaintiff was put off on medical leave and took a release from the Canadian Forces as of 16 August 2011.

[15] The plaintiff maintains that members of the Cadet Instructors Cadre (CIC) are subject to military law but "do not receive equal benefits, protection, pay, rank and other considerations accorded to Regular Military Members." He takes the position that the differential treatment of CIC members compared with other members of the armed forces is discriminatory by design, being intended to marginalize CIC officers so as to allow former CF members into positions that would otherwise be occupied by CIC personnel. He says the amendment of the terms of reference was an example of this discriminatory intent.

[16] The statement of claim in Action 119 makes general assertions of tort, malice, "inappropriate and illegal actions," conspiracy "to inflict economic and emotional harm," defamation, harassment, verbal assault, "laying a false and malicious disciplinary complaint," false arrest, arbitrary detention, false imprisonment, and "false charges being brought" against the plaintiff. He adds that the Crown is both vicariously and directly liable for 'systematic and institutionalized negligence" as well as various human rights and *Charter* violations. He refers to constructive dismissal, breach of fiduciary duty, and breach of statutory duties. He alleges generally that the defendants' acted maliciously.

***The second action: Hfx. No. 392048***

[17] In the second action (abbreviated as Action 048), the named defendants are "Her Majesty, Queen Elizabeth II, in the right of the Dominion of Canada," and four Canadian Forces officers: Capt. (N) Darren Garnier, the Chief of Staff of Maritime Force Atlantic; Cdr. Garrett Reddy; Maj. Patrick Kavanagh; and Maj. Prem Rewal. The plaintiff states that the two actions include similar causes of action and parties and arise from "a common root cause," but that they are "nonetheless, separate and distinct." The second action, it appears, advances allegations that post-date the filing of the first action.

[18] The second action adds detail to the facts alleged in the first. The plaintiff now claims that upon his assignment to the Gliding School, Lt. Col. Lewis had little or no experience with military flying or gliding, or with cadet command. After allowing the school to run as it had before for the first year, Lt. Col. Lewis allegedly failed to acquaint himself with the operation and made decisions that were "not informed by historical practices nor consistent with" required procedures and training. The plaintiff says it was his duty to caution Lt. Col. Lewis against negative courses of action, and that he did so, but was ignored.

[19] The plaintiff also says Cdr. Reddy "had formed an inappropriate view" of him and took "inappropriate and malicious punitive action" against him. He says Cdr. Reddy resolved to force him out of the Canadian Forces, and embarked, along

with Capt. Garnier and Lt. Col. Lewis, on a malicious course of abuse in retaliation for his retention of civilian counsel.

[20] The plaintiff says Lt. Col. Lewis modified the terms of reference to ensure that only Capt. Cooper would qualify, and concealed this from him, leaving him without a position. He says that concerns about his removal, and about Lt. Col. Lewis's conduct, were raised by the Atlantic provinces' Air Cadet Leagues, but Cdr. Reddy took no action, having already decided to eliminate the plaintiff. Only when the plaintiff retained counsel did Cdr. Reddy take any action, by conducting the investigation that led to his conclusion that the plaintiff had been treated unfairly. He then allegedly circumvented the request to deal with the plaintiff's counsel by offering the plaintiff a new contract directly, solely to create the impression that he was being dealt with in good faith. There followed a conspiratorial campaign of abuse and false accusations by Lt. Col. Lewis, supported by Cdr. Reddy and Capt. Garnier. This campaign included the events of 24 July 2010, which the plaintiff suggests was deliberately planned as a method of bringing false charges against him. The subsequent "fobbing off" of the plaintiff's concerns, and the handling of Lt. Col. Lewis's harassment complaint, were further aspects of this alleged scheme, as was the allegedly malicious decision by Cdr.

Reddy and Capt. Garnier to lay a disciplinary charge against the plaintiff for using insulting language to a superior officer.

[21] The disciplinary charge and the plaintiff's Court Martial were further aspects of the alleged campaign of abuse and malice. He appears to allege that Capt. Garnier manipulated Rear Admiral David Gardam into recommending Court Martial to the Director of Military Prosecutions. The defendant Maj. Prem Rewal preferred a three-count indictment, which the plaintiff claims was done maliciously. There were pre-trial applications and a General Court Martial began, followed by an application to re-elect to a Standing Court Martial. The Crown appealed the re-election decision in October 2011, and the General Court Martial was ordered resumed. The plaintiff was found not guilty on all three counts.

[22] The plaintiff says Cdr. Reddy continued the campaign of "malicious and abusive actions" against him. Among other things, he says Cdr. Reddy did not "redress" the "inexplicable" promotion of Capt. Cooper; failed to ensure that the plaintiff was adequately prepared to assume the FSO position; failed to protect him from Lt. Col. Lewis's "inappropriate treatment and retaliation"; and "wrongfully and maliciously" reassigned him "without probable or any cause" when he expressed concerns about working under Lt. Col. Lewis. Cdr. Reddy assigned him to the Cadet Training Cell with (he says) "no legitimate purpose other than pure

spite." The plaintiff claims that Cdr. Reddy intended to force him to spend the summer in Greenwood rather than "at home … in Debert." Generally, he says, Cdr. Reddy engaged in "petty" behaviour in order to show support for Lt. Col. Lewis. He also says his reassignment was designed to give the allegedly defamatory impression that "he was the problem" and that the unit was better off without him.

[23] The plaintiff says Maj. Kavanagh took it upon himself to advance Lt. Col. Lewis's harassment complaint by, among other things, misleading the military prosecutor "into giving erroneous advise" (*sic*), and providing members of the chain of command with "[p]rotected information that he had improperly maintained…" This information apparently arose out of a 2001 security screening, was allegedly "secured under the *Privacy Act*" and was to be returned to National Defence Headquarters after being used for its intended purpose. Maj. Kavanagh allegedly retained the document, "to be used when he decided the time was right," and disclosed it in order to help "get" the plaintiff.

[24] The plaintiff alleges that his Court Martial was tainted by Capt. Garnier's decision to give him an election between summary trial and Court Martial; he says an election is only available if the superior officer determines that summary trial provides insufficient punishment in the event of conviction. The plaintiff says this

was punishment for retaining a civilian lawyer. He says there were also acts of "intimidation", such as having him "marched in under escort".

[25] The plaintiff goes on to say that Capt. Garnier "falsely" ordered him to attend at his office along with his former military lawyer. He says Capt. Garnier suggested that "the matter could be looked after right there in his office for a fine of $150.00-$200.00." He then provided the plaintiff with a "Request for Counsel Form," although Capt. Garnier knew he had civilian counsel. He says this was an attempt to intimidate him into pleading guilty.

[26] The matter was then referred to the military prosecutor's office, where, the plaintiff says, Maj. Rawal decided to "send a message" to him and preferred a three-count indictment, while "maliciously" indicating that he believed there was a reasonable prospect of conviction, despite knowing that there had been no "proper investigation" and that the available information did not support Lt. Col. Lewis's version of events.

[27] At the Court Martial, the plaintiff says, Maj. Rawal "maliciously" refused to call exculpatory witnesses and "maliciously" refused to "consent to any reasonable suggestion designed to streamline the process," for instance, by (allegedly) making objections he knew were without merit, refusing to consent to the admission of

"non-controversial" documents, and refusing to consent to a re-election "when it was in everyone's best interest to do so." Additionally, he says, Maj. Rawal represented to the court that he would be reimbursed for the expenses incurred in calling certain witnesses, but no such reimbursement has been received. He says Maj. Rawal knowingly made "unsupported accusations" against him, such as Lt. Col. Lewis's claim that he did not have a current medical in the spring of 2010. He says it was a breach of an unspecified Code of Ethics for Maj. Rawal to advance the prosecution. He adds that Maj. Rawal made a "shocking and improper" offer for a plea bargain, which constituted a "Breach of Ethics" (*sic*) as well as an assault, an intentional infliction of nervous shock, abuse of authority, and a breach of fiduciary and statutory duties.

[28] The plaintiff also claims that Maj. Rawal conspired in the creation of a "false" conduct sheet to be used in sentencing; he says he had no conduct sheet at the time and had never had one, but that the alleged conspirators assembled one using the information wrongfully retained by Maj. Kavanagh. He says this was intended to result in a greater sentence "by using stale and irrelevant information that even if true (which is not admitted but denied)" would not be relied on by a "reasonable" prosecutor. He regards the conduct sheet as defamatory. After he left the Armed Forces, he was provided with an amended version by counsel from the

Department of Justice, who indicated that there had been a clerical error in the original. Of the conduct sheet, the plaintiff says that "[i]n addition to alleging an Offense under S. 253(a) of the Criminal Code … ("Impaired Driving"), the description set out in the 'conduct sheet' falsely asserted that MacLellan was criminally convicted of driving while impaired."

**NAMING OF DEFENDANTS**

[29] As a preliminary matter, the defendants request a change in the manner in which the Crown in right of Canada is identified in the second action. They submit that, rather than "Her Majesty, Queen Elizabeth II, in the Right of the Dominion of Canada," the proper form is to sue the Attorney General of Canada. Subsection 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, provides that proceedings against the Crown "may be taken in the name of the Attorney General of Canada..." The plaintiff argues that this language is permissive, and that the word "may" leaves it open to use alternative names. I am satisfied that the correct framing is as set out in s. 23(1). I accept the reasoning in *Dix v. Canada*, 2001 ABQB 256, and *Munro v. Canada* (1992), 11 O.R. (3d) 1 (Ont. Ct. (Gen. Div.)). While counsel for the plaintiff refers in a general way to the existence of competing lines of authority as to whether s. 23 is mandatory or permissive, I conclude that the resolution of this point in *Dix* is persuasive.

**JURISDICTION AND THE GRIEVANCE PROCEDURE**

[30] The defendants challenge the court's jurisdiction over a good deal of the subject matter of the two actions. Nova Scotia Civil Procedure Rule 4.07 provides that a "defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction": Rule 4.07(1). Making such a motion does not entail adverting to jurisdiction: Rule 4.07(2).

[31] Rule 23.08(1) permits a party to a chambers motion to adduce evidence in various forms, including by affidavit. The defendants, accordingly, rely on the affidavits of Maj. Michael Keleher, Lt.-Cdr. Jacques Lecours, and Jill Thompson, on the jurisdiction motion.

[32] The defendants submit that this court has no jurisdiction over the claims pleaded in the two actions, with the exceptions of the claims for false arrest, false imprisonment, negligent or fraudulent investigation, malicious prosecution, abuse of authority, abuse of process, and defamation. Other than these exceptions, the defendants say the claims are grievable complaints under the exclusive jurisdiction of the mechanisms set out in s. 29 of the *National Defence Act*, R.S.C. 1985, c. N-

5, and c. 7 of the *Queen's Regulations and Orders for the Canadian Forces* (the QR&Os).

[33] The defendants argue that this case falls within the category of workplace complaints that fall within a collective agreement or statutory dispute resolution scheme, and over which the court has no jurisdiction or, if it does have jurisdiction, it should decline to exercise it. This principle is set out in a line of decisions, principally *St. Anne Nackawic Pulp & Paper Co.*, [1986] 1 S.C.R. 704, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, and *Vaughan v. Canada*, 2005 SCC 1.

[34] The "exclusive jurisdiction" model originally described in *Weber*, which directs that "an administrative tribunal should decide all matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law": *R v. Conway*, 2010 SCC 22, [2010] S.C.J. No. 22, at para. 30. Originally set out in the context of labour law, the *Weber* principles also govern disputes as to whether matters are properly heard by the court or under statutory mechanisms. The Nova Scotia Court of Appeal summarized the principles in *Pleau v. Canada (Attorney General)*(1999), 181 N.S.R. (2d) 356, and *Gillan v. Mount Saint Vincent University*, 2008 SCC 55,

[2008] N.S.J. No. 251. In *Gillan*, beginning with a discussion of the judgment of McLachlin J. (as she then was) in *Weber*, the court said: (some citations omitted)

> 13 … After identifying the two elements that must be considered in determining the appropriate forum for the proceedings as being the nature of the dispute and the ambit of the collective agreement, she elaborated:
>
> > 52 In considering the dispute, the decision-maker must attempt to define its "essential character"…. The fact that the parties are employer and employee may not be determinative. Similarly, the place of the conduct giving rise to the dispute may not be conclusive; matters arising from the collective agreement may occur off the workplace and conversely, not everything that happens on the workplace may arise from the collective agreement ... In the majority of cases the nature of the dispute will be clear; either it had to do with the collective agreement or it did not. Some cases, however, may be less than obvious. The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.
> >
> > 53 Because the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator. ...
> >
> > 54 This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts... Additionally, the courts possess residual jurisdiction based on their special powers... [Emphasis by N.S.C.A.]
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> 14 In *Pleau v. Canada*, supra Cromwell, J.A. for the court described three inter-related considerations arising from several Supreme Court of Canada decisions, including *Weber* and *O'Leary*:
>
> > 19 The first consideration relates to the process for resolution of disputes. Where the legislation and the contract show a strong preference for a particular dispute resolution process, that preference should, generally, be respected by the courts. While it takes very clear language to oust the jurisdiction of the superior courts as a matter of law, courts properly decline to exercise their inherent jurisdiction where there are strong policy reasons for doing so.

> 20 If the legislature and the parties have shown a strong preference for a dispute resolution process other than the court process, the second consideration must be addressed. It concerns the sorts of disputes falling within that process. This was an important question in the *Weber* decision. The answer given by *Weber* is that one must determine whether the substance or, as the court referred to it, the "essential character", of the dispute is governed, expressly or by implication, by the scheme of the legislation and the collective agreement between the parties. Unlike the first consideration which focuses on the process for resolution of disputes, the second consideration focuses on the substance of the dispute. Of course, the two are inter-related. The ambit of the process does not exist in the abstract, but is defined by the nature of the disputes to be submitted to it.
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> 21 The third consideration relates to the practical question of whether the process favoured by the parties and the legislature provides effective redress for the alleged breach of duty. Generally, if there is a right, there should also be an effective remedy. [Emphasis in *Pleau*.][Some citations omitted.]

[35] The defendants submit that essential character of the disputes in the two actions falls within the grievance scheme set out in ss. 29 to 29.28 of the *National Defence Act* (NDA) and in c. 7 of the QR&O, governs most of the subject matter. Section 29 of the NDA provides:

> Right to grieve
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> 29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.
>
> Exceptions
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> (2) There is no right to grieve in respect of
>
> (a) a decision of a court martial or the Court Martial Appeal Court;
>
> (b) a decision of a board, commission, court or tribunal established other than under this Act; or
>
> (c) a matter or case prescribed by the Governor in Council in regulations.

> Manner and conditions
>
> (3) A grievance must be submitted in the manner and in accordance with the conditions prescribed in regulations made by the Governor in Council.
>
> No penalty for grievance
>
> (4) An officer or non-commissioned member may not be penalized for exercising the right to submit a grievance
>
> Correction of error
>
> (5) Notwithstanding subsection (4), any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the officer or non-commissioned member.

[36] The QR&O provide that "[t]here is no right to grieve in respect of a decision made under the Code of Service Discipline": QR&O at 7.01(2).

[37] The scheme under s 29 provides the "broadest possible wording" and "accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination"; it has been held to be "exhaustively comprehensive": *Jones v. Canada* (1994), 87 F.T.R. 190, [1994] F.C.J. No. 1742 (Fed. T.D.); *Moodie v. Canada (Minister of National Defence)*, 2008 FC 1233, at para 27, affirmed at 2010 FCA 6. The CF grievance scheme has been described as one that can provide "recourse to a true *de novo* assessment of the case": *Schmidt v. Canada (Attorney General)*, 2011 FC 356, at para. 20; *Zeidler v. Canada (Attorney General)*, 2011 FC 1154, at para. 19.

[38] The QR&O process begins with a grievance to an "initial authority," usually the grievor's commanding officer, unless "the grievance relates to a personal

decision, act or omission of an officer who is the initial authority," in which case that officer refers the grievance upward to the next officer with responsibility for the subject matter: QR&O 7.06(1) and (2). If the grievor is dissatisfied with the redress provided by the initial authority, the grievance may be referred to the Chief of the Defence Staff (CDS) for "consideration and determination": QR&O 7.10. At the time of the events involved in these actions, certain grievances, including harassment, were referable to the Canadian Forces Grievance Board (CFGB), whose powers were set out at ss. 29.16-29.28 of the NDA, as it read at the time. The CFGB would make recommendations to the CDS, who is "the final authority in the grievance process": NDA, s. 29.11.

[39] In *Sandiford v. Canada*, 2007 FC 225, the Federal Court struck out a statement of claim filed by a CF officer seeking damages for alleged breaches of statutory and fiduciary duties, breach of constitutional rights, and negligence, on the basis that he had allegedly been denied consideration for certain CF positions. In reviewing s. 29 of the NDA, the court referred to the "basic proposition" that "when Parliament creates statutory remedies and institutions designed specifically to provide redress to persons aggrieved, the court should not lightly intervene before those statutory remedies have been exhausted. Failure to pursue the available procedures does not render the remedy inadequate…" (para. 26). Layden-

Stevenson J. held that "the resolution mechanism existing through the grievance procedure in the *National Defence Act* constitutes an adequate alternative remedy that must be exhausted before an individual can turn to the court for redress" (paras. 28-29). The "genesis" of the claim was the alleged failure of the plaintiff's superiors "to place him where he wished to be placed. That is a matter that clearly falls within the ambit of the grievance procedure. Mr. Sandiford's recourse is to pursue his grievance. He has an adequate alternative remedy. That remedy must be exhausted before he turns to the court" (para 31).

[40] Likewise, in *Graham v. Canada*, 2007 FC 210, where it was "common ground that Ms. Graham's complaint arises out of her engagement as a member of the Canadian Forces and specifically relates to her dissatisfaction with the decision of the selection board in not selecting her for a position" (para. 20), the plaintiff had a remedy through the grievance process (para. 24). Similar results occurred in *Hamm v. Canada*, 2007 FC 597, affirmed at 2008 FCA 139, and in *Moodie, supra*.

[41] At the material time the plaintiff was an officer as defined by s. 2(1) of the NDA: "a person who holds Her Majesty's commission in the Canadian Forces…" This includes reservists. The Reserve Force is defined in the NDA as a component of the CF which consists of "officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active

service" NDA, s. 15(3). The defendants deny that the plaintiff was a "contract employee," as he suggests. He was commissioned in 1973 and served in Cadet training units, including the Cadet Instructor Cadre, a component of the reserves which he describes in his own pleadings as a branch of the CF.

[42] The defendants submit that claims of abuse of authority, false arrest, false imprisonment, fraudulent or negligent investigation, abuse of process, negligent prosecution, and malicious prosecution involve decisions under the *Code of Service Discipline*, and therefore fall outside the grievance scheme. However, they argue, the remaining allegations are grievable complaints dealing with promotion, pay, rank and harassment. According to the defendants, the pleading of such allegations as breach of contract, defamation, discrimination, tortious interference with contractual rights, deceit, equitable fraud, conspiracy, intentional infliction of emotional and economic harm, constructive dismissal, harassment, retaliation, verbal assault, tortious interference with economic interests, discrimination, "systematic and institutionalized" negligence, breach of fiduciary duty, and various *Charter* and statutory breaches, is an attempt to "dress up" grievable issues as tort and contract law matters. They say the grievance scheme under the NDA provides "an exclusive and comprehensive scheme" for determining such matters, which is intended to be final, subject only to judicial review by the Federal Court.

[43] The court is required to look past the specific legal characterization to the facts giving rise to the dispute: *Weber* at para. 49; *Vaughan* at para. 11. In other words, a plaintiff cannot avoid application of a grievance process by creatively framing pleadings so as to remove the substance of the dispute from its coverage: see *Weber* at para. 49, where the majority warned against allowing "innovative pleaders to evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action…". In this case, I am satisfied that the essential character of the dispute, no matter how it may be particularized in the pleadings, is one arising in the course of his military service and falling squarely within the ambit of s. 29 of the NDA. The events complained of occurred within the context of his military service and related directly to the exercise of his duties; his claims revolve around the exercise (or failure to exercise) by other personnel of their duties.

[44] It is abundantly clear that the NDA process shows a strong preference for the use of the statutory grievance process for an officer who is "aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act," as described in s. 29(1). While the NDA does not specifically oust the court's jurisdiction as a

matter of law, there are strong policy reasons for the court to decline to exercise jurisdiction.

[45] The unavailability of third party adjudication is not a determinative consideration in deciding whether the court should defer to a statutory grievance procedure: *Vaughan* at para. 38. There are exceptions to this general rule, such as so-called "whistleblower" cases, involving a disclosure of illegality jeopardizing the public: *Van Duyvenbode v. Canada (Attorney General)*, [2007] O.J. No. 2716, 2007 CarswellOnt 4368 (Ont. Sup. Ct. J.), at para. 18, affirmed at 2009 ONCA 11. The defendants submit that the plaintiff's complaints in this case concern alleged wrongs done to him personally, not institutional wrong-doing with a public-interest component. While the plaintiff claims that the defendants engaged in a wide-ranging conspiracy, it was allegedly targeted at him personally; I am not satisfied that he is a whistle-blower.

[46] The defendants concede that the NDA grievance process did not provide for a monetary remedy in the nature of tort damages. This is not dispositive however. The available remedy need not be identical to what would be available through the court process. Rather, as the Supreme Court of Canada has indicated, "[w]hat must be avoided … is a 'real deprivation of ultimate remedy'": *Weber* at paras. 56-57, citing *St. Anne Nackawic* at p. 723. In *Gillan,* for instance, the plaintiff argued that

effective redress was not available because the arbitrator could not award aggravated and punitive damages. The Court of Appeal held that this was not sufficient to create jurisdiction for the court (paras. 39-43).

[47] The defendants say the NDA grievance procedure provided remedies for the claims raised in the pleadings. The scope of remedies available to the CDS included the power to promote or reinstate, to deal with pay and benefits issues, and to give an individual an opportunity to train and qualify for a position. The CDS would also have the power to displace the holder of a position. The grievance process also provided remedies for harassment, including reassignment, counselling, and training. These remedies would extend to a member who had been released from the CF if the grievance process was commenced before his release.

[48] It appears that the scope of remedies that may be provided by the CDS includes *Charter* damages. The Supreme Court of Canada held in *R v. Conway*, 2010 SCC 22, that if a tribunal "has jurisdiction, explicit or implied, to decide questions of law" it is "a court of competent jurisdiction and can consider and apply the *Charter* -- and *Charter* remedies -- when resolving the matters properly before it", absent a clear demonstration that the Legislature intended to exclude the *Charter* from the tribunal's jurisdiction (para 81). There is precedent for *Charter*

issues being considered in the current CF grievance process: *McBain v. Canada (Attorney General)*, 2011 FC 745, affirmed at 2012 FCA 23.

[49] The plaintiff alleges various deficiencies in the grievance process, in particular the lack of monetary remedies. He maintains that the grievance procedure has no application to his "unique situation." He cites *Korecki v. Nova Scotia (Minister of Justice)*, 2013 NSSC 312. In that case, the plaintiff sued for wrongful dismissal, in the face of a statutory adjudication process. Moir J. concluded that this was a case where the statutory process had "shown itself incapable of providing, or unwilling to provide, redress" (para. 41), as discussed in *Pleau*; however, the plaintiff in *Korecki*, unlike the plaintiff in this case, had availed himself of the statutory process.

[50] The fact that the plaintiff did not commence a grievance while he was still a member of the CF does not render the available remedy inadequate: *Lazar v. Canada (Attorney General)*(1999), 168 F.T.R. 11, [1999] F.C.J. No. 553 (Fed. Ct. (T.D.)), at para. 18, affirmed at 2001 FCA 124; *Gillan v. Mount Saint Vincent University*, 2008 NSCA 55, at paras. 44-45. In the defendants' view, if the plaintiff had brought a successful grievance, there was an adequate remedy available. They say he should not be permitted to improve his legal position by not grieving, absent circumstances of the kind that existed in *Jones v. Canada (Attorney General)*, 2007

FC 386, where the court concluded that the failure to grieve was not attributable to the applicant (para. 79). The defendants say there is no basis to reach such a conclusion here, pointing out that the plaintiff in this case was specifically advised by the Department of Justice that he should grieve before leaving the CF.

[51] The plaintiff suggests that his lawyer's letter to the CO of 10 March 2010 constituted an "informal" grievance. The defendants maintain that this letter did not constitute a grievance under the terms of QR&O 7.04, which requires that the grievance be signed by the grievor. Moreover, the plaintiff's dissatisfaction with the outcome was not advanced to the final authority.

[52] The plaintiff also asserts that he was never made aware of the grievance process (at least, prior to the letter from Department of Justice counsel advising him about it.) The defendants cite the principle that "ignorance of the law is no excuse: see, e.g. *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, [1989] S.C.J. No. 44, at para. 90, *per* Wilson J. (dissenting in part). More to the point, QR&O 4.02 imposes a duty on an officer to "become acquainted with, observe and enforce" the QR&O and the NDA, *inter alia*. Whether or not the plaintiff was actually aware of the grievance process, it was incumbent on him to be aware of its existence. In any event, it is not in dispute that before his release from the CF he had taken civilian legal advice and had been made aware of the grievance process.

[53] The defendants submit that naming the individual defendants Lewis, Garnier, Reddy, and Kavanagh in the claim does not exclude the grievance process. They submit that any remedy would remain one against the Crown, which would be vicariously liable for the individual's actions. I agree that if the matter arose out of a "decision, act or omission in the administration of the affairs of the Canadian Forces", the plaintiff cannot avoid the grievance process by simply naming the personnel involved.

[54] The plaintiff maintains that the court has concurrent jurisdiction with the grievance process. He says the NDA does not oust the court's jurisdiction. It appears that the authority for this claim is *Kaiser v. Dural,* 2003 NSCA 122, [2003] N.S.J. No. 418, where the Court of Appeal held that a trial judge had jurisdiction to determine a discrimination issue that was integral to a wrongful dismissal action (paras. 27-28). In holding that the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, did not mandate exclusive jurisdiction to the Board, Hamilton J.A. added, at para. 28:

> … Having the trial judge deal with this aspect of Mr. Kaiser's wrongful dismissal claim at the same time he deals with the other aspects of the wrongful dismissal claim is a cost and time effective way for Mr. Kaiser's whole claim, including discrimination, to be adjudicated, without the loss of any procedural safeguards. This is not to say it will always be appropriate for the court to adjudicate on discrimination alleged in a wrongful dismissal action. There may be fact situations where the discrimination issue should be dealt with separately by a board of inquiry, perhaps where there are remedies claimed that are available to a

> board but not to a court. I agree with the statement by the board: "Mandating that proceedings must be bifurcated, so that a civil court may hear only some aspects of a wrongful dismissal case while a Board of Inquiry has exclusive jurisdiction to deal with any and all allegations of discrimination, can only add unnecessary complications to legal proceedings.

[55] I do not take this to mean that there is concurrent jurisdiction for human rights *complaints*, as plaintiff's counsel suggests, but rather that the court can deal with the substance of a discrimination complaint in the context of a matter properly before it. It is clear from Justice Hamilton's comments that this does not amount to giving the court the power to deal with all remedies that might be available under the *Human Rights Act*.

[56] The plaintiff says the defendant "concedes that the grievance process does not apply to any decision for Court Martial, malicious prosecution…, negligent investigation leading to Court Martial, nor for any matter that could be a complaint for discrimination … [under] the *Canadian Human Rights Act*…" The "concession" he refers to appears to be the defendants' statement in their brief that "[a]part from matters which fall under the *Code of Service Discipline*, members of the Canadian Forces must seek redress for any matter arising during their service through the Canadian Forces grievance process, pursuant to s. 29 of the [NDA] and/or file a complaint for discrimination pursuant to the … *Canadian Human Rights Act*."

[57] I conclude that the claims identified by the defendants as relating to decisions, acts or omission "in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under" the *National Defence Act* are exactly that, in their essential character. I am satisfied that the legislative scheme shows a strong preference for proceeding under the statutory grievance process, and that the grievance process is capable of providing effective redress, if not the full extent that the plaintiff would prefer. I conclude that this is a situation where the court must decline jurisdiction in favour of the statutory grievance process.

**CONSTRUCTIVE DISMISSAL**

[58] The plaintiff claims in both actions that he was a contract employee of the Crown, and that he was constructively dismissed due to the actions of Lt. Col. Lewis, and due to his transfer to the training cell. The defendants submit that he was not, in fact, in a contractual relationship with the Crown, but rather was a commissioned officer serving at her majesty's pleasure. The defendants cite *Gallant v The Queen in Right of Canada* (1978), 91 D.L.R. (3d) 695, [1978] F.C.J. No. 1122 (Fed. T.D.), where Marceau J said, at paras 4 and 7:

> Both English and Canadian Courts have always considered, and have repeated whenever the occasion arose, that the Crown is in no way contractually bound to

> the members of the Armed Forces, 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. This principle of common law Courts not interfering in relations between the Crown and the military, the existence of which was clearly and definitively confirmed in England in the oft-cited case of *Mitchell v. The Queen*, [1896] 1 Q.B. 121,1 was taken over by our Courts and repeated in a wide variety of situations…
>
> …
>
> In short, because the hiring of plaintiff in the Armed Forces does not create any contractual obligation whatever on the part of the Crown; because the release of plaintiff, had it been unjustified, could not in any case be seen as having encroached upon his rights and, because only the appeal authorities to which plaintiff has already had recourse can grant a remedy with respect to his grievances concerning the way in which his commanding officer's decision was made, this Court has no jurisdiction to hear the action as instituted, based as it is on facts which could not give rise to the remedies claimed.

[59] The defendants submit that this reasoning applies to the plaintiff's claims of constructive dismissal and breach of contractual duties of good faith and fair dealing. I accept the defendants' argument that the relationship between the plaintiff and the Crown was one of military service and not an employment contract. In any event, it seems to me, the statutory process would apply to the matters complained of under this heading.

## LIMITATION OF CIVIL LIABILITY UNDER THE *CODE OF SERVICE DISCIPLINE*

[60] After the incident between the plaintiff and Lt. Col. Lewis on 24 July 2010, the plaintiff was prosecuted for insubordination under the *Code of Service*

*Discipline*. As a commissioned reserve officer, the plaintiff was subject to the *Code of Service Discipline* while on duty: NDA, s. 60(1)(c)(iii). The plaintiff was charged under s. 85 (insubordinate behavior), which is a "service offence" as defined by s. 2(1). The Code sets out duties and procedures relating to investigation, charging offences, referrals of charges to CO's or other superior officers, decisions as to whether to proceed, decisions between summary trial and trial by court martial, elections, and other related processes.

[61] Section 270 of the *National Defence Act* provides:

> No action or other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the *Code of Service Discipline*, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause.

[62] The Supreme Court of Canada made the following remarks about the *Code of Service Discipline* in *R. v. Généreux*, [1992] 1 S.C.R. 259, [1992] S.C.J. No. 10, where Lamer J. said, for the majority, at para. 60:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own *Code of Service Discipline* to allow it to meet its particular disciplinary needs. In addition,

> special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the *Code of Service Discipline*. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military…

[63] The defence submission is that the defendants were executing their duties under the *Code of Service Discipline*, that the plaintiff has not pleaded particulars of malice, and that the defendants did not act "without reasonable and probable cause." Accordingly, they argue, the claims arising from the service discipline matter are barred by s. 270.

[64] The first requirement for a sustainable action under s. 270 of the NDA is a pleading that the officer in question "acted, or omitted to act … maliciously." The defendants maintain that no particulars of malice have been pleaded. Moreover, Civil Procedure Rule 38.03(3) mandates that a pleading include "full particulars of a claim alleging unconscionable conduct, such as … malice." A "bald allegation" of malice is not sufficient: *Symington v. Halifax (Regional Municipality)*, 2011 NSSC 474, at para. 73, aff'd 2013 NSCA 152, citing *Wilson v. Toronto (Metropolitan) Police Service*, [2001] O.T.C. 483, [2001] O.J. No. 2434 (Ont. Sup. Ct. J.), aff'd [2002] O.J. No. 383 (Ont. C.A.).

[65] The content of malice in the context of malicious prosecution was considered in *Miazga v. Kvello Estate*, 2009 SCC 51, where the Supreme Court of

Canada confirmed that such a claim requires proof that "the prosecutor's conduct was fuelled by 'an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve.'... In other words, it is only when a Crown prosecutor steps out of his or her role as "minister of justice" that immunity is no longer justified" (para. 7, citing *Nelles v. Ontario*, [1989] 2 S.C.R. 170). Charron J. went on to say, for the court, that "[b]y requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (para. 81).

[66] In addition to malice, s. 270 of the NDA requires that the officer carrying out duties under the *Code of Service Discipline* "acted, or omitted to act … without reasonable and probable cause." The standard to be applied to a decision to prosecute is that "the Crown must have sufficient evidence to believe that guilt could properly be proved beyond a reasonable doubt before reasonable and probable cause exists, and criminal proceedings can be initiated": *Miazga* at para. 61, citing *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, at para 31.

[67] The charge in question here arose under s. 85 of the NDA, which provides that "[e]very person who uses threatening or insulting language to, or behaves with contempt toward, a superior officer is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment." QR&O 103.18(e), the specimen charge, adds detail to the elements.

[68] The defence submits that the plaintiff does not plead material facts to sustain a finding that any defendants acted without reasonable and probable cause. The plaintiff does plead that Lt. Col. Lewis was his superior officer, and the pleading describes a verbal altercation. While the pleadings could support provocation, the defendants argue, this would only be relevant on sentencing, in accordance with the limited applicability of the defence. The defendants refer to several court martial decisions involving charges of insubordination, including *R v. Tupper*, 2007 CM 1028 and *R v. Cadet* (26 November 2002). The latter included an element of provocation from a Sergeant, leading to a charge against a corporal under s. 85. In the corporal's Court Martial, the behavior of the Sergeant was taken into account on sentencing, but did not absolve him from discipline.

[69] The plaintiff says the defendants' actions were outside the scope of s. 270 of the NDA. Counsel submits that "where an officer or member is not exercising authority under the *Code of Service Discipline* or even where they are exercising

such authority, those acts or omissions are done maliciously and without reasonable probable [*sic*] grounds, there is no protection and the common law action can be maintained against that member or officer." Counsel says this is confirmed by "[c]ase law", but cites no actual cases. Counsel also advanced the argument that (if I understand it correctly) the two elements of the exception under s. 270 – malice and the absence of reasonable and probable grounds – should each be presumed if the other is proven; he argued that, for instance, if malice is proven, it follows that there could not be reasonable and probable grounds. I do not accept this argument, nor do I accept that there is a shifting onus, so that malice would be presumed when an absence of reasonable and probable grounds is established.

[70] I conclude that the pleadings are not sufficient to bring the remaining pleaded causes of action within the exception under s. 270 of the NDA. The pleadings allege malice by attributing to it virtually all of the defendants' acts or omissions to which the plaintiff objects; I am not satisfied that this amounts to the degree of specificity required for malice. I am even less convinced that the pleadings can support a finding of no reasonable and probable cause. As the defendants point out, it does not follow from the fact that the plaintiff was acquitted at the Court Martial that the proceeding was taken without reasonable

and probable cause. In summary, I conclude that the pleadings do not bring the plaintiff within the exception under s. 270.

**UNSUSTAINABLE CAUSES OF ACTION**

[71] In the alternative, the defendants submit that various causes of action should be struck under Civil Procedure Rule 13.03, which permits the court to grant summary judgment on the pleadings alone where a pleading "discloses no cause of action" (Rule 13.03(a)) or where a pleading "otherwise makes a claim that is clearly unsustainable when the pleading is read on its own" (Rule 13.03(b)).

[72] It is well established that the plaintiff must plead facts that will establish the necessary elements of the tort, not merely allegations or legal assertions. In considering whether to strike a pleading on this basis, the court must assume that the facts pleaded are true. The pleading must be struck if it is "plain and obvious" that the claim cannot be sustained: see, e.g., *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 32. The plaintiff must plead specific material facts; bare allegations will not suffice: *R. Baker Fisheries Ltd. v. Widrig*, 2002 NSCA 82, [2002] N.S.J. No. 283, at para. 19; *CIBC Mortgage Corp. v. Ofume*, 2004 NSSC 132, [2004] N.S.J. No. 259, at para. 5.

[73] **Malicious prosecution.** The defendants say the elements of malicious prosecution are not adequately pleaded. The elements of malicious prosecution are set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, *per* Lamer J. (as he then was) for the majority, at 192-193:

> There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:
>
> a) the proceedings must have been initiated by the defendant;
>
> b) the proceedings must have terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.

[74] The defendants say the plaintiff has not adequately pled the absence of reasonable and probable cause or malice. They also submit that the pleadings do not adequately allege that Lt. Col. Lewis, Maj. Kavanagh, Cdr. Reddy, or Capt. Garnier initiated the proceeding. They say the claims that the proceedings were initiated as a result of actions of those four officers are only bald allegations. The pleadings demonstrate that each of them had duties under the *Code of Service Discipline*, but do not indicate that any of them had discretion over laying charges. I agree that the pleadings cannot support such a claim against these defendants.

[75] As for the allegation of malicious prosecution against Maj. Rawal, the defendants maintain that the plaintiff has provided nothing more than bald

allegations that he exercised his prosecutorial duties and discretion with malice and without reasonable and probable cause. As noted earlier, a successful malicious prosecution claim requires an improper purpose or motive involving "an abuse or perversion of the system of criminal justice for ends it was not designed to serve…" (*Miazga* at para 7). Malice requires something more than proceeding "absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (para. 81).

[76] The defendants submit that the malicious prosecution claim against Maj. Rawal does not rest on any pleading of particulars of malice or of a primary purpose other than of carrying out the law. I am satisfied that the plaintiff's complaints against Maj. Rawal relate to matters within his exercise of prosecutorial discretion, including, *inter alia*, allegations that he objected "to matters that he knew were not objectionable", refused to consent to admission of "non-controversial documents", and refused to consent to a re-election. I am satisfied that it is plain and obvious that the pleadings cannot sustain an action for malicious prosecution against Maj. Rawal.

[77] **Abuse of process.** Like malicious prosecution, abuse of process occurs "when a Crown prosecutor's actions are so egregious that they take the prosecutor

outside his or her proper role as minister of justice, such that the general rule of judicial non-intervention with Crown discretion is no longer justified": *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] S.C.J. No. 51, at para. 51. The elements of abuse of process are set out in *Amirault v. Westminer Canada Holdings Ltd.* (1994), 127 N.S.R. (2d) 241, [1994] N.S.J. No. 12 (C.A.), at para. 122:

> 1. The defendant must have used the legal process;
>
> 2. He must have done so for a purpose other than that which the process in question was designed to serve, that is, for a collateral and illicit purpose;
>
> 3. He must have done some definite act or made some definite threat in furtherance of the purpose; and
>
> 4. Some measure of special damage must be shown…

[78] The defendants say the pleadings do not assert any definite act or threat that was separate and distinct from the proceedings themselves, and related to any improper purpose or collateral advantage. The defendants submit that there is nothing in the pleadings "to suggest the Defendants did anything except employ the legal process to its proper conclusion." In the case of Lt. Col. Lewis, the defendants argue that the pleadings do not suggest that he used the legal process; he only made complaints, and so any claim against him would be under the grievance process. The defendants also point out that the pleadings indicate that the plaintiff asserted an unsuccessful abuse of process defence at the Court Martial.

[79] The pleadings with respect to alleged abuse of process are, as in the case of many of the other causes of action asserted, quite vague. On their face, the pleadings seem to set out a chain of events to which the plaintiff objected, to which the pleading appends allegations of malice, spite, and abuse, blended with legal conclusions and speculation as to what the defendants were thinking. To give one example, I am not satisfied that the pleading can support the claim that the plaintiff's transfer to the Cadet Training Cell constituted an abuse of process simply by the insertion of allegations that the transfer was "wrongful", "malicious", "without probable or any cause", "full well knowing he had no legitimate purpose other than pure spite", and "knowing that MacLellan would be miserable" (Action 048 at paras. 143-146). It is plain and obvious that such pleadings cannot sustain the asserted cause of action.

[80] **Abuse of authority.** This appears to be an allegation of the tort of misfeasance in public office. The Supreme Court of Canada set out the elements in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] S.C.J. No. 74, at para. 32, *per* Iacobucci J., for the court:

> [T]he tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct

> was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[81] The defendants say nothing in the pleadings supports these elements. Once again, they submit that the pleading is no more than a bald allegation. As with abuse of process, the pleadings on this issue consist of accounts of actions and omissions with which the plaintiff was dissatisfied, overlaid with a good deal of argument and drawing of legal conclusions. It is also unclear what asserted facts are said to go to which issue. It appears, for instance, that the pleadings assert that Capt. Garnier offered the plaintiff an election between summary trial and Court Martial in order to "punish" him for retaining civilian counsel (Action 048 at paras. 119-124 and 184-193). Aside from the bald allegations that everything that was done was done for improper purposes, however, I am unable to discern material facts that could support the asserted cause of action. Once again, it is plain and obvious that this pleading must fail.

[82] **Negligent investigation.** The elements of negligent investigation were considered at length in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129; they are summarized as follows in *Romanic v. Johnson*, 2012 ONSC 3449, [2012] O.J. No. 2642, at para. 9, affirmed at 2013 ONCA 23:

> The judicial authorities establish that the tort of negligent investigation is very similar to the tort of malicious prosecution, with some overlapping components. More particularly, the jurisprudence dictates that, in order to establish the tort of negligent investigation (at least in cases where the investigation has resulted in criminal charges) the plaintiff must establish four necessary elements, namely: (a) the proceedings must have been initiated by the defendant; (b) the proceedings must have been terminated in favour of the plaintiff; (c) there must have been an absence of reasonable and probable grounds to commence the proceedings against the plaintiff; and (d) in conducting the investigation the defendant owed a duty of care to the plaintiff, and did not meet the objective standard of a reasonable police officer in similar circumstances…

[83] Once again, when the pleading is read with a view to identifying material facts to support the alleged cause of action, it must fail. Absent the gloss of argument and speculative motivations, the material facts pleaded cannot make out the elements of the cause of action. To cite but one example, I am at a loss to grasp how Capt. Garnier's actions in respect of the plaintiff's election, and his subsequent order for the plaintiff to attend at his office, where he allegedly suggested a guilty plea and provided the plaintiff with a 'Request for Counsel" form, constitutes negligent investigation, but this appears to be the assertion in the pleading (Action 048 at paras 194-218).

[84] **False arrest, false imprisonment, and false detention.** A claim of false imprisonment or detention requires the plaintiff to establish (1) that he was totally deprived of his liberty, (2) that the deprivation was against his will, and (3) that the deprivation was directly caused by the defendants: Lewis Klar et al., *Remedies in*

*Tort*, vol. 1, at ¶7:8. False arrest substitutes wrongfully placing the plaintiff under arrest for wrongful and total deprivation of liberty: Remedies in Tort at at ¶7:7.

[85] The defendants submit that there are no material facts pleaded in support of these claims; there is no suggestion that the plaintiff was arrested or held in custody. They deny that he was arrested. As to his claim that Capt. Garnier falsely detained him, the defendants say the particulars pleaded do not suggest a total deprivation of liberty. Once again, the defendants maintain that the pleadings amount to nothing more than bald allegations that cannot be cured by amendments.

[86] I can see no sustainable cause of action pleaded for false arrest, imprisonment, or detention. I see nothing in the pleadings that could support a finding of "total deprivation."

[87] **Discrimination.** The plaintiff makes various claims of discrimination, citing various enactments, including the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, the Canadian Bill of Rights, S.C. 1960, c. 44, and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[88] The plaintiff's position appears to be that as a member of the Cadet Instructor Cadre, he was discriminated against in respect of matters of pay, benefit

and advancement in the Canadian Forces. As the defendants note, to make out a claim of discrimination pursuant to s. 15 of the Charter requires the claimant to establish differential treatment based on an enumerated or analogous ground of discrimination. They argue that membership of such a subcomponent is not analogous to immutable or inherent characteristics of the kind that have been recognized as grounds of discrimination.

[89] In effect the plaintiff alleges discrimination on the ground of occupation, which is not recognized as an analogous ground. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] S.C.J. No. 27, McLachlin C.J.C. and Lebel J. said, for the majority, at para. 165:

> The courts below found no discrimination contrary to s. 15 of the Charter. We would not disturb these findings. Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the Charter. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

[90] The defendants submit that the same reasoning applies to the claim under the *Bill of Rights*. As for the *Canadian Human Rights Act*, the defendants point out that it recognizes a specific range of grounds of discrimination, without provision

for analogous grounds: see *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, *per* McIntyre J. (dissenting in part) at 175. They submit that the plaintiff does not plead material facts to support an allegation of discrimination under the legislation. Finally, they say, there is no recognized tort of discrimination: see, e.g., *Seneca College v. Bhadauria*, [1981] 2 SCR 181, at 194-195.

[91] Accordingly, the defendants argue that the claims under the heading of discrimination are unsustainable. I agree. There is no sustainable cause of action apparent in the plaintiff's allegations of discrimination.

[92] **"Systematic and institutionalized" negligence.** Once again, the defendants submit that this claim is not substantiated by the pleadings. They also suggest that this is a claim particular to class or representative actions, where it is alleged that there was a failure to implement procedures that would reasonably prevent harm: see, e.g., *Rumley v. British Columbia*, 2001 SCC 69, [2001] S.C.J. No. 39, at para. 18. Whether or not the cause of action is so limited, the defendants also submit that the plaintiff has not adequately pleaded private law duty of care, a breach, or the alleged harm. The pleadings, they submit, "speak to his personal conflict with others in the Chain of Command, not about institutional problems that are generally brought in the context of a class or representative action. It is insufficient for the plaintiff to simply make the bald allegation of systematic and

institutionalized negligence." I agree. I am not satisfied that the pleadings can make out the requisite duty of care, breach thereof, or damage, that would be required to establish systemic negligence.

[93] **Charter breaches.** In addition to the claim under s. 15, the plaintiff pleads that the defendants violated ss. 7, 9 (arbitrary detention or imprisonment), 11, and 12 of the *Charter of Rights and Freedoms*. With respect to the allegations of arbitrary detention or imprisonment (s. 9), denial of rights upon being charged (s. 11), and cruel and unusual treatment, the defendants say there are no material facts pleaded to support the alleged violations, rendering the claims unsustainable. I agree. As for s. 7 – providing for "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" — the defendants say the pleadings do not suggest a violation. This claim is based on the malicious prosecution claim (already dealt with)(Action 048 at para. 292). The defendants submit that the failure of the malicious prosecution claim leads inexorably to the collapse of the Charter claim. This position is supported by *Pearson v. Ontario (Attorney General)*, 2006 CarswellOnt 1895 (Ont. Sup Ct. J.), at para. 26, affirmed at 2007 CarswellOnt 1469 (Ont. C.A.), leave to appeal denied, 245 O.A.C. 396 (note)(S.C.C.). The pleadings establish that the plaintiff was able to lead evidence

of the alleged conspiracy against him during the Court Martial, and that he was able to bring an application alleging abuse of process.

[94] The defendants note that, to the extent that the plaintiff claims that the loss of his position constituted a violation of s. 7, such an economic or proprietary interest does not found a s. 7 violation: *MacPhee v. Nova Scotia (Pulpwood Marketing Bd.)*(1989), 88 N.S.R. (2d) 345, 1989 CarswellNS 109 (N.S.S.C.A.D.) at paras. 46-51. Further, the defendants argue that a tort claim and a Charter claim may not permit double recovery; in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] S.C.J. No. 27, the court said, "[t]he existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the Charter. Tort law and the Charter are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation" (para. 36).

[95] Once again, I am unable to discern a basis in the pleadings for a s. 7 claim, particularly in view of the failure of the malicious prosecution claim, and I am satisfied that it is plain and obvious that the pleadings must fail on this ground.

[96] **Statutory breaches.** There is no free-standing tort of breach of statute: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. On this basis, the

defendants argue that the various assertions of breach of statutory duties, as well as the alleged violation by Maj. Rawal of the *Code of Legal Ethics*, do not provide sustainable causes of action. The plaintiff also makes allegations of breach of the *Privacy Act* in Action 048, apparently in respect of the information in the allegedly false conduct sheet. I infer that he is referring to the *Privacy Act*, R.S.C. 1985, c. P-21. That legislation contains a complaint process (see s. 29). The plaintiff does not indicate that he has pursued the process, which I am satisfied would be the appropriate route for any such complaint. With respect to the statutory breaches, I am once again forced to the conclusion that the pleadings do not specify material facts that could support such claims, even if the alleged breaches could provide causes of action.

[97] **Intimidation.** As described in *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan*, [1979] 1 SCR 42, at 81, the tort of intimidation is defined as follows (citing *Clerk & Lindsell on Torts*, 14th ed., p. 414, para. 802):

> A commits a tort if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure.

[98] The pleadings allege "intimidation" in a generic sense, but it is not clear which, if any, facts pleaded would go to this cause of action. I note that

"intimidation" is not a cause of action identified in the "Pleads & Relies Upon" section of the Amended Statement of Claim in Action 048 (see paras 281-298). I am satisfied that it is plain and obvious that this ground must fail.

[99] **Intentional infliction of nervous shock.** The elements of this cause of action are set out in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, [2002] O.J. No. 2712 (Ont. C.A.), at para. 48:

> A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness…

[100] The defendants submit that the plaintiff's claim is comprised of bare allegations which are unsustainable. This is another cause of action which does not appear under the "Pleads & Relies Upon" heading in Action 048, although under the heading 'Relief Sought" the plaintiff seeks declarations that he was subject to emotional shock (para. 299). Once again, stripped of the rhetoric that surrounds the description of the relevant events in the pleading, I conclude that the pleading cannot support this claim.

[101] **Conspiracy.** The elements of a conspiracy claim are set out by Allen M. Linden and Bruce Feldthusen in *Halsbury's Laws of Canada - Torts* in the following terms, at §HTO-21:

> The following elements must be established in order to succeed in an action for conspiracy:
>
> 1. An agreement between two or more persons;
>
> 2. Actual or constructive intent to cause injury to the plaintiff;
>
> 3. Committing unlawful acts, or using unlawful means, where the intent is constructive; and
>
> 4. Damage to the plaintiff or the threat of damage that requires an injunction because an award of damages would not adequately compensate the plaintiff. To maintain an action for damages, actual pecuniary loss caused by the conspiracy must be established.

[102] Once again, the defendants maintain that the necessary elements and material facts are not pleaded sufficiently, and that the claim amounts to a collection of unsustainable bald allegations. In the absence of a basis in material facts to support the alleged wrongful intentions of the defendants, it is plain and obvious that a conspiracy claim cannot be established on these pleadings.

[103] **Breach of fiduciary duty.** The circumstances in which a fiduciary duty may be imposed upon government in favour of an individual were considered in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] S.C.J. No. 24. The general elements for an ad hoc fiduciary duty require the plaintiff to establish "(1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely

affected by the alleged fiduciary's exercise of discretion or control" (para. 36). The general fiduciary duty analysis applies in the government context, but "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances" (para. 37). Where the undertaking to act in the alleged beneficiary's interest is alleged to arise from statute, "the language in the legislation must clearly support it... The mere grant to a public authority of discretionary power to affect a person's interest does not suffice. A thorough examination of the provisions in issue is mandatory" (para. 45).

[104] The defendants submit that the requirement to "promote the welfare, efficiency and good discipline of all subordinates" (QR&O at Art. 4.02) does not create a fiduciary obligation, and that no other legislative language is offered that would do so. I agree. The pleadings do not disclose a reasonable cause of action for breach of fiduciary duty.

[105] **Defamation.** The elements of defamation are set out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] S.C.J. No. 61, where Chief Justice McLachlin said, for the majority, at paras 28-29:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were

> defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed… The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[106] The plaintiff pleads that his reassignment amounted to defamation, as it allegedly suggests publicly that he was a problem. The defendants maintain that the pleadings do not bear out a claim in defamation. A claim for defamation was dismissed on a motion for summary judgment on the pleadings in *Robertson v. McCormick*, 2012 NSSC 4, [2012] N.S.J. No. 9. In the case, the plaintiff claimed that the defendant school principal had defamed him by not continuing a substitute teaching assignment he had been assigned. The relevant pleadings were summarized in the following terms by McDougall J., at para. 22:

> The Amended Statement of Claim, alleges that the defendant "informed" the School Board that he "had not performed his professional duties as a teacher, and consequently was not a suitable substitute teacher for continuing the assignment." (para. 14) The plaintiff does not quote exact words. He says he was informed by the defendant that this is what she told the School Board. Paragraph 17 alleges that the plaintiff's replacement by another substitute carried a "clear inference of professional incompetence" that was relayed to his employers, union and colleagues, as well as students and parents. It appears that this is an allegation of defamation by conduct. Paragraph 21 alleges that after the plaintiff's assignment was ended, the defendant "compounded the slander by communicating to the employers that the Plaintiff was derelict in his professional duties as a teacher by not adhering to the unilateral list of teaching strategies issued by the Defendant and staying with the assignment until the end of the term. That he was refusing to

> supervise the exam, correct the exam and enter marks and comments for the students taught this semester." Once again, no precise words are cited.

[107] After reviewing the issue under the summary judgment on pleadings analysis, Justice McDougall was not satisfied that "that the failure to continue or extend a substitute's assignment under the Nova Scotia *Education Act*, on its own, can be regarded as an act of defamatory communication" (para. 34). Similarly, in this case, the plaintiff's reassignment, arising out of apparent friction between himself and Lt. Col. Lewis, is alleged to have been defamatory on the basis of the plaintiff's own "gloss" on the situation. I am not convinced that such a reassignment, on its own, can constitute defamatory communication.

[108] The plaintiff also alleges defamation against Maj. Kavanagh, Cdr. Reddy, Maj. Rawal, and an unidentified Department of Justice lawyer in respect of an allegedly defamatory conduct sheet. It appears from the pleading that the impugned information involved an allegedly false assertion that the plaintiff had been convicted of impaired driving under s. 253 of the *Criminal Code*. The plaintiff's position is that there was no conduct sheet, and that the creation of such a document, apparently for the purpose of sentencing in the event he were convicted at the Court Martial, was defamatory (Action 048 at paras. 258-279).

[109] The pleading is confusing on this point, to say the least; on the one hand, the impugned information is said to be "non-relevant and stale", and is attacked on the grounds that it was provided as part of an earlier security screening and thus should not have been made available in the Court Martial (paras. 261-262, 264). There is no clear pleading of the specifics of the information on the conduct sheet; instead there is a general assertion that "[i]n addition to alleging an Offense [*sic*] under S. 253 (a) of the Criminal Code of Canada ("Impaired Driving"), the description set out in the "conduct sheet" falsely asserted that MacLellan was criminally convicted of driving while impaired" (Action 048 at para. 275).

[110] It also appears (without a clear narrative) that unidentified "Justice Counsel" indicated that there had been a clerical error in the conduct sheet. As for the claim against the Department of Justice, the defendants point out that it is not pleaded that Department of Justice counsel was involved in preparing the conduct sheet, or that counsel had authority to make additions or deletions to the conduct sheet.

[111] The pleading does not provide the exact words that are alleged to be defamatory. This is a general requirement when the words are within the plaintiff's knowledge: see, e.g., *Body Shop Canada Ltd. v. Dawn Carson Enterprises Ltd.*, 2010 NSSC 25, [2010] N.S.J. No. 92, at paras. 20-23. Along with the ambiguity in the pleadings as to whether the information in the conduct sheet was untrue or only

irrelevant, I find the pleading deficient not only in failing to plead the specific language, but in failing to provide "a coherent body of fact surrounding the incident": *Cooper v Hennan*, 2005 ABQB 709, [2005] A.J. No. 1977, at para. 16.

**THE *COMPENSATION ACT* CLAIM**

[112] As an alternative remedy, in the event that any or all of the claims in the two actions survive dismissal on the grounds already argued, the defendants seek a stay pursuant to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21. The Act makes benefits available to members or veterans, including lump-sum disability payments: see s. 45. (A veteran is "a former member": s. 2(1)). A disability award is payable on account of, *inter alia*, a "service-related injury or disease" (s. 46(1)(a)) or a "non-service-related injury or disease that was aggravated by service" (s. 46(1)(b)). Section 92 provides:

> Definition of "action"
>
> 92. (1) In this section, "action" means any action or other proceeding brought by or on behalf of a member, a veteran, a member's or a veteran's survivor, a member's or a veteran's orphan or a person who was, at the time of the member's or veteran's death, a dependent child, against Her Majesty in which damages are claimed in respect of any injury, death, damage or loss for which compensation may be claimed under this Act.
>
> Stay of action against Crown until compensation refused
>
> (2) An action that is not barred by virtue of section 9 of the *Crown Liability and Proceedings Act* shall, on application, be stayed until an application for compensation has been made under this Act, in respect of the same injury, death,

> damage or loss in respect of which the claim has been made, and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought, and,
>
> (a) in the case of an application that may be made under Part 2, a final decision to the effect that no compensation may be paid has been made under section 83 in respect of the application; and
>
> (b) in the case of an application that may be made under Part 3, a decision to the effect that no compensation may be paid to or in respect of that person in respect of the same injury, death, damage or loss has been affirmed by an appeal panel of the Board in accordance with the *Veterans Review and Appeal Board Act*.

[113] The plaintiff is not receiving benefits under the Act, and there is no record that he applied for such benefits: Affidavit of Barbara Anne Pater, 26 September 2013. The defendants seek a stay on the basis that the plaintiff claims damages for psychological injuries, may be eligible for compensation, and has not applied.

[114] The defendants say the prerequisites for a stay under s. 92 are met: first, s. 9 of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50, bars an action "against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable … in respect of the death, injury, damage or loss in respect of which the claim is made." There has been no such payment, or determination of whether such compensation or pension is payable. As such, the action is not barred by s. 9 of the *Crown Liability and Proceedings Act*.

[115] Second, the plaintiff has not exhausted the statutory benefits regime, given that he has not sought benefits, nor has he appealed any decision to the Veterans Review and Appeal Board.

[116] Third, the defendants are not required to prove that the plaintiff will receive compensation, only that he may be eligible, on the basis of a nexus between the injury and his military service that could ground a decision in his favour by the Minister. Proceedings respecting injuries that do not have such a connection will not be barred: *Dumont v. Canada*, 2002 FCT 641, [2002] F.C.J. No. 849 (Fed. T.D.), at paras. 14-24; varied on other grounds, 2003 FCA 475. The defendants submit that the plaintiff "might reasonably qualify for compensation under the Act", and that the court must defer to the Minister for such a determination, in accordance with s. 92 of the *Compensation Act*.

[117] As such, the defendants submit that both actions should be stayed in accordance with s. 92, pending the plaintiff's exhaustion of the statutory process.

[118] The pleadings allege that the plaintiff believed it was "unsafe" for him to remain under Lt. Col. Lewis's direct supervision (Action 048, para. 143) and that as a result of the defendants' actions he "has and continues to suffer … stress, humiliation, embarrassment and associated depression, sleeplessness and difficulty

coping and same is not barred by the … *Compensation Act*…" (Action 119, para. 170). He pleads that he had counselling and was put off on medical leave before taking his release from the Armed Forces (Action 119, para. 171). In addition, as discussed earlier, he claims for intentional infliction of emotional harm.

[119] The plaintiff says the Crown "misses the point" in invoking the Act, as his damages were allegedly suffered "both before and after his service with CIC and by actions of individuals who are not protected" by ss. 29 or 270 of the NDA; therefore, he says, such damages are compensable by the court. He says he is not obliged to apply for a disability pension, and that he is entitled to have his damages assessed independent of – and "perhaps concurrently" with – any such application. He also says he was never advised that he could apply for a disability pension and that the defendants have pointed to no basis upon which he could seek one. It is not entirely clear from counsel's submission, but his essential position appears to be that the defendants must establish that he would qualify for benefits or compensation under the Act.

[120] I am satisfied that the plaintiff's claims would, at least in part, fall within the *Compensation Act* stay provisions. As such, I conclude that the stay required by s. 92 of the Act must issue.

**ABUSE OF PROCESS**

[121] The defendants have additionally moved for relief on the ground of abuse of process pursuant to Civil Procedure Rule 88. In view of the lack of argument directed to this point, and given my conclusions on the other grounds, I do not find it necessary to address abuse of process.

**CONCLUSION**

[122] Accordingly, the two actions must be dismissed. As I have held above, the plaintiff's claims are in part subject to a statutory process of wide scope under the *National Defence Act* to which the court must defer. Further aspects of the claims involve matters arising under the *Code of Service Discipline*, and I conclude that the claims do not fall within the exception under s. 270 of the National Defence Act. Alternatively, those claims are not sufficiently pleaded, leading to striking under Rule 13. Finally, s. 92 of the *Compensation Act* imposes a stay of the claims.

**COSTS**

[123] In the event that the defendants elect to seek costs in these proceedings, the defendants shall have 30 days from the date of the filing of this decision to make written submissions and the plaintiff shall have an additional 15 days to also make written submissions.

LeBlanc, J.