Federal Court  Cour fédérale

Date: 20250409

Docket: T-840-20

Citation: 2025 FC 652

Ottawa, Ontario, April 9, 2025

PRESENT: The Honourable Madam Justice Strickland

PROPOSED CLASS ACTION

BETWEEN:

FÉLIX LOUIS HENRI ROGER DUNN

Plaintiff/Respondent

and

ATTORNEY GENERAL OF CANADA

Defendant/Applicant

ORDER AND REASONS

[1] This is a motion in writing brought by the Attorney General of Canada [AGC] under Rules 221(1) and 369 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. The motion seeks an order striking the Statement of Claim filed by Félix Louis Henri Rogers Dunn, the plaintiff [Plaintiff] in that action [Claim], in its entirety and without leave to amend. The Claim is dated July 29, 2020, and is a proposed class action on behalf of members or former members of the Canadian Armed Forces [CAF]. The Plaintiff is the respondent in this motion.

[2] The grounds for the motion are that (a) the Claim is statute-barred pursuant to section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*] for the representative Plaintiff and all the proposed class members; and (b) the Court has no jurisdiction as the Claim is subject to a comprehensive CAF dispute resolution scheme under section 29 of the *National Defence Act*, RSC, 1985, c N-5 [*NDA*].

[3] For the reasons that follow, I am granting this motion to strike.

Background

[4] In 2006, the Plaintiff enrolled in the CAF. From June 2016 to December 2016, he was stationed onboard the HMCS "Vancouver", a Halifax-class frigate.

[5] In his Claim, the Plaintiff alleges that during his service on the HMCS "Vancouver", he began experiencing chills and fever, along with a cough, burning and tightness in his chest, and fatigue. He claims that he was treated with antibiotics while onboard but never fully recovered. Further, that he discovered what he believed to be black mould growing from the fittings in the pipes on the ship. Shortly thereafter he was diagnosed with exercise-induced asthma, sleep apnea, and chronic rhinitis.

[6] The Plaintiff claims that since first developing these symptoms on the HMCS "Vancouver", he has never fully recovered, he continues to experience violent swings in temperature and chest pain when breathing, that his overall quality of life has been compromised, and that his ability to perform any physically demanding activities has been severely limited.

[7] Between March 2019 and August 2022, the Plaintiff made applications to Veterans Affairs Canada [VAC] for various disability benefits, including pain and suffering compensation [PSC], critical injury benefit as well as rehabilitation services and vocational assistance programs for veterans.

[8] On May 27, 2020, the Plaintiff submitted a request for a Medical Release Attributable to Service Determination. He stated this request was due to his permanent lung issue caused by the exposure to mould on HMCS "Vancouver".

[9] On July 29, 2020, the Plaintiff filed his Claim as a proposed class proceeding on behalf of all members or former members of the CAF who served on CAF ships from January 1, 2000, to the certification date and who were exposed to mould, toxins, and other airborne contaminates throughout the course of their service [Proposed Class]. The Plaintiff claims that the CAF was aware, or should have been aware, of the dangerous levels of toxic mould on a number of its ships, that it breached its duty of care to maintain its property so that it was safe and, failed to take reasonable measures to ensure that preventable and foreseeable harm did not occur.

[10] More specifically, the Claim asserts systemic negligence, breach of fiduciary duty and violations of section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] and of subsection 1(a) of the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*]. The relief sought includes a declaration that the Proposed Class's *Charter* rights have been infringed as well as general, special and punitive damages.

[11] In early 2021, the Plaintiff was granted disability entitlement by VAC, pursuant to section 45 of the *Veterans Well-Being Act*, SC 2006, c 21 [*VWA*], for Chronic Cough and Chronic Rhinitis injury as these conditions arose out of his Regular Force service. His disability was assessed at 5% in accordance with subsection 51(1) of the *VWA* effective April 1, 2019. This resulted in a monthly PSC in the amount of $118.36 commencing in March 2021 as well as a retroactive one-time payment of $2,678.00 as his entitlement was retroactive to April 1, 2019.

[12] On February 17, 2021, the Plaintiff was advised of his favourable Medical Release Attributable to Service, as it had been determined that his service-related Chronic Cough had led to his medical release. He was granted a period of retention to continue to work in his administrative positions until March 2, 2023. However, at the Plaintiff's request, he was medically released from the CAF on September 1, 2022.

[13] In March 2022, the Plaintiff was granted disability entitlement for Adjustment Disorder with Mixed Anxiety and Depressed Mood from VAC as this condition was a consequence of his Chronic Cough and Chronic Rhinitis, under section 45 in accordance with section 46 of the *VWA*. His disability was assessed at 6% in accordance with subsection 51(1) of the *VWA* effective May 1, 2021. This resulted in a monthly PSC of $60.83 commencing in April 2022 as well as a retroactive one-time payment of $655.93 as his entitlement was retroactive to May1, 2021.

[14] Also in 2022, the Plaintiff received approval for Rehabilitation Services and Vocational Assistance and an Income Replacement Benefit [IRB] for his Adjustment Disorder with Mixed

Anxiety and Depressed Mood, Chronic Cough, Chronic Rhinitis and Lumbar Disc Disease and later for Cervical/Neck Problem. His IRB became payable on September 1, 2022, i.e., the day of his release from the CAF, which entitled him to 90% of his previous monthly military salary.

[15] The Plaintiff was also granted entitlement to monthly additional PSC, effective September 1, 2022. This resulted in a monthly additional PSC of $563.92 as well as a one-time lump sum retroactive payment of $2,116.04 for the period of September 1, 2022, to December1, 2022.

[16] Only his applications for disability benefits related to chest pain and for the critical injury benefit were denied.

[17] According to the CAF's records, as of December 7, 2023, the Plaintiff had received PSC payments in the amount of $158,169.17, and ongoing monthly PSC payments of $64.85. He had received $8,883.08 in additional PSC, and ongoing monthly payments of $563.92. The Plaintiff had also received IRB in the amount of $22,390.25, and ongoing monthly IRB of $1,516.36.

Relevant Legislation

[18] *Federal Court Rules*, SOR/98-106 [*Rules*]

> **Motion to strike**
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> **221 (1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
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> > **(a)** discloses no reasonable cause of action or defence, as the case may be,

> **(b)** is immaterial or redundant,
>
> **(c)** is scandalous, frivolous or vexatious,
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> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.
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> **Evidence**
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> **(2)** No evidence shall be heard on a motion for an order under paragraph (1)(a).

[19] *Crown Liability and Proceeding Act*, RSC 1985, c I-5 [*CLPA*]

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

[20] *National Defence Act*, RSC, 1985, c N-5 [*NDA*]

> **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.

Issues

[21] In my view, there are two questions to be resolved with respect to this motion to strike, as well as one preliminary issue. They are as follows:

A. Preliminary Issue: Are the affidavits filed by the parties admissible?

B. Issues on the merits:

    i. Is the Claim statute-barred by section 9 of the *CLPA*?

    ii. Should the Court decline jurisdiction in light of alternate administrative remedies, specifically, the CAF dispute resolution scheme provided in section 29 of the *NDA*?

Preliminary Issue: Are the affidavits filed by the parties admissible?

[22] The AGC filed two affidavits in support of its motion. They are:

i. The affidavit of Meghan Clark, acting manager of the Disability Benefit Program Management Section within the Service Delivery Branch of VAC, affirmed on January 19, 2024 [Clark Affidavit]. This affidavit describes the roles and responsibilities of VAC and provides a detailed description of the types of disability benefits available to CAF or former CAF members under the *Pension Act*, RSC 1985, c P-6 [*Pension Act*] or the *VWA* and the eligibility requirements for same; the reconsideration and review process for disability entitlements or assessments; and, the administration of disability claims including disability pensions and PSC. It also

describes other benefits and programs provided through the VAC including the critical injury benefit, rehabilitation services and vocational assistance, the IRB, Canadian Forces income support, the caregiver recognition benefit and the review process of same, as well as the group insurance benefit, career transition services, case management services, the veterans independence program, and "attributable to service" determinations. The Clark Affidavit then goes on to describe the disability and VAC benefits applied for and received by the Plaintiff. The Clark Affidavit attaches 18 exhibits, mainly comprised of the Plaintiff's applications for VAC benefits and programs as well as the VAC decision letters; and

ii. The affidavit of Nadine Dery, Grievance System Manager at the Canadian Forces Grievance Authority, sworn on January 19, 2024 [Dery Affidavit]. This describes the CAF grievance process as set out in sections 29 to 29.28 of the *NDA* and chapter 7 of the *Queen's Regulations and Orders* [*QR&O*], supplemented by two *Defence Administrative Orders and Directives* [DAOD], i.e., DOAD 2017-0 *Military Grievance* and DAOD 2017-1 *Military Grievance Process*. The Dery Affidavit attaches three exhibits, namely Chapter 7 of the *QR&O* as well as the two DAODs.

[23] The Dery Affidavit also describes what can be grieved, how the grievance process is navigated, the first level decision-making authority for a grievance, being the Initial Authority, the Final Authority which is the Chief of Defence and which is subject to judicial review by this Court, the military grievance external review committee, as well as redress available to the Final Authority. The Dery Affidavit also states that there is no record of a grievance submitted by the Plaintiff relating to mould exposure on HMC ships or service-related medical conditions.

[24] As to the Plaintiff, by Direction dated January 8, 2024, the Case Management Judge in the underlying Claim noted that the AGC's motion to strike would be heard and determined prior to a motion for certification of the class action by the Plaintiff and set out a timeline with respect to the motion to strike. The Plaintiff filed written representations in response to the motion to strike but no responding affidavits.

[25] However, the Plaintiff subsequently sought to file his certification motion, prior to the determination of the motion to strike. That motion record included the Plaintiff's own affidavit, sworn on March 5, 2024 [Plaintiff's Affidavit], which states that it is made in response to the motion to strike. Despite the apparent irregularity, the AGC refers to the Plaintiff's Affidavit in its written representations made in support of its motion to strike. Accordingly, I am assuming that the Plaintiff's stated purpose of his affidavit, as accepted by the AGC, is that it is in response to the motion to strike.

[26] The Plaintiff's Affidavit describes the Plaintiff's service on board the HMCS "Vancouver", his claim to have discovered black mould onboard and the medical problems he attributes to exposure to same. He also confirms that on February 17, 2021, he received an official determination letter stating that VAC had determined that his medical release was attributable to his military service; he was granted a period of retention to continue working in an administrative position until March 2, 2023, but, at his request, he was released for the CAF on September 1, 2022; he received compensation for his injury pertaining to Chronic Cough resulting in an awarded of 5% of the disability entitlement; and, he has also received approval for

rehabilitation services and income replacement benefits from VAC entitling him to 90% of his previous salary.

[27] The parties agree that pursuant to Rules 221(l)(a) and 221(2), in a motion to strike on the ground that the pleading discloses no reasonable cause of action, no evidence shall be heard. Where they part company is with respect to whether there is an exception in circumstances such as this case where the basis for the motion – i.e., that it discloses no reasonable cause of action – is because the Court lacks jurisdiction.

[28] The Plaintiff argues the affidavits submitted by the parties (apparently including his own) are not to be used in support of this motion to strike. Rather, the Court must determine whether there is a reasonable cause of action on the basis of the pleadings themselves.

[29] The AGC submits that the Court may accept affidavit evidence on the issue of whether the Court has jurisdiction. It adds that evidence should be considered when the Court is asked to apply a statutory bar, or is asked to decline its jurisdiction in favour of an alternative administrative process such as a grievance procedure. The AGC notes that the Federal Court of Appeal [FCA] considered evidence on motions to strike in the two leading cases dealing with the application of section 9 of the *CLPA* (citing *Lafrenière v Canada (Attorney General)*, 2020 FCA 110, leave to appeal to SCC dismissed, 39404 (March 18, 2021) [*Lafrenière*]; *Prentice v Canada*, 2005 FCA 395 [*Prentice*]). Further, that the FCA reconfirmed that it is impossible for the Court to properly determine whether or not to exercise its residual jurisdiction in a “factual

vacuum" in *Canada v Greenwood*, 2021 FCA 186 at para 95 [*Greenwood*]. This was recently reaffirmed in *Adelberg v Canada*, 2024 FCA 106 at para 40 [*Adelberg*].

[30] I agree with the AGC that evidence is admissible in this case as the two grounds advanced for striking the Claim, i.e., the statute-bar of section 9 of the *CLPA* and the comprehensive dispute resolution scheme provided in section 29 of the *NDA*, relate to the jurisdiction of this Court to adjudicate those issues.

[31] As held by the FCA in *McMillan v Canada*, 2024 FCA 199 [*McMillan*]:

> [79] …while evidence is not ordinarily admissible on a motion to strike under Rule 221(1)(a) of the [*Rules*], it may be considered insofar as the moving party alleges that the Court lacks or must decline jurisdiction: *Greenwood*, above at para. 95.

[32] Further, in *Doucette v Canada (Attorney General)*, 2018 FC 697 [*Doucette*], which is factually very similar to this matter, and which will be discussed further below, affidavits similar in content to those submitted by the AGC in this matter were found to be admissible as the primary question before the Court in that matter was its jurisdiction.

[33] Accordingly, the affidavits filed in support of or in response to this motion are admissible for, and to the extent that they address that purpose (*Tuharsky v O'Chiese First Nation*, 2022 CanLII 20057 (FC) at para 13 citing *MIL Davie Inc v Société d'Exploitation et de Développement d'Hibernia Ltée*, 1998 CanLII 7789 (FCA), [1998] FCJ No 614, 226 NR 369 (FCA) at para 8).

[34] As held in *Greenwood*:

> [95] Evidence is admissible on a jurisdictional issue such as that which arose in this case, where the Court is asked to decline to exercise its jurisdiction in favour of alternate administrative processes. Evidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies. A ruling on this sort of issue cannot be made in a factual vacuum: see, e.g., *Mil Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée*, 1998 CanLII 7789 (FCA), 226 N.R. 369, 85 C.P.R. (3d) 320, [1998] CarswellNat 814 (F.C.A.), at paragraphs 7–8; *Lebrasseur No. 1*, at paragraph 15).

[35] And, in *Adelberg*, the FCA held:

> [40] A pleading may be struck for disclosing no reasonable cause of action only where this is plain and obvious: *Berenguer v. Sata Internacional - Azores Airlines*, S.A., 2023 FCA 176, 2023 CarswellNat 2983 at para. 23, leave to appeal to SCC refused, 40949 (11 April 2024) [*Berenguer*], citing *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166 at para. 64; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17. The plain and obvious test applies to both the discernment of whether a claim pleaded is justiciable and to the discernment of whether it falls within the jurisdiction of the Federal Court: *Berenguer* at para. 24; *Windsor (City) v. Canadian Transit Co*., 2016 SCC 54, [2016] 2 S.C.R. 617 at para. 24. Where the issue is a jurisdictional one, evidence is admissible and, indeed, may be required: *Berenguer* at para. 26; *Greenwood* at para. 95; *MIL Davie Inc. v. Société d'Exploitation et de Développement d'Hibernia Ltée (1998)*, 226 N.R. 369, 1998 CanLII 7789 (FCA) at paras. 7-8.

[36] Thus, evidence as to the nature and efficacy of a suggested alternate process – i.e., the VAC grievance process – is admissible in order for the Court to determine whether it ought to decline jurisdiction in favour of the alternate administrative remedies. This is because such a determination "cannot be made in a factual vacuum", as submitted by the AGC (*Greenwood* at

para 95). Similarly, evidence is required to assess whether the Claim is statute-barred by section 9 of the *CLPA* because, if it is, then the Court lacks jurisdiction to hear the matter.

[37] More specifically, the Clark Affidavit and the Dery Affidavit establish necessary facts relevant to the Court's jurisdiction, by describing the VAC compensation programs for disability and other benefits and allowances as well as the CAF grievance process. They also address the Plaintiff's recourse, or lack of recourse, to these statutory programs and processes, including that the Plaintiff has received and continues to receive compensation for injury incurred during his deployment in the HMCS "Vancouver" and that he has not engaged the grievance process. These affidavits and the enclosed exhibits are therefore properly before the Court (*Doucette* at paras 19-20; *Oman v Hudson Bay Port Company*, 2016 FC 1269 at para 11; *Lebrasseur v Canada*, 2006 FC 852 at para 16 [*Lebrasseur FC*], aff'd 2007 FCA 330 [*Lebrasseur FCA*]).

[38] In his affidavit, the Plaintiff largely sets out his assertions as to his exposure to mould, the impact of same on his health and his allegations as to the CAF's knowledge of the existence of the mould. These facts do not speak to jurisdiction and are not admissible. In any case, his allegations are stated and grounded in the Claim, and the facts alleged therein are assumed to be true (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]; *Condon v Canada*, 2015 FCA 159 at para 13 [*Condon*]; see also *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at para 52).

[39] However, paragraphs 17 and 18 of the Plaintiff's Affidavit (and related exhibits C and D) speak to the determination letter in which VAC stated that the Plaintiff's medical release was

attributable to his military service and to the date of his release. These paragraphs and the exhibits referred to therein are thus admissible. Similarly, paragraphs 29-32 are admissible as they speak to the awarding of a 5% disability entitlement, the Plaintiff's release from service, and the approval for rehabilitation services and IRB entitling the Plaintiff to 90% of his salary. This is relevant to determining whether section 9 of the *CLPA* bars his Claim. The remainder of the Plaintiff's Affidavit and the other exhibits will be afforded no weight.

Legal Framework

[40] The parties are generally in agreement as to the applicable legal framework with respect to motions to strike under Rule 221. In that regard, I note that Rule 221(1)(a) permits the Court to strike out a pleading which discloses no reasonable cause of action, including for want of jurisdiction, with or without leave to amend.

[41] The test to strike out a pleading is well-established. It asks whether it is plain and obvious, assuming the facts as pleaded to be true, that the pleading discloses no reasonable cause of action. That is, that the claim has no reasonable prospect of success (*Imperial Tobacco* at para 17; *Condon* at para 13).

[42] The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations (*Condon* at para 21 citing *Biladeau v Ontario (Attorney General)*, 2014 ONCA 848 at para 15; see also *Mohr v National Hockey League*, 2022 FCA 145 at para 48 [*Mohr*]). That said, a plaintiff must plead the material facts in sufficient detail to support the claim and relief sought, including the constituent elements

of each cause of action or legal ground raised (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16, 19-20 [*Mancuso*]).

[43] Further, as stated in *Canada v Roitman*, 2006 FCA 266, leave to appeal to SCC refused, 31634 (December 7, 2006), the Court must interpret a statement of claim beyond the literal language employed:

> [16] A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court. To paraphrase statements recently made by the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11 (CanLII), [2005] 1 R.C.S. 146 at paragraph 11, and applied by this Court in *Prentice v. Canada (Royal Canadian Mountain Police)*, 2005 FCA 395, at paragraph 24, leave to appeal denied by the Supreme Court of Canada, May 19, 2006, SCC 31295, a plaintiff is not allowed to frame his action, with a degree of artificiality, in the tort of negligence to circumvent the application of a statute.

[44] Lastly, novel but arguable claims must be allowed to proceed to trial as new developments in the law often find their provenance in surviving motions to strike (*Mohr* at para 48 citing *Imperial Tobacco* at para 21). Motions to strike nonetheless serve an important screening or gatekeeping function:

> They are essential to effective and fair litigation and prevent unnecessary effort and expense being devoted to cases that have no reasonable prospect of success. This is particularly true in the context of class actions, where plaintiffs may have fundraised to cover their expenses and where they are relieved from paying costs when they are unsuccessful on interlocutory matters along the way.
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> (*Mohr* at para 49)

Is the Claim statute-barred by section 9 of the *CLPA*?

AGC's Position

[45] The AGC submits that the Claim is barred by section 9 of the *CLPA* because it is in respect of the same injury, damage, or loss for which compensation was paid or is payable to the Plaintiff and the entire proposed class.

[46] In that regard, the AGC notes that as held by the FCA in *Lafrenière*, section 9 is to be interpreted to ensure that there is no Crown liability for an event already compensated, even when the claimed head of damages does not match the head of damages compensated for by the pension. Further, the immunity conferred by section 9 prevents crown servants from using civil remedies to obtain the difference between the pension amount and the purported value of the harm suffered (citing *Prentice* at para 35).

[47] Relying on *Lebrasseur LC* at para 31, *Sarvanis v Canada*, 2002 SCC 28 at para 28 [*Sarvanis*] and *Dumont v Canada*, 2003 FCA 475 at para 67 [*Dumont*], the AGC adds that section 9 preserves the Crown's immunity from civil suit when it has paid or will pay a pension or compensation on the same factual basis from which the claim at issues arises. Section 9 asks whether the factual basis of the Plaintiff's compensation award and the factual basis of the Claim seeking damages are the same. If the answer is yes, then the Claim is barred (citing *Lafrenière* at paras 42-45, 65).

[48] More specifically, the AGC argues that all damages arising out of the incident which entitle a person to a pension will be subsumed under section 9, provided that the pension or compensation is given "in respect of" or on the same basis as the identical death, injury, damage, or loss (citing *Sarvanis* at para 29). Further, that the real nature of the action must be examined, and the Court must be wary of red herrings found in the claim which may attempt to circumvent the section 9 immunity (citing *Lafrenière* at para 60).

[49] Here, the essential character of the dispute are claims by the Plaintiff, and by the proposed class of current and former CAF members, for injuries, damages, and losses arising out of exposure to airborne contaminates during their CAF military service. They are all entitled to a pension for their service-related injuries pursuant to the *VWA* and the *Pension Act*. Accordingly, section 9 of the *CLPA* bars their action for damages arising from these service-related injuries.

[50] The AGC also submits that the Plaintiff's circumstances illustrate the application of the section 9 bar. The Plaintiff applied for, and received, VAC compensation and benefits for the service-related medical conditions which form the factual basis of his proposed class action claim against the CAF. The fact that he seeks different heads of damages in his Claim than those awarded through the statutory compensation scheme does not avoid the bar of section 9 of the *CLPA* (citing *Lafrenière* at paras 43-44).

[51] Further, the AGC points out that this case is similar to *Doucette*, in which the plaintiff, a CAF naval officer, sought damages for a lung injury he attributed to exposure to black mould on board Canadian naval ships and filed an action with similar allegations to this Claim against the

Crown after being medically released. In *Doucette*, this Court determined that the claim was barred by section 9 of the *CLPA* because it was formulated entirely on the same service-related facts upon which the plaintiff's disability. The broad application of section 9 barred the plaintiff's claim for black mould-related injuries for which he had already received compensation from VAC.

[52] Also in *Doucette*, the Court considered affidavit evidence and determined that section 9 was a complete bar to the claim, including the claim of systemic negligence, breach of fiduciary duty and malice. The claim was struck in its entirety on the basis of no reasonable cause of action under Rule 221(1)(a), without leave to amend. The AGC submits a similar outcome is warranted here.

[53] With respect to the *Charter* claims, the AGC argues that in *Lafrenière*, the plaintiff also brought an action for *Charter* damages arising from the investigation and botched handling of his harassment complaints. However, the FCA examined the essential character of the action and upheld this Court's finding that no separate or distinct facts were pleaded to support the *Charter* claims. All of the damages flowed from the same incidents: the investigation and the handling of the complaints. As in *Prentice*, the matter in *Lafrenière* was a disguised action prohibited by section 9 of the *CLPA* (*Lafrenière* at paras 57, 60-67).

[54] Further, and in specific response to the Plaintiff's written representations filed in this motion, the AGC submits that his *Charter* claim is not "supported" and distinguishable from *Lafrenière* on that basis.

[55] Similarly, as in *McQuade v Canada (Attorney General)*, 2023 FC 1083 [*McQuade*], the fact the Plaintiff partially frames the Claim in terms of *Charter* and *Bill of Rights* breaches and remedies does not preclude the application of section 9. This is because the factual basis of the Claim is the same, i.e., exposure to airborne contaminants during military service.

Plaintiff's Position

[56] The Plaintiff submits that the AGC's position with respect to section 9 of the *CLPA* is overstated and restricts this Court's ability to provide remedies under subsection 24(1) of the *Charter*.

[57] The Plaintiff acknowledges that the principle behind section 9 of the *CLPA* is to prevent double recovery where the government is liable for misconduct and compensation is payable. He submits, however, that in order for section 9 of the *CLPA* to apply, the factual basis for the loss must be the same as that which creates entitlement to the relevant pension. The Plaintiff submits that this is not the case in this matter. His claim does not arise merely from exposure to mould, it arises from the CAF's conduct, which has resulted in consequences separate and distinct from the damages suffered by the proposed class. The systemic negligence and breach of fiduciary duty are distinct from the section 7 *Charter* violations pleaded in the Claim which involve a malicious and purposeful exercise of power that subjected the Plaintiff and the proposed class members to a toxic and harmful environment.

[58] More specifically, the Plaintiff contends that his Claim is based on the fact that several members of the CAF failed to act, or maliciously and intentionally withheld information when

presented with detailed information about the rampant toxic mould growth on the Defendant's vessels and intentionally placed the members in said toxic environments. Thus, the alleged injuries and events are not identical to those for which compensation was previously awarded.

[59] The Plaintiff also submits that the Court has been cautious in finding that section 9 of the *CLPA* operates as an absolute bar without adequate proof supporting its application. And, even if this Court were to find that there is a sufficient evidentiary foundation to determine whether the immunity conferred by section 9 of the *CLPA* applies to remedies sought under the *Charter*, the law is unsettled at the highest levels regarding the limits of section 9 of the *CLPA* and *Charter* remedies.

[60] In this regard, the Plaintiff distinguishes *Lafrenière* and *McQuade* in which the claims were struck either because of the inadequate pleading of the *Charter* claim or because the *Charter* breach and systemic negligence claims were conflated, which the Plaintiff submits are not the circumstances here. Rather, in this case, the *Charter* complaints are supported, and the systemic negligence and breach of fiduciary duty claims are clear and separate claims from the *Charter* breach, which is based on a toxic intentional tort claim.

[61] On this point, the Plaintiff draws a distinction between "toxic torts" and systemic negligence. According to the Plaintiff, toxic torts require establishing a direct causal link between the exposure to the harmful substance and specific injuries, often suffered by individuals. However, systemic negligence focuses on broad institutional failings that impact a group of individuals. Accordingly, while systemic negligence can be severe and warrant

significant remedies, it is not inherently equivalent to a *Charter* breach. Each case must be evaluated on its specific facts and legal context to determine the appropriate legal framework and remedies. In other words, *Charter* remedies would address the broader societal harm, such as impaired public confidence and diminished faith in constitutional protections and would aim to deter future government misconduct and ensure *Charter* compliance.

[62] The Plaintiff adds, referring to *Sarvanis* for support, that he and the proposed class are not seeking double or enhanced recovery for medical disabilities diagnosed for compensation under a disability pension. Rather, they seek compensation for the intentional infringement of the *Charter* right to security of the person. Accordingly, there is no bar to the entirety of the Claim. Further, and in specific response to the AGC's assertion that PSC would encompass any *Charter* remedy available, the Plaintiff submits that such payments do not include compensation for the infringement of natural justice principles, such as the obligation to provide a safe workplace environment.

[63] The Plaintiff submits that eligibility for *Charter* damages is contingent upon identifying a breach and determining the suitability of remedies, which include compensation, vindication, and deterrence. Furthermore, that judicial discretion under subsection 24(1) of the *Charter* permits nuanced assessments of remedies, notwithstanding the application of section 9 of the *CLPA*.

Analysis

[64] To address the parties' arguments, it is perhaps helpful to first review the caselaw interpreting section 9 of the *CLPA* and its applicability in relevant or similar circumstances.

[65] The starting point is *Sarvanis*. There, the issue before the Supreme Court of Canada was whether, by receiving a disability pension under the *Canada Pension Plan*, RSC 1985, c C-8 [*CPP*], the appellant had been paid a "pension or compensation . . . in respect of the death, injury, damage or loss" in respect of which the claim was brought, so as to bar his action pursuant to section 9 of the *CLPA*. In interpreting section 9, the Supreme Court held that because "in respect of" is tied to specific events to which liability could attach but for the operation of section 9, an action will only be barred if it is based on the factual basis specified in section 9.

[66] By contrast, the *CPP* is a contributory plan wherein disability benefits are contingent on the present disabled condition of an otherwise qualified contributor. Since *CPP* benefits are contingent on a mere disability, and not on the factual basis specified in section 9, they did not fall within its scope. Accordingly, in *Sarvanis*, the disability benefit awarded to the appellant did not constitute a pension or compensation for the purposes of section 9 of the *CPLA*.

[67] More specifically, the Supreme Court held that:

> 28 In my view, the language in s. 9 of the *Crown Liability and Proceedings Act*, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown **be made on the same factual basis as the action thereby barred**. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section **does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made**.
>
> 29 This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the

> claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, **so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss.**
>
> [Underscore in the original, emphasis in bold added.]

[68] Before the Federal Court in *Lafrenière v Canada (Attorney General)*, 2019 FC 219, the plaintiff claimed that he had been harmed by acts and gestures committed by his superiors while he was a member of the CAF, specifically, what turned out to be groundless allegations of inappropriate conduct. He argued that insofar as his claim against the respondent was based on attacks "on his civil, constitutional and fundamental rights", section 9 of the *CLPA* could not serve to circumvent these rights on the ground that he receives a pension or disability award under the *VWA*. This Court did not agree.

[69] On appeal, the plaintiff/appellant again argued that with respect to compensation paid from the Consolidated Revenue Fund under a particular head of damages, section 9 of the *CLPA* cannot be used to hinder a claim against the Crown for the same harmful event, where compensation is sought for another type of damage (*Lafrenière* at para 43). The FCA also rejected that argument. It noted that, previously, it had uniformly held that "the determining factor in analyzing whether section 9 of the CLPA applied to a given situation was whether the compensation drawn from the Consolidated Revenue Fund and the loss claimed in the action had the same factual basis" (*Lafrenière* at para 45 citing *Dumont* at para 67; *Begg v Canada (Minister of Agriculture)*, 2005 FCA 362 at para 29 [*Begg*]; *Prentice* at para 65; *Lebrasseur FCA* at para 12).

[70] Further, that the source of the alleged wrongful act or negligence is not relevant for the purposes of determining the applicability of section 9 of the *CLPA* if payment of the compensation drawn from the Treasury and the compensation requested pursuant to the action resulted from the same event (*Lafrenière* at para 46 citing *Begg* at para 32). The FCA found that the Federal Court had correctly considered not the characterization of the damages claimed in the action, but the characterization of the event giving rise to it (*Lafrenière* at para 47).

[71] Of note in *Lafrenière* is that on appeal the plaintiff/appellant also argued that his claim was largely based on allegations of violation of his constitutional rights and that any analysis of the applicability of section 9 of the *CLPA* must take into account section 24 of the *Charter*. Further, that section 9 of the *CLPA* could not deprive him of the right to go to court to obtain an appropriate and just remedy under the circumstances (*Lafrenière* at para 48).

[72] The FCA noted that Supreme Court of Canada, like the FCA, had not had an opportunity to decide the substantive question as to whether the immunity provided for in section 9 of the *CLPA* also applies to remedies sought under the *Charter*. Prudence was therefore warranted. However, the plaintiff/appellant had not persuaded the FCA that the *Charter* could assist him. The FCA referred to *Prentice* in which the Supreme Court held that in the context of a remedy sought under the *Charter*, in order to oppose a motion to strike, the plaintiff must "at least be able to establish a threat of violation, if not an actual violation, of (his) rights under the *Charter*", regardless of how innovative the cause of action underlying the remedy sought may appear. In this regard, citing Justice Robert Décary's words in paragraphs 23 to 26 of *Prentice*, the FCA noted that it is the facts as plead that are assumed to be true, not the facts as they may be

interpreted in the statement of claim or the legal assertions that may be made in it (*Lafrenière* at paras 49-53).

[73] Further:

> [60] As the Court noted in *Prentice*, here it is necessary to examine the real nature of the action brought by the appellant and to be wary of the red herrings that may be found in his statement of claim in order to wittingly or unwittingly circumvent the immunity provided for in section 9 of the CLPA.

[74] Ultimately, at paragraph 62 of *Lafrenière*, the FCA found that the claim was such a circumstance and that the case could not be exempted from the effects of section 9 of the *CLPA* on the basis of the plaintiff/appellant's completely unsupported complaints based on the *Charter*.

[75] In *Prentice*, the issue before the FCA, on appeal of a motion to strike, was whether the respondent, a member of the Royal Canadian Mounted Police [RCMP] who had taken part in peace-keeping missions abroad, could bring an action in damages against the Crown, his employer, based on an alleged violation of section 7 of the *Charter*, notwithstanding the immunity granted to the Crown by section 9 of the *CLPA*. The remedy sought under section 24 of the *Charter* was an award of compensatory, moral and exemplary damages.

[76] The FCA ultimately found that notwithstanding the way in which the statement of claim was framed, the dispute arose out of the employment relationship between the respondent and the RCMP (*Prentice* at para 47). More specifically, the FCA concluded that:

> [69] The remedy sought here, compensatory, moral and exemplary damages, is typical of liability actions in common law and confirms the real nature of the action brought by the

> respondent. When stripped of the artifices that litter the statement of claim once it was amended in response to the decision in *Dumont-Drolet* —undoubtedly to avoid the Crown immunity against civil liability actions recognized by the Court—the respondent's action is in reality an action by an employee against his employer seeking damages for harm allegedly suffered in the course of his employment (see *Vaughan*, at paragraph 11).
>
> [70] Given that this action is a disguised action in civil liability against the Crown, it is prohibited by sections 8-9 of the *Crown Liability and Proceedings Act.*
>
> …
>
> [76] My conclusion is consistent with what the Court has recently decided, in *Grenier*: a plaintiff who wishes to bring action against the Crown in civil liability for damages must first exercise the remedies he or she is offered by administrative law. Section 24 of the Charter is not a life preserver for rescuing parties who fail to exercise the remedies that they have under the "ordinary" laws. It is not the role of the Federal Court to do the things that the statutes assign to arbitrators and ministers. It is quite simply not its function to decide, in an action brought under the Charter, whether a grievance or a claim for a disability pension is justified, let alone to determine the amount of damages or of the pension that arbitrators or ministers could have granted if the matter had been put to them.
>
> [77] In the circumstances, the respondent's action is undeniably certain to fail, even if there was a violation of section 7 of the Charter and even if his action under the Charter was not precluded by Crown immunity, issues on which I need therefore not state an opinion.
>
> [78] I would therefore allow the appeal with costs at both levels, set aside the judgment of the Federal Court, allow the motion to strike and strike out Mr. Prentice's amended statement of claim in its entirety.

[77] In *Gélinas v Canada*, 2021 FC 1157 [*Gélinas*], the plaintiff was a veteran who served in the CAF for 28 years prior to his medical release. While deployed to Afghanistan, he experienced severe psychological trauma after learning about the death of a comrade-in-arms on

August 23, 2007. As part of this action against the Crown, he alleged that the manner in which he was treated, or not treated, in the hours following the subject incident, and the subsequent conduct of Crown servants in response to his pursuit of the truth surrounding the circumstances of the incident, caused him serious material, physical and moral injury. He sought compensatory and punitive damages. The Crown sought to strike the statement of claim as barred by section 9 of the *CLPA* as the plaintiff received a pension or compensation related to his CAF service and the events of August 23, 2007.

[78] Justice McHaffie allowed the motion and struck the statement of claim. He found that the relevant statutory provisions, and the judgments of the Supreme Court of Canada and the FCA, required that outcome. While certain aspects of the plaintiff's statement of claim stemmed from the actions that were taken after the events of August 23, 2007, and even after his release from the CAF, the facts on which his claim for damages was based were the same as the ones on which his compensation was awarded. The treatment of the plaintiff on August 23, 2007, and the various responses from Crown servants thereafter were intrinsically related to the factual basis that led to his compensation payment. Justice McHaffie therefore found that it was plain and obvious that section 9 of the *CLPA* prohibited his claim (*Gélinas* at para 3).

[79] Justice McHaffie, having reviewed the decisions in *Sarvanis* and *Lafrenière*, held:

> [39] Several binding principles emerge from the Supreme Court's decision in *Sarvanis* and the Federal Court of Appeal's decision in *Lafrenière (FCA)*:
>
> - Section 9 of the *CLPA* has a broad interpretation to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated: *Sarvanis* at para 29; *Lafrenière (FCA)* at para 45.

- What is important is whether the compensation and loss claimed in the action have the same factual basis, regardless of the heads of damages raised in the action: *Sarvanis* at para 28; *Lafrenière (FCA)* at paras 45, 47.

- The source of the alleged wrongful act or negligence is not relevant for the purposes of determining the applicability of section 9 if payment of the compensation and the compensation requested pursuant to the action result from the same event: *Lafrenière (FCA)* at para 46.

- A claim based on the harm arising from the Crown's processing of the plaintiff's complaints is also barred by section 9 if the harm is intrinsically related to the factual basis which gave rise to the payment of compensation: *Lafrenière (FCA)* at paras 64–67.

[80] Justice McHaffie noted that the statement of claim alleged that Crown servants broke several rules and directives during the events of August 23, 2007, and that abhorrent behaviour caused stress and physical and psychological distress. Further, that the difficulties the plaintiff encountered in searching for the truth about the events of August 23, 2007, including the CAF's refusal to investigate and to grant his request for a financial settlement, compounded his psychological and moral distress (*Gélinas* at para 40). Justice McHaffie thus found that:

> [41] In my view, it is plain and obvious that Mr. Gélinas's action has the same factual basis as his compensation under section 45 of the *VWA*. The events of August 23, 2007, the actions of CAF members on that day, and the subsequent actions of CAF members in response to his search for the truth resulted in his current medical condition and thus the disabilities upon which his compensation is based. His statement is based on these same events and actions, and this same medical condition.

[81] With respect to the argument that section 9 of the *CPLA* did not apply because the plaintiff's claim was not related to the trauma caused by the death of his comrade-in-arms, but to the unfairness and negligence on the part of Crown servants, including violations of rules, the *Civil Code of Quebec*, CQLR c CCQ-1991, and the *NDA*, Justice McHaffie found that the Supreme Court of Canada and the Federal Court of Appeal have held that it is not the heads of damages raised in an action that matter, but the factual basis. In the case before him, the factual basis for the action was the same as the factual basis for compensation (*Gélinas* at para 42).

[82] Justice McHaffie also rejected arguments that the actions of government employees, such as abandoning him in his room and failing to provide medical care, were not "service-related" and therefore, could not form the basis of compensation under section 45 of the *VWA*. Rather, the events of August 23, 2007, occurred during the plaintiff's military deployment to Afghanistan. At issue was whether he was treated or not after receiving the news conveyed to him by a subordinate. Justice McHaffie held that, whether talking about a failure or an alleged breach of rules or directives, the actions of the CAF members and the effect they had on the plaintiff were directly related to his service in the CAF. Justice McHaffie also noted that the definition of "service-related" in the *VWA* was quite broad, covering any illness that "arose out of" service in the CAF (*Gélinas* at para 43).

[83] He reached the same conclusion with respect to the allegations regarding the Crown servants' subsequent actions, including refusing to launch an investigation and refusing the plaintiff's request for financial compensation. While these acts did not take place in Afghanistan and were committed after the plaintiff's release, Justice McHaffie found that they were

intrinsically linked to the events of August 23, 2007, and his military service. In Justice McHaffie's view, this conclusion was required as a result of the FCA's similar conclusion in *Lafrenière* (*Gélinas* at para 44).

[84] Finally, also of note is this Court's decision in *Doucette*, which is factually very similar to the matter before me (counsel for the plaintiff in *Doucette* is also counsel for the Plaintiff in this matter). There, the plaintiff was a full-time CAF naval officer between 2002 and 2012 until his release in October 2012 on medical grounds. In his statement of claim, he alleged that while working on navy ships between 2004 and 2009, he developed a permanent lung sensitivity medical condition due to exposure to black mould, diagnosed as Hyper-Reactive Airway Disease. He claimed that unnamed Crown servants individually or collectively were systemically negligent in allowing the black mould condition to occur on navy ships without addressing the known health risk that it created and by continuing to allow him to work in harmful conditions. Further, that the Crown knew or ought to have known about the workplace mould condition and the negative health effects it would cause him from exposure over a long period of time.

[85] Like in the present case, the plaintiff claimed that as a result of the effects of exposure to black mould he sustained significant personal health injuries for which he sought compensatory general and special damages. He further alleged that the Crown breached its fiduciary duty owed to him and acted maliciously towards CAF members, thereby requiring deterrence and denunciation from the Court in the form of an award of punitive damages.

[86] The Crown brought a motion to strike the plaintiff's statement of claim without leave to amend, pursuant to Rule 221(1), on the ground of lack of jurisdiction, or alternatively, a failure to disclose a reasonable cause of action.

[87] Justice Annis struck the statement of claim in its entirety without leave to amend. He found that the statement of claim was entirely related to service-related facts, which was not denied by the plaintiff. Referencing *Sarvanis*, and given that the statement of claim was formulated entirely on service-related facts upon which the plaintiff's disability payments were paid, any claim for compensation was barred (*Doucette* at paras 22-25).

[88] While the plaintiff in *Doucette* alleged that the failure to take action in respect of the harmful workplace conditions was malicious, supporting a claim for punitive damages, Justice Annis found this claim was unsupported by facts. And, in any event, section 9 of the *CLPA* had broad application so long as the facts raised in the claim were the same as those that provided for the award of the benefit. Justice Annis found this was the case for the plaintiff's illness alleged to have been caused by workplace conditions (*Doucette* at para 26).

[89] Justice Annis also found that the plaintiff had not exhausted his appeal rights under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, now known as the *VWA*. This represented a further bar to bringing an action. Not having exhausted these rights, the Court was without jurisdiction and without good cause as to why the statutory process was not applied (*Doucette* at para 27 citing *Vaughan v Canada*, 2005 SCC 11 [*Vaughan*], amongst others).

[90] Further, Justice Annis concluded that there was a second limitation on the Court's jurisdiction to entertain the statement of claim arising from the failure of the plaintiff to seek a remedy for his termination pursuant to CAF grievance process established under subsection 29(1) of the *NDA*. Any cause of action arising out of the plaintiff's statement of claim was entirely service-related and was therefore subject to the grievance process established under section 29 of the *NDA* (*Doucette* at paras 28, 30).

[91] In my view, the Plaintiff's Claim in this case relies on the same factual basis that led to compensation being paid to him by VAC. That is, the presence of mould on a CAF ship to which the Plaintiff was exposed in the course of his CAF duties causing him injury. Thus, the compensation paid or payable to him is a bar to the action against the Crown because it is made on the same factual basis as the Plaintiff's action. More specifically, the compensation was given in respect of the identical injury or disease which forms the basis of the Claim (*Sarvanis* at para 29).

[92] In that regard, it is of note that the Claim asserts that the Crown was negligent because it was aware, or ought to have been aware, of the dangerous levels of toxic mould on its ships and acted in bad faith by concealing this issue thereby failing to take appropriate action to ensure the health and wellness of service men and women it employs. Additionally, that the Crown is liable for systemic negligence having failed to address the mould growth.

[93] The Claim also alleges that the Crown owed a fiduciary duty to provide a safe work environment and was aware, or ought to have been aware of the black mould but continued to

employ the Plaintiff and other officers despite knowing of the health risk. Further, that the Crown's actions and/or omissions to act and their failure to address the black mould and related poor air quality placed the Plaintiff at a serious and life-threatening illness, thereby violating his section 7 *Charter* rights. All of the Plaintiff's claims for damages – general, special and punitive – are specified as being in connection with the presence of black mould and the alleged failure to respond to same.

[94] The Plaintiff's various applications for disability benefits demonstrate that these claims were made primarily on the basis of his exposure to mould while on the HMCS "Vancouver". For example:

- His Application for Disability Benefits claimed chest pain on breathing and asserted that his respiratory issue and symptoms were likely to have been caused by poor air quality on the Halifax class frigates. And, due to his previously existing allergies, that his illness was caused by prolonged exposure to multiple irritants like high levels of mould and dust symptoms (Exhibit B of the Clark Affidavit);

- His Application for Critical Injury Benefit claimed that while on board the HMCS Vancouver he became very ill with suspected pneumonia. He has since then been affected by chest pains on breathing, exercise induced asthma, sleep apnea and chronic rhinitis. Specialists suspected that the pneumonia caused these long-lasting symptoms and that the pneumonia was caused and exacerbated by the exposure to poor air quality caused by faulty HVAC on the Halifax class frigate and the presence of multiple irritants (Exhibit C of the Clark Affidavit);

- His application for Rehabilitation Service and Vocational Assistance Programs for Veterans and for IRB states that he developed health issues while sailing on the HMCS "Vancouver" and that specialist had found that it was caused by heavy black mould exposure (Exhibit E of the Clark Affidavit);

- His Medical Release Attributable to Service Determination application states that he is awaiting medical release due to his permanent lung issues "caused by the exposure to mould on the HMCS Vancouver" (Exhibit F of the Clark Affidavit); and

- His Additional PSC application states that he struggles adjusting "since developing a chronic respiratory illness when deployed on HMCS Vancouver in 2016." (Exhibit J of the Clark Affidavit)

[95] As stated above, although his chest pain and critical injury benefit applications were denied, all others were granted. Thus, the compensation paid, or payable, to the Plaintiff pursuant to the *VWA* and the losses asserted in the Claim have the same factual basis, and therefore are in respect of the same injury (*Sarvanis* at paras 28-29; *Lafrenière* at paras 45, 47). Accordingly, the Plaintiff's Claim is barred by operation of section 9 of the *CLPA*.

[96] The Plaintiff seeks to distinguish his claim of systemic negligence and breach of fiduciary duty on the basis that these pertain to the conduct of CAF members who, he asserts, failed to act or acted maliciously by intentionally placing members in a toxic environment. The injuries and events would thus not be identical as those for which compensation was paid.

[97] However, as held at paragraph 45 of *Lafrenière*, the determining factor in analyzing if section 9 applies is whether the compensation drawn for the Consolidated Revenue Fund and the loss claimed in the action had the same factual basis. Further:

> …the source of the alleged wrongful act or negligence is not relevant for the purposes of determining the applicability of section 9 of the CLPA if payment of the compensation drawn from the Treasury and the compensation requested pursuant to the action result from the same event…
>
> (*Lafrenière* at para 46 citing *Begg* at para 32; see also *Gélinas* at para 39)

[98] In this case, the event is exposure to black mould. Whether framed in terms of negligence, systemic negligence, or breach of fiduciary duty, the compensation paid and the damages sought all stem from that same event.

[99] As discussed above, in the factually similar *Doucette*, systemic negligence and breach of fiduciary duty were also alleged. The plaintiff also argued that the failure to take action in respect of the harmful workplace conditions was malicious, supporting a claim for punitive damages.

[100] Here, in his submissions in response to this motion to strike, the Plaintiff asserts malicious behaviour. In the Claim, however, he asserts that he is entitled to punitive damages as CAF acted with a callous lack of care or consideration of its members when it ignored and failed to respond to the black mould problem and engaged in “high-handed, willful, fraudulent and callus misconduct.”

[101] In my view, the fact that the Plaintiff raises punitive damages as a head of damage, based on alleged misconduct, does not assist him. As, again, the compensation paid and the damages sought all stem from that the same event and have the same factual basis. The manner in which he was treated and the responses of CAF with respect to the allegation as to the presence of black mould are all "intrinsically related" to the factual basis that led to the payment of compensation (*Gélinas* at para 39 citing *Sarvanis* at para 28; *Lafrenière* at paras 45, 47).

[102] With respect to the *Charter* claims, the Plaintiff's pleadings in the Claim are limited to a single paragraph in which the Plaintiff states that his right to security of the person was violated:

> 21. The Plaintiff states that the Defendant's actions and/or omissions to act, and their failure to address the black mould and related poor air quality aboard its naval ships, including the Vancouver, placed the Plaintiff at risk of serious and life threatening illness, and therefore violated his right to Security of the Person as guaranteed under section 7 of the *Canadian Charter of Rights and Freedoms*, and to his "right to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law," as guaranteed by section 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44.

[103] By way of remedy, the Plaintiff seeks a declaration that his *Charter* rights have been infringed, and such remedy as this Court considers appropriate and just in the circumstances pursuant to subsection 24(1) of the *Charter*.

[104] First, while it may be, as the Plaintiff submits, that the Supreme Court of Canada has not yet had a case before it to allow it to determine whether section 9 of the *CPLA* bars a claim for *Charter* damages, the FCA has reiterated that it is necessary to examine the real nature of the action "to be wary of the red herrings that may be found in [the] statement of claim in order to

wittingly or unwittingly circumvent the immunity provided for in section 9 of the CLPA" (*Lafrenière* at para 60; see also *Prentice* at paras 69-73).

[105] On this, *McQuade* is also of note. *McQuade* was a motion for certification of a proposed class action. The proposed class was all persons who are or have been regular members of the RCMP and who had been diagnosed with, and/or suffer or have suffered from, an Operational Stress Injury. The plaintiffs alleged that the RCMP implemented mental health services in a negligent manner.

[106] The plaintiffs also alleged that the services were substantially different from, and inferior to, the health care provided by the RCMP to members who suffered physical injuries in the line of duty. In particular, that the proposed class faced systemic obstacles and delays in obtaining diagnoses or treatment for Operational Stress Injury, and returning to meaningful work. The plaintiffs claimed that the RCMP's implementation of the mental health services amounted to discrimination against the proposed class on the ground of mental disability, contrary to subsection 15(1) of the *Charter.*

[107] The defendant in *McQuade*, the AGC, opposed certification primarily on the ground that the statement of claim disclosed no reasonable causes of action as the claims of the proposed class were barred by section 9 of the *CLPA.*

[108] During the oral submissions, counsel for the plaintiffs conceded that the systemic negligence claims of class members who are eligible for a disability pension were barred by

section 9 of the *CLPA*. Nevertheless, they argued that the class members could advance the *Charter* claim and participate in any aggregate award of *Charter* damages that may be awarded by the Court.

[109] Justice Fothergill held that the *Charter* claim advanced in the statement of claim was premised on the same facts as the allegation of systemic negligence. Both arose from the same injuries – the infliction and exacerbation of occupational stress injuries (*McQuade* at para 76). More specifically, Justice Fothergill held:

> [78] Where the factual basis for the pension and the claim in damages are the same, it does not matter that a plaintiff's claims are broader, or framed through a Charter damages lens. Section 9 of the CLPA applies to the whole fact situation (*Kift v Canada (Attorney General of)*, 2003 CanLII 11719 (ON SC), [2002] OJ No 5448 (OSCJ) at para 9).
>
> [79] As Justice Robert Décary observed in *Prentice v Canada*, 2005 FCA 395 [*Prentice*] at para 24, in order to determine whether a case arises out of an employer-employee relationship, the facts giving rise to the dispute must be considered, and not the "characterization of the wrong" alleged; otherwise, "innovative pleaders" could "evade the legislative prohibition on parallel court actions by raising new and imaginative causes of action".
>
> [80] Justice René LeBlanc applied *Prentice* in *Lafrenière v Canada (Attorney General)*, 2020 FCA 110 to uphold the dismissal of a Charter claim that had the same factual basis as the appellant's award of a disability pension (at paras 60, 62):
>
> > As the Court noted in *Prentice*, here it is necessary to examine the real nature of the action brought by the appellant and to be wary of the red herrings that may be found in his statement of claim in order to wittingly or unwittingly circumvent the immunity provided for in section 9 of the CLPA. […]
> >
> > Without deciding that in all circumstances section 9 of the CLPA bars a claim against the Crown based on section 24 of the Charter, for the above reasons, this case cannot be exempted from the effects of

> section 9 of the CLPA on the basis of the appellant's completely unsupported complaints, based on the Charter.

[81] In *Sherbanowski v Canada*, 2011 ONSC 177, Justice David Brown of the Ontario Superior Court found a plaintiff's claims to be barred by s 9 of the CLPA because they either arose out of, or were directly connected with, a service-related injury or disease (at paras 43-44):

> A complete identity exists between the losses asserted by Mr. Sherbanowski in this action in respect of the Events Claims and the losses for which awards of disability benefits have been granted to Mr. Sherbanowski and for which he has received payment or which are payable to him. The factual basis upon which Mr. Sherbanowski rests his claims for damages in this action is the same factual basis upon which he rested his applications for disability awards under section 45 of the *Compensation Act* […] His Statement of Claim, in essence, reproduces the events Mr. Sherbanowski narrated in the 16-page document attached to his application for PTSD benefits.
>
> Although Mr. Sherbanowski pleads, in addition to his claims sounding in negligence, causes of action framed in breach of fiduciary duty, breach of contract, misrepresentation and breach of *Charter* rights, they all either arose out of, or are directly connected with, his service in the Forces and they seek compensation for disabilities or injuries resulting from a service-related injury or disease: *Compensation Act*, ss. 2(1) and 45(1). Those additional claims are "claims" within the meaning of section 9 of the *CLPA* because any loss or damage claimed gives entitlement to payment of a pension or compensation: *Dumont v. Her Majesty the Queen*, 2003 FCA 475, para. 73.

[82] In *Lebrasseur v Canada*, 2006 FC 852, aff'd 2007 FCA 330, Justice Anne Mactavish held that a plaintiff's claim was barred by s 9 of CLPA because it had the same factual basis as her pension claim. Justice Mactavish found that "while numerous different causes of actions are pleaded, at its heart, the action remains essentially a claim for damages for the treatment that Ms.

> Lebrasseur says that she encountered in her workplace" (at para 31).
>
> [83] The Charter claim advanced in the Statement of Claim is premised on the same facts as the allegation of systemic negligence. It is therefore barred by s 9 of the CLPA for all members of the Class who are in receipt of disability pension or eligible to receive one. …

[110] Similarly, in this case, the alleged section 7 *Charter* violation in the Claim is directly tied to the existence of, and exposure to, black mould on the HMCS "Vancouver" during the Plaintiff's CAF service, which the Plaintiff claims placed him at risk of serious illness. The *Charter* claim arises out of, or is directly connected to, the Plaintiff's service in the CAF and seeks compensation for a service-related workplace injury or disease. The event, or factual basis, for the compensation paid or payable to the Plaintiff is thus the same event and factual basis of his *Charter* claim. I do not agree with the Plaintiff the alleged *Charter* infringement "arises from distinct acts and facts compared to the breach of duty of care and systemic negligence claims". This is determinative.

[111] In my view, the Claim effectively seeks to circumvent the immunity provided in section 9 of the *CPLA* and, therefore, cannot succeed. In any event, even if this were not so, the Plaintiff also did not identify the principle of fundamental justice that he alleges has been breached, as prescribed by the caselaw, therefore failing to plead the material facts necessary to support his *Charter* claims.

[112] In *Prentice*, the FCA discussed section 7 of the *Charter*. It referred to *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, at paragraphs 47 *et seq.* [*Blencoe*], in

which the Supreme Court of Canada held that to show a violation of section 7 of the *Charter*, a plaintiff must first prove that the right asserted is a right under section 7, i.e., that there has been a deprivation of his or her right to life, liberty or security, and then prove that the deprivation is contrary to the principles of fundamental justice. The FCA noted that security of the person includes physical and psychological security (*Prentice* at paras 39-40).

[113] With respect to the principles of fundamental justice, citing *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at paragraph 113, the FCA in *Prentice* noted that:

> [42] …for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

[114] The FCA, in *Prentice*, continued its survey of the jurisprudence including that:

> [43] The Supreme Court of Canada again considered this issue a few months later, in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, in which it held that the legal principle of the "best interests of the child" was not a principle of fundamental justice:
>
> > Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia* (Attorney General), [1993] 3 S.C.R. 519, at p. 590. The

> principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

[115] In this case, the Plaintiff's Claim does state that his right to security of the person has been deprived by the exposure to black mould. However, the Claim does not indicate any principle of fundamental justice that this alleged deprivation contravenes.

[116] In this regard, I note that in his written submissions responding to the motion to strike, the Plaintiff asserts that his PSC is not encompassed by a *Charter* remedy because such payments do not include compensation for the "infringement of natural justice principles, such as the obligation to provide a safe workplace environment." Elsewhere in those submissions, he asserts that the principles of fundamental justice include principles against arbitrariness, overreach and gross disproportionality. However, he does not relate this to his *Charter* claim.

[117] Specifically, in his submissions, the Plaintiff does not address whether an obligation to provide a safe workplace environment meets the test outlined by the Supreme Court in order to be found to be a principle of fundamental justice. Rather, he submits that eligibility for *Charter* damages is contingent upon identifying a breach and determining suitability of remedies.

[118] Even read as generously as possible, the Plaintiff does not plead the constituent elements of his *Charter* claim in the Claim, which is fatal (*Mancuso* at paras 16, 19-20; *Prentice* at paras 25-26).

[119] Finally, before leaving this issue, I also note that although in his Claim the Plaintiff also alleged a violation of subsection 1(a) of the *Bill of Rights*, this was not pursued in his written representations responding to the motion to strike. In conclusion, for all of the reasons above, I find that that the Claim is statute-barred pursuant to section 9 of the *CLPA*.

Is the Claim beyond this Court's jurisdiction given the CAF dispute resolution scheme provided in section 29 of the NDA?

[120] Although my finding that the Claim is statute-barred is determinative, I will also address the second issue raised by the AGC in its motion to strike.

AGC's Position

[121] The AGC submits that the Court lacks jurisdiction over the matter because the Plaintiff failed to exhaust available administrative remedies and because the Claim seeks to circumvent the exclusive statutory scheme available under the *NDA*. More specifically, section 29 of the *NDA* provides for a comprehensive, complete, and exclusive statutory scheme for the resolution of disputes between members of the CAF and His Majesty the King in respect of any decision, act, or omission in the administration of the affairs of the CAF.

[122] The AGC further argues that a grievance must be submitted prior to release from the CAF; an aggrieved CAF member cannot wait until they are released, complain that the grievance process is not available, and ask the Court to hear their case (citing subsection 29(1) of the *NDA* and section 16.1 of DAOD 2017-1).

[123] In this case, the Claim relates to exposure by the Plaintiff, and the proposed class of current and former CAF members, to mould, toxins, and other airborne contaminates through the course of their military service, resulting in service-related injuries. According to the AGC, the essential character of these allegations are workplace grievances. A complete and comprehensive CAF grievance system exists in which these allegations can be fairly assessed, investigated, and resolved.

[124] The AGC notes that the Plaintiff filed his Claim in July 2020, before his release from the CAF in September 2022. The AGC points to the Dery Affidavit which states that the Plaintiff has never filed a grievance to contest the issues alleged in his Claim. The AGC argues that the Plaintiff initiated this proposed class action while he was an active CAF member, and while the grievance process was available to him but that he did not avail himself of this process. Failure to pursue available remedies does not render them inadequate (citing *Sandiford v Canada*, 2007 FC 225 at para 26 [*Sandiford*]). Further, the fact that the grievance procedure is no longer available to the Plaintiff (since his September 2022 release) does not nourish jurisdiction or render the grievance remedy inadequate (citing *Doucette* at paras 32-34).

[125] The AGC refers to *Doucette* and *Thomas v Canada (Attorney General)*, 2024 FC 655 [*Thomas*] where the Court found that the plaintiffs' claims were service-related, and, therefore, subject to the exclusive grievance process under section 29 of the *NDA*.

[126] The AGC further stresses that where Parliament provides a specialized administrative scheme for the resolution of workplace conflicts, the Court should decline jurisdiction and defer to statutory grievance schemes "in all but the most unusual circumstances" (citing *Graham v Canada*, 2007 FC 210 at para 23; *Vaughan* at para 39).

[127] And, although courts retain residual discretion that may be exercised when administrative processes do not provide effective redress, the onus is on the plaintiff to establish the necessary factual basis to support the exercise of residual discretion (citing *Lebrasseur FC* at para 37). Where the record contains no evidence to impugn the grievance process, the Court has no basis to determine whether there is any room for the exercise of residual discretion (citing *Lebrasseur FC* at para 19; *Greenwood* at para 95; *Thomas* at paras 14-16, 26-28).

[128] Here, the AGC argues the Plaintiff has failed to meet his onus. Contrary to the Plaintiff's assertion, there is no basis for this Court to exercise any residual jurisdiction. Thus, the Plaintiff's reliance on *Anderson v Canada (Armed Forces)* (CA), 1996 CanLII 3848 (FCA) [*Anderson*] and other jurisprudence relating to the judicial review context does not assist him.

[129] Nor is the Plaintiff's assertion that the Court should exercise its residual discretion because he needs the process of discovery to make out his claim a valid factor warranting that

relief; the Plaintiff must plead a viable claim and cannot rely on the defendant to provide particulars. Nor should a plaintiff's position be improved by failing to engage with the grievance procedure and instead coming to the Court (citing *Ebadi v Canada*, 2024 FCA 39 at para 58 [*Ebadi*]).

Plaintiff's Position

[130] The Plaintiff acknowledges that this Court has previously held that, as a general rule, the grievance procedure constitutes an adequate alternative remedy in cases of judicial review, citing *Anderson*. However, he submits that *Anderson* is distinguishable from this case due to the nature of the claim. Specifically, because the Claim is an action and not an application for judicial review. That is, the Claim is not the result of any grievance process.

[131] Further, the Plaintiff notes that the AGC acknowledged that the Final Authority in the CAF grievance process cannot award monetary damages or amend policies, directives, or regulations promulgated under the authority of the Minister of National Defence, the Treasury Board, or the Governor in Council.

[132] The Plaintiff also submits, in the alternative, that if the reasoning in *Anderson* should apply to actions in the same manner as for judicial review, then there are special or exceptional circumstances that would make the grievance process an inadequate alternative remedy (citing *Loiselle v Canada (Attorney General)*, [1998] FCJ No 1932 and *Jones v Canada (Attorney General)*, 2007, FCJ No 532).

[133] Specifically, the Plaintiff argues that, in this case, the identity of decision-makers and the reason why no response to the toxic mould growth was made are currently unknown to him. He argues that the process of discovery, something that is not offered through the grievance process, is crucial to determining how he was subjected to the repeated mould exposure. He submits that without the opportunity for disclosure it is difficult to see how this matter can be disposed of in a fair and just way.

[134] In sum, the Plaintiff submits that there are special and exceptional circumstances pertaining to the availability of discovery that justify a departure from the general rule established in *Anderson*, and that the grievance procedure is not an adequate alternative remedy.

Analysis

[135] I agree with the AGC that the Court should decline jurisdiction given the comprehensive CAF dispute resolution scheme.

[136] In this regard, I first note that in *Chua v Canada (Attorney General)*, 2014 FC 285 at paragraph 13, this Court found that "until a grievor has exhausted all other forms of potential recovery, it is premature to consider a claim to civil damages even if it is based on allegations of Charter breaches." The Court subsequently described the jurisprudence supporting that position. Further, I agree with the AGC that failure to pursue the available procedures does not render the remedy inadequate (*Sandiford* at para 26).

[137] As detailed above, the Dery Affidavit outlines the CAF grievance process. It states that the jurisdiction of the grievance process is broad and includes a right to grieve matters related to safety and injuries or illnesses incurred while serving in the CAF. Paragraph 7 of the Dery Affidavit also states that pursuant to DAOD 2017-1, the obligation of CAF grievance authorities to consider and determine a grievance continues if the grievor is released from the CAF.

[138] At paragraph 29 of *Doucette*, which was an action and not a judicial review, Justice Annis described the broad scope of section 29 of the *NDA* and the fact that the grievance procedure provided therein "has consistently been held to constitute an adequate alternative remedy that must be exhausted before an individual can turn to the Courts for redress".

[139] This principle was recently reiterated by Justice Duchesne in *Graham v Canada (Attorney General)*, 2024 CanLII 89508 (FC) [*Graham*], albeit in a judicial review. Justice Duchesne noted that:

> [33] … The grievance process provided by section 29 of the [*NDA*] has been held by this Court and by other courts as an expansive resolution mechanism that accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination of any type. It is an exhaustingly comprehensive scheme (*Pilon* and *Bernath*).
>
> [34] There is little question that the grievance process provided by subsection 29(1) of the [*NDA*] is mandatory, requires that its process run its course, and that all remedies that may be provided within it are to be exhausted by a person within that process prior to seeking judicial review before this Court. The Court held in *Sandiford v. Canada*, 2007 FC 225 (CanLII) ("*Sandiford*") that were a grievance has been filed pursuant to grievance process and has not been finally determined within that process, the grievor must exhaust the grievance process before turning to this Court:…

[140] And, as held by the Supreme Court of Canada in *Vaughan*:

> 39 Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

[141] Further, the FCA has held that the initial legal burden is on the party seeking to establish that a pleading fails to disclose a reasonable cause of action. However, once that party satisfies the Court that there is an applicable dispute resolution scheme to which the Court must defer, the onus or burden shifts to the plaintiff to demonstrate, on a balance of probabilities, that the Court should exercise its residual jurisdiction (*McMillan* at paras 134-135 citing *Brink v Canada*, 2024 FCA 43 at para 44; *La Rose v Canada*, 2023 FCA 241 at para 19; *Davis v Canada (Royal Canadian Mounted Police)*, 2024 FCA 115 at para 74; *Lebrasseur FCA* at para 19).

[142] Here, the AGC has established that the Plaintiff was enrolled with the CAF at the time he filed his Claim. Therefore, like in *Doucette*, he was subject to the exclusive grievance process in effect by virtue of section 29 of the *NDA*. The onus therefore shifts to the Plaintiff to demonstrate that the Court should exercise its residual jurisdiction to address the Claim.

[143] On this point, the Plaintiff argues that: (1) the general rule that the grievance procedure constitutes an adequate alternative remedy outlined in *Anderson* does not apply in this case; and (2) section 29 of the *NDA* offers an inadequate alternative remedy as discovery is not offered through the grievance process.

[144] The Plaintiff's first reason is without merit. *Anderson* was an appeal of a decision of this Court refusing to strike an application for judicial review. The FCA held that the process mandated by section 29 of the *NDA* and as laid down in articles 19.26 and 19.27 of the *QR&O* did afford an adequate alternative remedy and, accordingly, that the application for judicial review should be struck.

[145] It is not apparent to me why the reasoning that led to that finding would not be equally applicable in a motion to strike an action for no reasonable cause of action on the basis that an adequate alternative remedy was available. Whether it is the hearing of an application for judicial review or of an action that is challenged on the basis that the Court should decline jurisdiction in the face of an adequate alternative administrative remedy, the rational is the same. And, in any event, there is ample jurisprudence that supports that the alternative administrative remedy argument also applies with respect to motions to strike actions (e.g., *Vaughan* at para 39; *Lebrasseur FCA* at para 18; *Doucette* at para 34).

[146] With respect to residual discretion, as stated in *McMillan*:

> [113] The Supreme Court has held that where Parliament has created schemes for dealing with labour disputes (such as grievance or complaint processes), courts should generally defer to those processes: *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59, at para. 58; *Vaughan v. Canada*, 2005 SCC 11 at para. 39; *Greenwood*, above at para.129.
>
> [114] Courts do, however, retain a residual discretion to deal with employment disputes where internal grievance mechanisms are incapable of providing effective redress, or where the case is otherwise exceptional: *Ebadi v. Canada*, 2024 FCA 39 at para. 47, leave to appeal to SCC refused, 41260 (17 October 2024); *Greenwood*, above at para. 130; *Adelberg*, above at para. 58; *Bron v. Canada (Attorney General)*, 2010 ONCA 71 at paras. 27-30.

[147] Further, "[a]s the Supreme Court observed in *Vaughan*, above, while courts retain a residual jurisdiction over workplace disputes, that jurisdiction should be exercised sparingly and only in exceptional cases" (*McMillan* at para 135).

[148] Here, the exceptional circumstance that the Plaintiff asserts is that the grievance process does not afford him a discovery process. However, it appears to me that if this were a valid exceptional reason, virtually all workplace grievance processes would be derailed in favour of actions. And, more particularly in this case, the process mandated by section 29 of the *NDA* could be avoided in favour of an action in every instance.

[149] Nor does the Plaintiff make any connection between his assertion that the identity of decision-makers and the reason why no response to the toxic mould growth was made are currently unknown to him, and the effectiveness of the grievance process. Put otherwise, while he asserts that the lack of a discovery process in the grievance process prevents him from obtaining this information, it is unclear why it would be needed for purposes of that internal process and, even if it was needed, that the process could not reveal this information other than by way of discovery.

[150] In any case, it is trite law that an action is not a fishing expedition for evidence (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34). The onus was on the Plaintiff to plead material facts to support his Claim which he failed to do with respect to the decision-maker identity and mould response. Instead, he now asserts that these unplead facts support his being exceptionally permitted to pursue the Claim so as to avail of the discovery process. In my

view, the Plaintiff is not so much challenging the effectiveness of the grievance process as he is attempting to circumvent it.

[151] Further, in *Ebadi* when concluding that the Federal Court did not err in declining to exercise its residual discretion to hear the appellant's action, the FCA held:

> [47] In *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635, this Court confirmed the existence of a residual discretion but confined its exercise to circumstances where "the internal mechanisms are incapable of providing effective redress" (at para. 130). Similarly, the New Brunswick Court of Appeal has confined the discretion to circumstances where the grievance process itself is entirely "corrupt" (*Attorney General of Canada, on behalf of Correctional Service of Canada v. Robichaud and MacKinnon*, 2013 NBCA 3, 398 N.B.R. (2d) 259 at para. 10). Therefore, the Court's residual discretion arises where the available mechanisms cannot provide effective redress, either because the legislative scheme does not cover the circumstances, or because the existing processes are demonstrably ineffective (see, for example, *Weber* at para. 67; *Bron* at para. 29).

[152] Here, the Plaintiff's limited submissions do not persuade me that a lack of a discovery mechanism in the grievance process – which process the Plaintiff did not engage with –renders that process demonstrably ineffective such that the Court should exercise its residual discretion and allow the Claim to proceed.

[153] In that regard, there is also no evidence that the Plaintiff sought to grieve any matter related to workplace safety, injury or illness while serving in the CAF, and he does not assert otherwise. As the AGC submits, the Claim makes no reference to the grievance process. It does not assert that it is ineffective or that the grievance process does not address the circumstances of the Claim. The Plaintiff's Affidavit is also silent as to the grievance process provided in section

29 of the *NDA.* It is only in his written submissions in response to this Motion to Strike that the Plaintiff raises the inefficiency of the grievance process.

[154] The Plaintiff asserts that the grievance process does not provide effective redress because, as acknowledged in the Dery Affidavit, it cannot result in an award of damages or result in policy or regulatory change. However, I note that although no monetary damages may be awarded, the Dery Affidavit also states that a wide variety of redress is available, including issuing or modifying orders and directives that govern conditions of service, safety measures and other matters.

[155] Further, there is no suggestion that the grievance process provided in subsection 29(1) of the *NDA* precludes a grievor from applying for disability benefits and all other benefits and programs provided through VAC. That is, while damages are not a grievance remedy, compensation for workplace injury is otherwise available from CAF. I am not persuaded that the inability to award damages in a grievance process is a valid argument or that the absence of damages as a remedy renders that process ineffective. The Plaintiff offers no jurisprudence to support his position, and the case law suggests otherwise (e.g., *Vaughan* at para 39; *McMillan* at para 113, *Graham* at paras 33-34). As to regulatory or policy change, this is not a remedy sought in the Claim.

[156] This case is also distinguishable from *Thomas*. There, the AGC also raised jurisdictional arguments founded on section 9 of the *CLPA* and the internal grievance process provided in section 29 of the *NDA*. Justice Zinn granted the motion for certification of a class action

concerning all current or former CAF Members who have been diagnosed with a mental health disorder and alleged they were subjected to non-sexual and non-racial discrimination, bullying, stigmatization, harassment, and/or abuse during their CAF Service, between 1986 and the date the matter was certified.

[157] In that case, Justice Zinn found that there were exceptional circumstances warranting the exercise of the Court's residual discretion to exercise its jurisdiction - including the alleged lack of impartiality in the internal grievance process (*Thomas* at para 32). Further, that the relief the Plaintiff sought on behalf of the class members was beyond what can be and has been provided by the VAC and was based on harms arising out of a separate factual basis from those compensated for by the VAC. As such, section 9 of the *CLPA* did not apply to absolve Crown liability and prevent the Court from moving forward with the certification motion (*Thomas* at paras 47, 51).

[158] In this case, the evidentiary record and the pleadings before the Court do not support similar findings.

[159] In sum, on this point, the Plaintiff has not persuaded me that the grievance process provided in section 29 of the *NDA* is demonstrably ineffective, is incapable of providing effective redress or that there are exceptional circumstances such that the Court should exercise its residual discretion and permit the Claim to proceed.

Conclusion

[160] I find that the compensation paid, or payable, to the Plaintiff pursuant to the *VWA* and allegations of damages and loss asserted in the Claim have the same factual basis and arise from, or are directly connected to, the same event, i.e., the Plaintiff's exposure to black mould while serving as a CAF member onboard the HMCS "Vancouver" causing him injury. Accordingly, the Plaintiff's Claim is barred by operation of section 9 of the *CLPA*.

[161] Further, the Plaintiff, as an enrolled CAF officer when he filed his Claim, was subject to the dispute resolution scheme in effect by virtue of section 29 of the *NDA*. The Plaintiff has not established that the Court should exercise its residual jurisdiction to permit the Claim to proceed.

[162] Accordingly, I find that the Claim does not disclose a reasonable cause of action for a want of jurisdiction. It shall be struck, pursuant to Rule 221(1)(a), without leave to amend.

Costs

[163] The AGC has been successful in its motion, therefore it would be entitled to costs. However, it has asked that the Claim be dismissed on a without costs basis. The Court will so order.

ORDER IN T-840-20

THIS COURT ORDERS that:

1. The AGC's motion is allowed;

2. The Plaintiff's statement of Claim is struck in its entirety without leave to amend; and

3. There shall be no award of costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-840-20
STYLE OF CAUSE:	FÉLIX LOUIS HENRI ROGER DUNN v ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 221(1) OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	STRICKLAND J.
DATED:	APRIL 9, 2025

APPEARANCES:

Brian P.F. Murphy, K.C.	FOR THE PLAINTIFF/RESPONDENT
Angela Green Shauna Hall-Coates	FOR THE DEFENDANT/APPLICANT

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