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Court File No.: T-238-19

FEDERAL COURT

BETWEEN:

FEDERAL COURT COUR FÉDÉRALE		D É P O S É
NOV 21 2019		
DRAGA-SLADJA KOSORIC		
TORONTO, ON		12

JOHN DOE 1 individually and as litigation guardian for JOHN DOE 2 and JOHN DOE 3, JANE DOE 1, JANE DOE 2 individually and as litigation guardian for JANE DOE 3 and JOHN DOE 4, JANE DOE 4, JANE DOE 5, JANE DOE 6, JOHN DOE 5 individually and as litigation guardian for JANE DOE 7 and JOHN DOE 6, AND JANE DOE 8 individually and as litigation guardian for JOHN DOE 7

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

STATEMENT OF DEFENCE

1. The Defendant admits the allegations of fact contained in the Statement of Claim at paragraphs 14 to 18; the first sentence of paragraph 29; paragraph 56; paragraph 75, beginning with "Diplomat Evans" and ending with "mid-August 2017"; the second sentence of paragraph 91; paragraph 92, with the exception of the word "belatedly" and the words beginning with "in the event" and ending with "Syndrome"; paragraph 93, with the exception of the word "belatedly"; and, the first sentence of paragraph 94, with the exception of the word "belatedly".
2. The Defendant admits that the plaintiffs John Doe 1, Jane Doe 2, Jane Doe 4, John Doe 5, Jane Doe 6, and Jane Doe 8 were all employees of the Government of Canada at the relevant times at which they were posted to the Canadian Mission in Havana, Cuba.

3. The Defendant admits that the most common symptoms reported by Canadians posted to Havana between 2015 and 2018 included a general feeling of impaired wellbeing (sleep disturbance, fatigue, headache and irritability), poor cognition (concentration and memory), visual disturbance (blurred vision and sensitivity to light) and audio-vestibular symptoms (tinnitus, sensitivity to sound and dizziness).
4. The Defendant denies the allegations of fact contained in the Statement of Claim, as pleaded and alleged by the Plaintiffs in the first and fourth sentence of paragraph 2; the first two sentences of paragraph 3; paragraphs 4 to 13; paragraphs 19 to 25; the fourth and fifth sentence of paragraph 26; paragraph 27, with the exception of the last sentence; paragraphs 28 and 29; paragraphs 31 to 34; paragraphs 87 to 94; paragraph 96, beginning with the fifth sentence; paragraphs 97 to 99; paragraph 103; paragraph 106; paragraph 108; paragraph 111; paragraph 112; paragraphs 116 and 117; and, paragraph 126.
5. The Defendant has no knowledge of, or insufficient knowledge, except to the extent pleaded herein, to plead to the allegations contained in the Statement of Claim at paragraphs 2 to 3, except what is denied above; paragraphs 23 to 24; the first three sentences of paragraph 26; the last sentence of paragraph 27; paragraph 30; paragraphs 35 to 86; paragraph 95; and, the first four sentences of paragraph 96.
6. Except as expressly admitted herein, the Defendant denies each and every other allegation contained in the Statement of Claim.
7. The Defendant states, as the fact is, that some of the plaintiffs who were posted to Havana, Cuba or, resided in Havana with a family member posted to Havana, have exhibited concussion-like symptoms, and the Defendant admits that the cause of these symptoms is unknown.
8. With respect to the allegations contained in paragraphs 35 to 86, the Defendant has no knowledge or insufficient knowledge to plead to the allegations except to the extent previously pleaded and except to the extent that the Plaintiffs had self-reported the

symptoms and the chronology of symptoms to Global Affairs Canada or to another department or official of the Government of Canada.

9. The Defendant pleads that the cause of the symptoms experienced by some of the Plaintiffs, referred to by the Plaintiffs as Havana Syndrome, is unknown, and in any case, the Defendant pleads that there is no definitive medical diagnosis of any medical condition, illness, or disease called Havana Syndrome, notwithstanding the use of this term by the Plaintiffs.
10. The Defendant has no knowledge or insufficient knowledge to plead to the total number of Plaintiffs affected by symptoms referred to by the Plaintiffs as Havana Syndrome.

Government of Canada and its departments

11. The Attorney General of Canada (“AGC”), is the Chief Law Officer of the Crown. Pursuant to subsection 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 1, proceedings against the Federal Crown may be taken in the name of the AGC, or in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency. The AGC represents the Crown in actions brought against the Crown.
12. Global Affairs Canada is the a department of the Government of Canada established pursuant to the *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 147. Pursuant to section 10 of the Act, the Department is responsible for all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development. This includes, among other enumerated responsibilities, conducting consular relations on behalf of Canada, having management of Canada’s diplomatic and consular missions, and administering the foreign service of Canada.

13. Pursuant to sections 2 and 29, and subject to section 131 of the *Public Service Employment Act*, SC 2003, c 22, ss 12 and 13, and pursuant to Schedule 1 of the *Financial Administration Act*, RSC 1985, c. F-11, the Treasury Board is the employer of all employees working at the Department, including all the Plaintiffs who were employees of the Government of Canada during their postings in Havana, Cuba between 2015 and 2018.

Employees at Global Affairs Canada – Terms and conditions

14. The defendant denies that it exercises an extraordinarily high level of control over the lives of its employees or their families while posted abroad.
15. Canada has over 160 diplomatic missions in countries around the world. These missions are staffed by a mix of Canada-based and locally-engaged employees. Canada-based employees are generally rotational. Rotationality is a term and condition of their employment, pursuant to which they agree to be posted either abroad or within Canada, in accordance with Canada's operational needs.
16. Employees working at Global Affairs Canada, including in any posting abroad, are subject to the terms and conditions of their employment. Among the various terms and conditions of employment, employees posted abroad are subject to additional privileges and obligations as outlined in the Foreign Service Directives (FSDs). The stated purpose of the FSDs is to provide a system of allowances, benefits and conditions of employment that, in combination with salary, will enable departments and agencies to recruit, retain and deploy qualified employees in support of government programs outside Canada. The FSDs are co-developed by participating bargaining agents and public service employers at the National Joint Council of the Public Service of Canada. FSDs form part of the collective agreements with employees and are considered terms and conditions of employment.
17. The FSDs ensure that Canada meets its obligations to its employees and that employees are placed in neither a more nor a less favourable situation than in Canada.

18. Canada does not prevent or restrict its employees from seeking adequate medical care. Subject to the FSDs (including FSDs 38 to 42, 47 and others), Canada may reimburse employees for medical expenses including expenses related to medical travel away from the overseas post in order to facilitate medical care.
19. The provision of accommodations or reimbursement of expenses for accommodations is subject to FSD 25 and may differ based on individual circumstances of each posting, mission, and employee. Where employees are allocated Crown-held accommodation at a post, it is a condition of assignment to that post that employees occupy that accommodation, if it is suitable, and that they sign an Occupancy Agreement.

Department action when it first became aware of alleged injuries

20. Officials at the Canadian Mission in Havana, Cuba (HAVAN), including the Head of Mission, Ambassador Parisot, first became aware of an incident and injuries reported by United States embassy employees posted in Havana as a result of a verbal report from John Doe 1 on 18 April 2017. John Doe 1 also informed Ambassador Parisot that he and his family had experienced unusual symptoms.
21. On 26 April 2017, officials from the Canadian Mission in Havana were invited to a meeting with the US Ambassador and were informed of a general account of symptoms reportedly experienced by US diplomatic staff posted in Havana.
22. The Defendant has no specific knowledge of the particular symptoms, illness or injury sustained by individual American diplomatic or intelligence staff.
23. The United States had limited information and could not explain the cause of these symptoms. As a result, neither the United States nor the Canadian officials could determine the level of risk or mitigation measures.
24. Since the first reports of symptoms experienced by employees in Havana, until today, the Defendant does not have sufficient information to determine the cause of symptoms reported by its employees, nor can it definitively determine the level of risk associated with the symptoms.

Canada's response to reported impacts on employees

25. Contrary to paragraph 28 of the Statement of Claim, on or about 8 May 2017, Canadian employees at the Canadian Mission in Havana were briefed by Ambassador Parisot about the US situation including a briefing of the unusual symptoms reported. Ambassador Parisot asked employees to remain alert, report unusual symptoms and share information with other embassy employees.
26. On or about 26 May 2017, two households of Canadian embassy employees were identified for testing due to reported symptoms, locations and timing.
27. Following the reports of a further incident by John Doe 1 on 1 June 2017, immediate and significant measures were undertaken by the defendant to better assess the situation and the risk to Canadian employees.
28. Immediate medical evaluation was arranged for John Doe 1 and the rest of the "Allen Family" on 4 June 2017 at the University of Miami.
29. On or about 9 June 2017, a commitment was secured by Canadian officials from high-level officials in the Government of Cuba to conduct a joint investigation into the cause of the symptoms reported by Canadian embassy employees. Further meetings took place on 26 to 28 June 2017 to establish joint investigative work into the symptoms.
30. The Department arranged for four households of Canadian employees posted in Havana, a total of 17 individuals, to undergo medical testing in Canada between 11 June 2017 and 4 July 2017.
31. Further medical, security and environmental investigations and assessments began in June 2017 and continue to the present time.
32. Individual communication between officials of the Department and embassy employees who reported experiencing symptoms during their postings in Havana, began on or about May 2017 and continues to take place on a regular basis.

33. During a briefing by Department officials with employees leaving Havana on 29 June 2017, employees were encouraged to discuss the situation with the person who would replace them. Contrary to the allegations contained in paragraphs 28 and 33 of the Statement of Claim, the Defendant did not prohibit employees from speaking about their possible symptoms with their families, healthcare providers, or other employees.
34. At all material times, the Department relied on facts and all information available, and communicated the same to all embassy employees. However, the Department could not share any details of specific medical information or individual's symptoms to protect the privacy of individual embassy employees and their families.
35. Neither the Department nor any of its officials have ever made any statements to downplay, minimize or reject the reported symptoms or to downplay the seriousness of the situation. On the contrary, despite no cause being known, the Department took all steps to facilitate testing to address the symptoms and determine the causes.
36. The Defendant was never aware of any indication that any Crown-held accommodation was the cause of symptoms or injuries. Contrary to the allegations contained in paragraph 29 of the Statement of Claim, an independent environmental assessment of all staff quarters of the Canadian Mission in Havana revealed no evidence of unusual environmental phenomena. The investigation found no evidence of foul play at the staff quarters.

Communications with all employees

37. Contrary to the allegations contained in paragraphs 7, 29 and 34 of the Statement of Claim, further meetings took place with Ambassador Parisot or officials of the Department and all embassy employees in Havana to provide updates on the situation and share all available information. Employees were also encouraged to seek further information directly from officials at the Canadian Mission. All-embassy employee meetings to share information took place regularly beginning in May 2017.

38. All-embassy employee meetings with the Ambassador or other officials from Department headquarters took place regularly including, but not limited to the following dates: 8 May 2017, 6 June 2017, 8 June 2017, 12 June 2017, 21 June 2017, 27 June 2017, 13 July 2017, 1 September 2017, 29 September 2017, 6 October 2017, 10 October 2017, 13 October 2017 (with employees who had returned to Canada), 18-19 October 2017, 16 April 2018.
39. In addition to many individual meetings with officials from the Department and outgoing employees (those taking up posting in Havana) between June 2017 to the present, further information sessions with outgoing employees took place on, including, but not limited to, the following dates: 29 June 2017, 15 June 2017, 16 June 2017, 29 September 2017, 1 November 2017, 19 December 2017, 16 April 2018.

Change of status at Canadian Mission in Havana

40. On or about 11 April 2018, the status of the Canadian Mission in Havana was approved for a change to an unaccompanied post. On or about 23 April 2018, all dependents were evacuated and all embassy employees were provided the option to return to Canada.
41. On or about 16 April 2018, a decision to change the status of the Canadian Mission in Havana to an unaccompanied post was announced and all outgoing embassy employees (those scheduled to go to Havana) were updated and given time to reassess their interest in being posted to Havana.
42. Additional posting parameters to address and mitigate any health and safety concerns were approved on 27 April 2018. On 1 May 2018 new posting parameters were established and communicated to all embassy employees including those currently in Havana and to those scheduled to be posted to Havana. Outgoing employees were provided the option of cancelling their postings if they had concerns about their health and safety or their ability to abide by the proactive posting parameters.

43. Contrary to the allegations in paragraph 6, 9, 31 and 34 of the Statement of Claim, beginning in June 2017, Canadian embassy employees of the Department were offered the option by Ambassador Parisot and Departmental officials to terminate their posting and return to Canada.
44. On or about 3 January 2018 the hardship status of the Havana Mission was changed from level III to level IV retroactive to 1 June 2017. The status was subsequently changed from IV to V in July 2018. In January 2019, staffing levels at the Canadian Mission in Havana was reduced by up to 50%.

Medical Care and Information

45. When symptoms were first reported by John Doe 1, the Department took actions to identify and mitigate health and safety risks and to protect Canadian employees beginning as early as May 2017:
- a) Beginning with the first reports, the Department facilitated access to medical testing, first in the United States and then in Canada, as soon as a Canadian option was secured;
 - b) A Health Canada doctor was engaged to facilitate medical testing;
 - c) 17 individuals were initially screened and tested in Canada;
46. The Defendant facilitated medical testing based on what was available and what was determined to be the fastest and best option at the given time. Attempts were made to secure testing in the United States at the University of Miami and then at the University of Pennsylvania. As these avenues were pursued, and given rising concerns with the privacy of personal medical information of Canadian employees, access to medical services in the French language and long term treatment and follow-ups, a Canadian solution was sought.
47. A Health Canada doctor was engaged to facilitate medical testing as early as May 2017. The Health Canada doctor travelled to Cuba to conduct assessments in June 2017.

48. After assessment by the Health Canada doctor in Havana, Departmental officials facilitated and arranged clinical testing in Canada, as soon as possible. The Ambassador approved travel and expenses for the affected employees to seek medical care as early as June 2017.
49. Canadian testing was first arranged through the Canadian Forces Health Services Centre (at Montfort Hospital) after which arrangements were made to have further testing and medical follow-ups through other healthcare providers.
50. Initial screening and testing of 17 individuals took place at Montfort Hospital. The report from the Department of National Defence indicated that 15 individuals were fit to return to duty with no additional testing required. Two others required additional testing. Contrary to allegations contained in paragraph 34, 90 and 91 of the Statement of Claim, individual testing results were communicated to the individual patients and were not shared with the Defendant.
51. At no time did departmental or other Government of Canada officials direct or interfere with the medical testing of its employees, whether in Canada or abroad, in any way, nor has it interfered with the ability of the Plaintiffs to access medical treatment or prohibited the Plaintiffs from seeking medical care. The Defendant also specifically denies that it instructed, or caused instruction be given to, the University of Pennsylvania Centre for Brain Injury and Repair to stop testing of any of the Plaintiffs.
52. The Defendant took and continues to take all steps available to it, to provide for medical testing and facilitate clinical care for the Plaintiffs and other affected employees.

General averrals and no claim for damages

53. The Defendant denies that any of the symptoms reported by the Plaintiffs are caused by the wrongdoing, negligence, or breach of any contractual, constitutional, statutory, or common law duties of the Defendant.

54. The Defendant denies the allegations of wrongdoing, negligence, or breach of any contractual, constitutional, statutory, or common law duties of the Defendant. The Defendant further denies that it failed to ensure the safety of its employees or their families.
55. In respect of the allegation of negligence, the defendant denies that it acted or omitted anything in respect of any of the Plaintiffs that would amount to a breach of the standard of care owed to its employees or to the dependants of employees.
56. In the alternative, the Defendant pleads that if the Plaintiffs sustained the damages alleged, which is not admitted but denied, the Defendant is not responsible at law for those damages as the Plaintiffs had the possibility of terminating their posting and leaving Havana at their earliest opportunity. Further, the Defendant provided the Plaintiffs an opportunity to leave Havana at least by June 2017. The Defendant pleads and relies on the *Negligence Act*, RSO 1990, c N.1.
57. The Defendant denies that the Ontario *Occupiers' Liability Act*, RSO 1990, c O.2 has application to the allegations pleaded in the Statement of Claim. The Defendant further denies the conduct alleged at paragraph 106 in the Statement of Claim. In the alternative, the Defendant pleads that its conduct would not amount to a breach of the standard of care or duty.
58. In respect of the allegations of negligent misrepresentation, the Defendant denies that it, at any time, made any statements or representations to the Plaintiffs that were inaccurate, incomplete, false, deceptive or misleading. The Defendant further pleads that it did not act negligently in any making any statements or representations whatsoever to the Plaintiffs; and, that in any event, the Plaintiffs did not rely, in a reasonable manner, on any statements or representations of the Defendant, to the detriment of the Plaintiffs.
59. The Defendant denies that it owed a fiduciary or special fiduciary duty to the Plaintiffs. Alternatively, the Defendant denies that it breached its fiduciary obligations.

60. In respect of the Plaintiffs' allegations of violations of their rights under the *Charter*, the Defendant denies that any of the Plaintiffs' rights were violated. In the alternative, the Defendant pleads that any such violation was justified under section 1 of the *Charter*.
61. Furthermore, the Defendant pleads that the claims with respect to violations of rights of the Plaintiffs under the *Charter* are a disguised action in civil liability against the Crown and are prohibited by section 12 of the *Government Employees Compensation Act*, RSC 1985, c G-5, and sections 8 and 9 of the *Crown Liabilities and Procedures Act*, RSC 1985, c C-50.
62. The Defendant denies that it was in breach of any term or condition of employment between itself and the Plaintiffs who were employed by the Government of Canada at all material times.
63. The Defendant denies the Plaintiffs suffered any damages for which the Defendant is responsible at law.
64. The Defendant further denies that the Plaintiffs are entitled to any punitive, aggravated or exemplary damages.
65. The Defendant denies that Plaintiffs suffered damages pleaded and alleged in paragraphs 100, 118 to 125, and 127 to 140 of the Statement of Claim and put the Plaintiffs to strict proof thereof. The Defendant further denies that it is responsible for those alleged damages on the grounds set out above.
66. The Defendant states that if the Plaintiffs suffered any damages or injuries as pleaded and alleged in the Statement of Claim, which is not admitted but is specifically denied, such damages or injuries are attributable to incidents, injuries, or illnesses which predated or postdated the events referred to in the Statement of Claim and are unrelated to any acts or omissions of the Defendant as alleged.

67. The Defendant denies that any of the family members of any of the Plaintiffs have suffered any loss of care, guidance or companionship, as these terms are used in the *Family Law Act*, RSO 1990, c F-3.

68. The Defendants state that the damages pleaded and alleged in the Statement of Claim are excessive, exaggerated and/or too remote to be compensable and that the Plaintiffs have failed to take reasonable measures to mitigate same.

Statutory prohibitions to claims against the Crown

69. The Defendant pleads that the Plaintiffs who are employees of the Government of Canada have no claim or cause of action against the Defendant, and relies on section 12 of the *Government Employees Compensation Act*, RSC 1985, c G-5, and sections 8 and 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

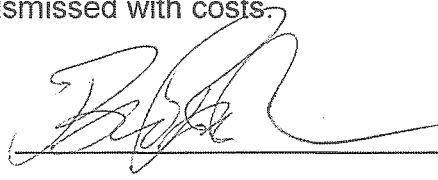
70. The Defendant further pleads that no claim or cause of action lies against the Defendant with respect to the claims of the Plaintiffs who are not employees of the Government of Canada under the Ontario *Family Law Act*, RSO 1990, c F.3, that derive from the claims of employees of the Government of Canada, and relies on section 12 of the *Government Employees Compensation Act*, RSC 1985, c G-5, and sections 8 and 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

71. The Defendant also pleads that no claim or cause of action lies against the Defendant with respect to the claims of the Plaintiffs who are not employees of the Government of Canada that have received compensation in respect of the injuries, damages, or losses in respect of which the claim is made, and relies on sections 8 and 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50.

72. The Defendant pleads that the Plaintiffs who are employees of the Government of Canada have no claim or cause of action against the Defendant with respect to any claims relating to their employment contract or the terms and conditions of their employment, and relies on section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2.

73. The defendant asks that this action be dismissed with costs.

November 15, 2019



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