Federal Court Cour fédérale

Date: 20170310

Docket: T-1505-15

Citation: 2017 FC 270

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 10, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MAURICE ARIAL
(VETERAN – DECEASED)
MADELEINE ARIAL (ESTATE)
MADELEINE ARIAL (IN HER PERSONAL CAPACITY)
SONIA ARIAL

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ON BEHALF OF THE DEPARTMENT OF VETERANS AFFAIRS AND THE VETERANS REVIEW AND APPEAL BOARD

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion by which the defendant, Her Majesty the Queen in Right of Canada, on behalf of the authorities of the Department of Veterans Affairs (the defendant), is seeking to strike the entire action for damages brought against it by the plaintiffs, without possibility of amendment. The defendant submits that said action must be struck on the grounds that it discloses no reasonable cause of action and constitutes an abuse of process within the meaning of paragraphs 221(1)(*a*) and 221(1)(*f*) of the *Federal Courts Rules*, SOR/98-106 (the Rules).

[2] This motion, which was first brought before Prothonotary Mireille Tabib under rule 369 at the same time as a similar motion by the other defendant in the plaintiffs' action, the Veterans Review and Appeal Board (the Board), is the most recent episode in a long saga between the plaintiffs and the Canadian authorities responsible for applying the *Pension Act*, RSC 1985, c P-6 (the Act), a saga that has already resulted in five judgments or orders by this Court and one judgment by the Federal Court of Appeal, the most recent before the action was brought by the plaintiffs. The list is as follows:

a. *Arial v Canada (Attorney General)*, 2010 FC 184 (Justice Tremblay-Lamer), application for judicial review allowed;

b. Order by Justice Tremblay-Lamer, docket T-1739-10, December 16, 2010, application for judicial review allowed on consent;

c. *Arial v Canada (Attorney General)*, 2011 FC 848 (Justice Shore) [*Arial 2011*], application for judicial review allowed;

d. *Arial v Canada (Attorney General)*, 2012 FC 353 (Justice Shore), motion for directions dismissed;

e. *Arial v Canada (Attorney General)*, 2013 FC 602 (Justice Roy) [*Arial 2013*], application for judicial review dismissed; and

f. *Arial v Canada (Attorney General)*, 2014 FCA 215 [*Arial FCA*], appeal from the judgment of Justice Roy dismissed.

[3] To put it simply, the plaintiffs—the late Maurice Arial (Mr. Arial), a veteran who served in the Second World War; Madeleine Arial, his spouse; and their daughter, Sonia Arial (Sonia), who has been defending her parents' interests almost since the beginning of this saga—are seeking in their action a total of $802,217.72 in compensation for faults allegedly committed against them by officials from the Department of Veterans Affairs (the Department) and the Board in processing applications for pensions and other allowances filed under the Act by Mr. Arial and, following his death, by his spouse. They submit that they are also entitled to non-pecuniary and punitive damages, the amount of which they leave to the Court's discretion.

[4] The source of the plaintiffs' allegations is the treatment of the initial pension application filed by Mr. Arial, in March 1996, for a stomach problem related to his military service, with regard to which Departmental officials allegedly failed in their duty to provide Mr. Arial with aid and assistance, as required by the Act, particularly given his age and precarious health when the application was filed and his low level of education.

[5] It is settled law that in order to strike an action on the ground that it discloses no reasonable cause of action within the meaning of paragraph 221(1)(*a*) of the Rules, the Court, assuming the alleged facts to be true, must be satisfied that it is plain and obvious that the action brought, even if interpreted generously, has no reasonable chance of success (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 17, [2011] 3 SCR 45; *Odhavji Estate v*

Woodhouse, 2003 SCC 69 at paragraph 15, [2003] 3 SCR 263; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, at page 980).

[6] Furthermore, when asked to find that a statement of claim must be struck out as an abuse of process within the meaning of paragraph 221(1)(*f*) of the Rules, the Court must be satisfied that allowing the litigation to proceed would "violate principles such as 'judicial economy, consistency, finality and the integrity of the administration of justice' . . ." (*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422, at paragraph 33 [*Figliola*]). The principles underlying the approach to be followed to detect "abuse of the decision-making process" were summarized as follows at paragraph 34 of *Figliola*:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on (references omitted).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (reference omitted).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (references omitted).
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (references omitted).
>
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (reference omitted).

[7] Before determining whether the defendant's motion meets these requirements, background is needed given the singular nature of this case and of the events that led to the hearing of that motion.

II. Background

A. *The order and direction by Prothonotary Tabib*

[8] As she was the first to hear the motions to strike filed by the defendant and the Board, it is important, as initial background, to first examine the manner in which Prothonotary Tabib disposed of those two motions on April 25, 2016.

[9] First, in an order, Prothonotary Tabib granted the Board's motion, thus striking the plaintiffs' action against it, without possibility of amendment. Prothonotary Tabib found that the plaintiffs' action constituted an abuse of process and was contrary to the immunity afforded to the Board and its members.

[10] Regarding the first basis for her decision, Prothonotary Tabib stated that she was of the view that, since the plaintiffs are seeking to recover the sums that should have been paid to them if Mr. Arial's entitlement to the full pension and attendance allowance had been recognized, retroactive to March 1996, this constitutes an abuse of process because that claim ultimately aims to recover sums for which payment was refused to the plaintiffs after they had exhausted all recourse under the Act. In this regard, Prothonotary Tabib stated the following:

> [TRANSLATION]
> Regarding the claim for the sums that Maurice Arial, his spouse or his estate could have received as a pension or allowance if entitlement to those sums had been recognized retroactively to March 7, 1996, instead of the years 2000 to 2002, it is clear that the action is seeking to recover the same sums and amounts that the plaintiffs had unsuccessfully attempted to recover through the administrative process provided for in the Act. The breaches and faults that the action alleges to have been committed by the Board or its agents and that apparently unfairly "deprived" the plaintiffs of their right to full retroactivity have already been or could have been raised as grounds that vitiate the merits, the appropriateness or the fairness of the Board's decisions at all stages of the administrative process and the judicial reviews undertaken. Moreover, the most recent decision by the Federal Court of Appeal in the judicial review of the Board's last decision is absolutely clear: the Board's decision to cite section 85 was reasonable (*Arial v Canada (Attorney General)*, 2014 FCA 215, at paragraph 30) and therefore cannot be wrongful. The Court of Appeal also stated the following at paragraph 33 of its reasons:
>
>> . . . the maximum award paid under the Act cannot, in any event, ever exceed the three-year retroactivity period (subsections 39(1) and 56(1)) and the additional award equivalent to two years' pension (subsections 39(2) and 56(2)). The appellants were indeed granted the maximum amounts under both these headings.
>
> The plaintiffs' action is clearly an attempt to circumvent the decisions that were rendered and that found the final outcome of the administrative process to be lawful and reasonable. That is an obvious abuse of process that warrants the action being struck out. (*Toronto (City) v C.U.P.E., Local 79*, [2003] 3 SCR 77 and *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, 2011 SCC 52).

[11] Regarding the second basis for striking the plaintiffs' action against the Board, Prothonotary Tabib found that, when considered from the perspective of a civil liability action, the plaintiffs' action is contrary to the Board's immunity, which limits its civil liability and that of its members to acts resembling bad faith:

> [TRANSLATION]
> The Crown's liability for damages or extracontractual fault must necessarily be based on the failure of one of its employees or agents, for which the employee or agent could be held liable if he or she were sued in his or her personal capacity.
>
> All allegations in the statement of claim regarding faults by the Board or its members are related solely to how the Board and its members behaved in carrying out their duties. However, it is a well-established legal principle that members of administrative tribunals have immunity from any civil liability action with regard to their conduct in carrying out their duties, unless there is evidence of bad faith. (See: Henri Brun, Guy Tremblay, *Droit Constitutionnel*, 4th ed., Cowansville, Éditions Yvon Blais Inc., 2002, at pages 814–815).
>
> The *Federal Courts Rules* require that particulars be provided of any alleged wilful default or state of mind of a person, such as malice or fraudulent intention, that may constitute bad faith (rule 181). However, the statement of claim does not allege any fact that, if assumed to be true, would make it possible to conclude that the conduct of any member or agent of the Board was tainted by bad faith. That shortcoming, by itself, is also fatal and justifies striking the action.

[12] The plaintiffs did not appeal that decision.

[13] Secondly, in a direction, Prothonotary Tabib ruled that, unlike the Board's motion, in which the issues seemed clear and simple despite the complex background of the case and therefore conducive to a decision without an oral hearing, the defendant's motion could not be adequately dealt with in writing. She found that to be the case because the Court would benefit from hearing the parties' submissions in light of paragraph 35 of Justice Roy's judgment in *Arial 2013*, which, as stated in the direction, [TRANSLATION] "seems to leave the door open to a civil liability action in the circumstances of this case . . .".

[14] In response to the direction from Prothonotary Tabib, additional written submissions were produced by the defendant, and its motion was argued orally, in a general sitting for motions in Quebec City on November 17, 2016.

B. *Outline of the plaintiffs' statement of claim*

[15] As noted by Prothonotary Tabib, the plaintiffs' statement of claim is prolific, and the background of the relationship between Mr. Arial, his spouse and the authorities responsible for applying the Act, which spans nearly 20 years when we consider the various actions taken by the plaintiffs to assert their rights under the Act, is complex and the supporting documentation is voluminous.

[16] However, as Prothonotary Tabib also noted, this background, set out in paragraphs 10 to 78 of the statement of claim out of a total of 95, is not only assumed to be true for the purposes of this motion, but is also not disputed.

[17] In their written submissions in reply to the motions by the defendant and the Board, the plaintiffs indicated that their statement of claim [TRANSLATION] "was in fact a copy/paste from the memorandum of fact and law in docket T-250-11 . . .", which led to the judgment by Justice Shore in *Arial 2011*. Under the circumstances, it will suffice for me to reproduce the following passages of the judgment by Justice Roy in *Arial 2013*, which was rendered in the wake of Justice Shore's judgment, to present the main elements of that background:

> [4] The factual background in this case is complex because of the multiplicity of proceedings. I believe that the following summary will suffice for the purposes of this judicial review.

[5] It should be noted that, parallel to the proceedings that are before this Court regarding a disability pension for stomach problems, the applicants brought a series of proceedings with respect to an application for an attendance allowance and an application for a disability pension for hearing loss. The application for an attendance allowance was the subject of an application for judicial review; Madam Justice Danièle Tremblay-Lamer's decision is found at *Arial v Attorney General of Canada*, 2010 FC 184. We are concerned here only with the saga of the disability pension for stomach problems.

[6] The veteran, Maurice Arial, was born on January 8, 1916. He enrolled in the Royal Canadian Navy in June 1940. From July 1940 to July 1945, on different ships, he was responsible for both machinery maintenance and the supply of ammunition located in the holds of the ships. He was demobilized at the end of the war. In his service records, there are two medical reports dated May 7, 1944, and February 19, 1945. Apart from being rather general, they deal with weight loss, nervousness, fatigue and seasickness.

. . .

[8] On March 7, 1996, Mr. Arial filed an application for a disability pension for stomach ulcers. A number of incidents ensued concerning the filing of a medical report required by the authorities at the time and necessary for considering whether to grant such a pension. In the absence of a medical report, Mr. Arial's file was closed on September 27, 1996. The service documents did not reveal any specific problem other than the seasickness Mr. Arial suffered.

[9] On October 13, 1999, Mr. Arial appointed his daughter as his designated representative. That day, she contacted [Veterans Affairs Canada (VAC)] and filed a new application on her father's behalf for a disability pension based on stomach problems. A few days later, a pension officer sent a form to Mr. Arial asking him to submit a recent medical report. On November 18, 1999, Sonia Arial sent the pension officer a cover letter, the pension application form and a statement from one Dr. Lepage indicating the diagnosis of gastroesophageal reflux [GER]. These documents indicate, *inter alia*, that Mr. Arial had been under doctor's care for stomach problems since returning from the war.

[10] On December 29, 1999, the pension application was denied. An analysis of Mr. Arial's service documents led to the conclusion that they did not reveal [TRANSLATION] "any

impairment or condition arising from military service or any injury resulting from a service-related accident."

[11] Mr. Arial passed away on September 25, 2005.

[12] On December 19, 2005, Sonia Arial contacted VAC and asked that an official decision be made concerning the disability pension application for various stomach problems that had been submitted in 1999. Additional information was provided at that time.

[13] On August 8, 2006, VAC, by ministerial decision, denied this application on the ground that the medical service documents did not reveal any impairment and that no relevant dispute had been submitted in Mr. Arial's file for many years following his demobilization. Sonia Arial disputed this decision.

[14] On January 24, 2007, a review panel of the Veterans Review and Appeal Board confirmed the ministerial decision of August 8, 2006. The review panel found that there was no causal connection between Mr. Arial's stomach problems and his military service. Sonia Arial also disputed that decision.

[15] On October 30, 2007, an appeal panel of the Veterans Review and Appeal Board granted the applicants a pension entitlement for the Second World War service. The appeal panel recognized that Mr. Arial had suffered from a recurring duodenal ulcer since 1940 and that the GER diagnosis was the manifestation of the ulcer. The appeal panel established the effective date of the pension retroactively to November 9, 2005, the date the application was considered to be complete. No additional award was granted.

[16] The issue that gave rise to this application for judicial review concerns the commencement date of the pension that the applicants say they are entitled to. They disputed the date of November 9, 2005.

[17] On June 24, 2008, a reconsideration panel of the Veterans Review and Appeal Board refused to change the effective date of the pension on the ground that the application was not completed until that date under the *Award Regulations*.

[18] This issue was heard again before a second reconsideration panel. On May 14, 2009, this second reconsideration panel agreed that a pension application was made in 1996. It established the effective date as October 30, 2004, the day three years prior to the day on which the pension was awarded, invoking paragraph 56(1)(*a.1*) of the *Pension Act*, RSC 1985, c P-6 (the

Act), and granted an additional award of 24 months under subsection 56(2) of the Act because of delays beyond the applicants' control. [Citation from subsections 56(1) and 56(2) of the Act omitted]

That decision was, in turn, disputed by Sonia Arial.

[19] On December 2, 2010, a third reconsideration panel denied Sonia Arial's application for reconsideration because there were no grounds warranting a new examination under section 32 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18.

[20] That decision was subsequently the subject of an application for judicial review (*Arial Estate*, *supra*). Justice Shore set aside the decision of December 2, 2010, and referred the case back to a differently constituted panel.

[21] As a result of Justice Shore's decision, a new hearing was held before the Board on November 1, 2011. A decision was finally issued on January 4, 2012, the decision that is the subject of this judicial review.

[Heading omitted]

[22] To understand the decision for which judicial review is sought, it is important to first identify the *ratio decidendi* of the Court's judgment by Mr. Justice Shore because that decision for which review is sought was intended to be the follow-up ordered by the Court.

[23] On the basis of the minister's duty under subsection 81(3) of the Act to "on request, provide a counselling service to applicants and pensioners with respect to the application of the Act to them; and assist applicants and pensions in the preparation of applications", Justice Shore ordered that the issue of the retroactivity of the pension be examined again. Paragraph 65 of the decision is instructive:

> [65] Moreover, it is not this Court's role to determine if the pension should be retroactive to March 7, 1996, or not; rather, the Court must determine whether the case should be referred back to a new panel so that the facts and law can be reconsidered should an error in fact or in law have been committed. It will be up to this new panel to determine whether the retroactive effect of the award should be extended back to March 7, 1996. <u>Clearly, Parliament does not speak in vain. Since</u>

> <u>Parliament has provided that VAC pension officers owe veterans certain obligations to provide them with the information they seek about pension applications, a breach of these obligations must carry consequences.</u>
>
> [Emphasis in the original.]

[24] Thus, the Court did not pre-order a conclusion by the reconsideration panel. Pointing to the spirit of the Act, which is intended to be generous and which should be interpreted that way, the Court referred the case back so that the facts and law could be re-examined. Paragraph 76 appears to me to capture the essence of the Court's decision:

> [76] VAC's breach of the duty owed to Mr. Arial degraded the quality of life of this veteran. The Court refers the case back to the Veterans Review and Appeal Board so that the Board can review its responsibilities toward the Arial family. It will be up to the Board to determine what a major breach of its duty to inform is worth, in accordance with the legislation and the case law and bearing in mind that fact that it is not merely suggested but is explicitly stated in the PA itself that VAC must provide a counselling service to applicants and pensioners "with respect to the application of this Act to them . . . and . . . assist applicants and pensioners in the preparation of applications" (subsection 81(3) of the PA). The Board has an obligation to stay true to its mandate to respect this statement and not treat it like a superficial public relations ploy.

[25] Faced with this order, the Board reviewed the issue of the date on which the pension should be paid in light of the law and the facts. In its decision, the Board stated that it was unable to do better than the final decision already made. The pension could be paid effective October 30, 2004, three years prior to the date of the decision to award a pension. An additional award of 24 months was granted under subsection 56(2) of the Act.

[26] Essentially, the Board submitted to this Court's decision and concluded that, in accordance with the clear wording of the Act, it confirmed the previous decision.

[18] The statement of claim refers to Justice Roy's judgment, but it must be noted, which is not clearly done, that Justice Roy dismissed the plaintiffs' application for judicial review of the Board's decision, which was subsequent to the judgment by Justice Shore in *Arial 2011*. In his judgment, Justice Roy first notes the concession made by the plaintiffs, correctly in his view, that the Board had awarded them the maximum compensation provided under the Act for the Department's breaches towards them (*Arial 2013*, at paragraphs 27–28). He goes on to dismiss the plaintiffs' alternative ground that the Board should have awarded more for the Department's failure to provide them with aid and assistance by referring the case back to the Minister of Veterans Affairs (the Minister) to exercise the discretion conferred on the Minister under section 85 of the Act. In that regard, Justice Roy finds that referring the case back to the Minister would have been of no help to them, as the Minister could not have awarded them additional damages to what they had already received without contravening the Act. Consequently, he concludes that the Board's decision not to refer the case back to the Minister was reasonable (*Arial 2013*, at paragraphs 33–36).

[19] It should also be noted that, for the same reasons, in *Arial FCA*, the Federal Court of Appeal dismissed the plaintiffs' appeal from Justice Roy's judgment, finding that his refusal "to order that the matter be referred to the Minister is necessarily reasonable because even if he had done so, the appellants could not have been awarded any additional amount" (*Arial FCA*, at paragraph 34).

[20] Once this background is understood, I find that the essence of the action taken by the plaintiffs in this case, which, according to paragraph 95 of the statement of claim, is based on the

Crown's extracontractual liability and, secondarily, on subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the Charter), can be summarized as Prothonotary Tabib did in her order on April 25, 2016:

> [TRANSLATION]
> . . . Mr. Arial first filed a pension application under the [Act] in March 1996. Eventually, following numerous applications for review, appeals and judicial reviews, Mr. Arial's entitlement to his full pension and an attendance allowance for various conditions was recognized, but retroactive only to dates between June 2000 and October 2002. According to the plaintiffs, were it not for the wrongful and illegal actions of the defendants, Mr. Arial's entitlement to the full pension and allowance would have been recognized retroactively to March 1996, and Sonia Arial would not have had to spend more than 6,000 hours and incur costs, including medical expenses, to help her father in his efforts.
>
> The action therefore seeks the "losses" resulting from this lack of full retroactivity for Mr. Arial and his spouse and the costs, lost wages and medical expenses incurred by Sonia Arial as pecuniary damages, in addition to non-pecuniary and punitive damages not quantified by the three plaintiffs.

[21] In that regard, it seems important to cite paragraph 94 of the statement of claim, which details what the plaintiffs state they want to demonstrate, in the event of a trial, to convince the Court of the merits of their claims:

> [TRANSLATION]
> 94. Under subsection 181(1) of the Federal Courts procedures [*sic*], the plaintiffs seek to demonstrate to the Federal Court that:
>
> a) The [Veterans Review and Appeal Board (VRAB)] changed my testimony on two occasions: in May 2006 and January 2007;
>
> b) The [Department of Veterans Affairs (DVA)] was informed of the unfair situation in a first letter sent to the Minister in July 2007, a second letter in April 2008 and finally a third in July 2010, with no action and total denial on their part;

c) The DVA and the VRAB changed the wording of the claim by making a decision regarding the [gastroesophageal reflux (GER)], when the decision should have been based on the duodenal ulcer including GER;

d) The VRAB attributed something to my counsel that he never said and that we had never discussed: [TRANSLATION] “the pension officer must obtain/find the diagnosis”;

e) Through its failure to act during the proceedings, the VRAB compelled my counsel, who had taken on the case PRO BONO, to send them a formal notice for Contempt of Court to get them to react. However, there was a consent order from the Federal Court by Madam Justice Tremblay-Lamer between counsel for the family and counsel for the Department of Justice. That took five months to resolve;

f) The DVA and the VRAB are disregarding the job description of a pension officer and the pension officer manual, and all of their actions are contrary to the Act;

g) The VRAB disregarded subsection 81(2), even though in 1976, “[t]he Commission claimed an application was not complete unless the proof of disability existed. The Board disagreed. It held that a ruling was mandatory, whether or not a disability existed.” - All applications = a decision;

h) The VRAB ignored the letter from Régis Gagnon in December 1999, overwhelming evidence mentioned by the veteran at the first hearing;

i) At the hearing on May 14, 2009, the VRAB made the following remark: [TRANSLATION] “The Board finds that this application was decided with the required expeditiousness, that there were no delays beyond the appellant’s control and that the retroactivity for this condition was granted on the date of the application.” In 2011, Justice Shore of the Federal Court contradicted that allegation;

j) In its decision on June 24, 2008, the VRAB found that there was [TRANSLATION] “no error in law or in fact” and that decision was set aside;

k) The VRAB prevented me from speaking to them at the hearing on May 14, 2009, despite the 2001 decision in *Gagné* by Justice Tremblay-Lamer;

> l) In so doing, the VRAB forced me to take a series of steps over four months to obtain the reasons for decision;
>
> m) The members of the VRAB are abusing their immunity and the fact that the burden of proof is on the appellants;
>
> n) The VRAB refuses to recognize that the applications were split in 2004;
>
> o) The time limits were not respected, despite numerous requests.

[22] On reading that paragraph of the statement of claim, it must be noted, and I will return to this, that nearly all of the allegations that form the basis of the plaintiffs' action are directed at the Board.

[23] I also consider it relevant to cite paragraph 2 of the statement of claim, which I find provides a good summary of what underlies this action by the plaintiffs and the significance of the judgment rendered by Justice Shore in *Arial 2011* to this action:

> [TRANSLATION]
> 2. On November 1, 2011, after having neither challenged nor complied with the reasons for judgment and judgment by the Honourable Mr. Justice Michel Shore, **docket T-250-11**, the Veterans Review and Appeal Board, in its role as an administrative tribunal, increased the damages by rendering a negative decision with different reasons with which the plaintiffs disagree, as they are unfounded. The subsequent decisions by the Federal Courts were negative, so the plaintiffs have no choice but to take the necessary measures to be able to obtain compensation for the harm caused by the infringement of their rights.

[24] Finally, it should be noted that Mr. Arial and his spouse, who are the primary individuals affected by the decisions made by the authorities responsible for applying the Act in this case, are not the only ones seeking compensation. Their daughter, Sonia, is also seeking damages that,

incidentally, represent more than 50% ($410,084.33) of the total amount sought from the defendant ($802,217.72). However, as we will see, her legal relationship with the defendant is not the same, and thus neither is the resulting legal analysis of the admissibility of her claim.

III. Analysis

[25] In my view, the plaintiffs' action has no more chance of success against the defendant than it had against the Board and, the way it is currently worded, is just as much an abuse of process. In that regard, paragraph 35 of Justice Roy's judgment, which is the source of Prothonotary Tabib's hesitation to reserve the same treatment for the defendant's motion as she did the Board's motion, changes nothing and is therefore of no help to the plaintiffs.

[26] I note that that paragraph of Justice Roy's judgment is one of the reasons why she dismissed the plaintiffs' argument that the Board should have awarded more for the Department's failure to provide them with aid and assistance by referring the matter to the Minister to exercise the discretion under section 85 of the Act in their favour. Justice Roy found that this argument was of no use to them, as the Minister could not have awarded them additional damages to what they had already received without contravening the Act. In other words, Justice Roy found, and the Federal Court of Appeal agreed in *Arial FCA*, that the plaintiffs could not expect to receive more from the compensation regime set out in the Act than what they had already been awarded. That is what led the Federal Court of Appeal to state that Justice Shore's judgment, which gave rise to the Board's decision before Justice Roy for judicial review, unfortunately, "did create false hopes" (*Arial FCA*, at paragraph 35).

[27] This also led Justice Roy to state, at the very end of paragraph 35 of his judgment, which clearly seems to have been what ultimately prompted Prothonotary Tabib to schedule a hearing in the case, that the fault alleged against the authorities responsible for applying the Act was one of two things: either “the fault is in the range of what is described in subsection 56(2),” in which case “the Act establishes its own remedy” or “the fault is of a different kind, and we are then in the area of civil liability where the Board has no jurisdiction.”

[28] I interpret this passage from Justice Roy’s judgment to mean that, if the plaintiffs wanted to obtain additional compensation beyond what they had already been awarded under the Act, including for the failure to provide aid and assistance, the entitlement to such compensation must be rooted not in the Act, but in a different legal regime, in this case the civil liability of the Crown. However, Justice Roy did not rule on the conditions for admissibility of such a remedy, much less on the actual admissibility of an eventual claim by the plaintiffs under the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 (CLPA), particularly regarding section 9 of that Act, as he was not required to do so and, in any event, was not in a position to do so. Indeed, that was not his role in the judicial review before him, and thus it was also not for him to speculate on how an eventual claim of that type by the plaintiffs would be worded.

[29] Section 9 of the CLPA is, in my view, an estoppel to the plaintiffs’ action, as they worded it. That provision reads as follows:

No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if	9 Ni l’État ni ses préposés ne sont susceptibles de poursuites pour toute perte —

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.	notamment décès, blessure ou dommage — ouvrant droit au paiement d'une pension ou indemnité sur le Trésor ou sur des fonds gérés par un organisme mandataire de l'État

[30] It is well established that the purpose of that provision is to prevent double recovery of damages for a single event for which a pension or compensation has already been paid out of the Consolidated Revenue Fund and that it applies to all damages arising from that event, even if the head of damages claimed in the legal action "did not match the apparent head of damages compensated for in that pension" (*Sarvanis v Canada*, 2002 SCC 28, at paragraphs 28–29, [2002] 1 SCR 921 [*Sarvanis*]). The objective is to "ensure that there is no Crown liability under ancillary heads of damages for an event already compensated" (*Sarvanis*, at paragraph 29).

[31] It is also well established that section 9 of the CLPA applies in a context such as this one where a pension or compensation has been paid—or is payable—under the Act. In *Dumont v Canada*, 2003 FCA 475 [*Dumont*], the Federal Court of Appeal, citing in particular section 9 of the CLPA, struck the claims of two members of the Canadian Forces who argued that the Forces were liable for damages associated with post-traumatic stress disorder they reported to have experienced as a result of events arising from or related to their military service.

[32] In that case, the appellants placed a great deal of emphasis, in their respective statements of claim, on the incompetence that the Canadian Forces' employees, personnel or agents had shown toward them, their negligence in fulfilling all of their legal obligations, the abuse of

authority that they had exhibited, and the Forces' failure to fulfill its fiduciary obligation and its breach of section 7 of the Charter (*Dumont*, at paragraph 39). Both appellants reported suffering from major depression; internal distress; serious disturbance of interpersonal relationships; significant feelings of aggression, resulting in serious symptoms of irritability; post-traumatic stress, resulting in major problems at the family level; great difficulty adapting socially and living in an urban setting; intolerance to stress; symptoms of overstimulation; increasing demoralization; and difficulty concentrating (*Dumont*, at paragraphs 28–29). Both had been partially compensated under the Act, one for major depression, and the other for post-traumatic stress disorder.

[33] The Federal Court of Appeal found that the claims were "prohibited under section 9 of the Act because any loss or damage that is claimed gives entitlement to payment of a pension" and that they therefore had to be struck "because it is 'plain and obvious beyond a reasonable doubt' that they cannot succeed" (*Dumont*, at paragraph 73).

[34] In *Sherbanowski v Canada*, 2011 ONSC 177 [*Sherbanowski*], the Ontario Superior Court reached the same conclusion in a case brought under the CLPA by a former member of the Canadian Forces who was seeking to recover losses and damages resulting from his military service. The plaintiff stated that he had suffered various forms of abuse and harassment during his military service, including after he filed a compensation claim under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 (*Veterans Compensation Act*). He also alleged that the Canadian Forces had denied his initial pension application and failed to implement adequate policies and procedures regarding abuse and

harassment. Finally, he sought not only general damages, but also damages for the loss of past and future income that is not compensated under the *Veterans Compensation Act*, in addition to exemplary damages (*Sherbanowski*, at paragraphs 40, 41 and 46).

[35] The Ontario Superior Court found that the plaintiff's action was inadmissible under section 9 of the CLPA because the action relied on the same factual basis as the compensation applied for under the *Veterans Compensation Act*. It added that the fact that the plaintiff was also seeking damages for breach of contract, misrepresentation, breach of fiduciary duty and breach of Charter rights did not change anything. The Court stated the following in this regard:

> [43] 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* – i.e. harassment and abuse prior to his deployment to Bosnia; his possible exposure to uranium in Bosnia; and the harassment and abuse following his return from Bosnia, including the difficulties he claims he encountered in securing medical attention. His Statement of Claim, in essence, reproduces the events Mr. Sherbanowski narrated in the 16-page document attached to his application for PTSD benefits.
>
> [44] 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.

> [45] Mr. Sherbanowski has not pleaded a recognizable cause of action in respect of [Veterans Affairs Canada's] initial denial of his applications. The governing statutory scheme afforded Mr. Sherbanowski a right of appeal to the Board, which he utilized, and he was successful on his appeals.

[36] Recently, in *Hardy Estate v Canada (Attorney General)*, 2015 FC 1151 [*Hardy Estate*], Prothonotary Kevin R. Aalto struck the action by a veteran's estate (the Estate) under the CLPA based, among other things, on section 9 of that Act. That case has significant similarities to the case at hand. The veteran (Mr. Hardy), who was seriously injured during military training in 1943, had taken steps the following year to be compensated under the Act. Those efforts were unsuccessful, according to the Estate, because of the failure of the Department's employees to help him complete the appropriate pension application. In 1975, Mr. Hardy filed a new pension application, which was not processed and for which he again received no assistance from the Department. It was not until 1997, following a fourth attempt, that Mr. Hardy was granted a pension. He passed away two years later (*Hardy Estate*, at paragraphs 3–9).

[37] In 2010, the Estate appealed the component of that decision concerning the retroactivity of the pension. The Estate argued that the pension should have been paid from the date of the first pension application in 1944 or, alternatively, from the date of the application filed in 1975. The Board ultimately recognized that the pension application filed by Mr. Hardy in 1975 was satisfactory and well-founded and that the Department's failure to respond to that application was attributable to administrative difficulties within the Department that were beyond Mr. Hardy's control, meaning that, under subsection 39(1) of the Act, Mr. Hardy would have been entitled to the maximum retroactivity period set out in that provision, that is, three (3) years from the date on which the pension was granted (*Hardy Estate*, at paragraphs 10–11).

[38] The list of remedies sought by the Estate was lengthy. It is worth reproducing here, as it is largely similar to the remedies the plaintiffs are seeking in this case. Prothonotary Aalto presented the following list:

> [14] The Claim seeks a range of remedies. The remedies include the following:
>
> a) A declaration that the Defendant owed a duty of care to the Veteran and breached that duty causing the Veteran and the Plaintiffs directly and indirectly physical and emotional distress, loss of income, and humiliation;
>
> b) The Defendant breached the Plaintiffs' rights pursuant to section 7 of the *Charter*;
>
> c) Damages pursuant to section 24 one of the *Charter*;
>
> d) A declaration of the limitation on the ability to correct errors or failures of the Department pursuant to section 39 of the *Pension Act* violates section 7 of the *Charter* and is therefore of no force in effect;
>
> e) An accounting of shortfalls in payment of pension benefits to the Veteran retroactive to 1994 and restitution of benefits unfairly denied from 1943 to 1994;
>
> f) Damages for negligence including damages for mental suffering and distress;
>
> g) Loss of employment;
>
> h) Reduced capacity for employment;
>
> i) An underpayment of pension benefits;
>
> j) Damages for misfeasance [in public office];
>
> k) Damages for vicarious liability for failing to adequately train and/or supervise medical officers and personnel;
>
> l) General damages;
>
> m) Aggravated damages;
>
> n) Costs.

[39] Prothonotary Aalto found that section 9 of the CLPA provided a bar to the Estate's claim because, in his view, that claim stemmed from the fact that the conduct of the Department and the Board prevented a proper pension, in terms of both the amount and the time frame, being paid to Mr. Hardy and his spouse and that it was therefore "an action respecting a 'pension or compensation' which 'has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown' for, *inter alia*, injury" (*Hardy Estate*, at paragraph 66).

[40] In the case at hand, there is no doubt that the claims by Mr. Arial and his spouse are barred by section 9 of the CLPA. Their daughter Sonia, on their behalf, is claiming pecuniary damages ($245,117.56 for Mr. Arial and $47,015.83 for his spouse), punitive damages, the amount of which is left to the discretion of the Court, and non-pecuniary damages, the amount of which is also left to the discretion of the Court, for injury to honour and human dignity in both cases, and for [TRANSLATION] "loss of choice" for Mr. Arial and [TRANSLATION] "added responsibilities" for Ms. Arial.

[41] As was the case in *Hardy Estate*, the claims filed by Mr. Arial and his spouse both arise from the allegation that, were it not for the faults of the Department and the Board, they would have been awarded appropriate compensation under the Act, that is, retroactive to March 1996, the date of Mr. Arial's first pension application. I note that, according to paragraph 2 of the plaintiffs' statement of claim, which I reproduced at paragraph 23 of these reasons, this action was brought after the plaintiffs failed, before this Court and the Federal Court of Appeal, to have the Board's decision subsequent to Justice Shore's judgment in *Arial 2011* overturned because

the Board allegedly failed, in their view, to comply with that judgment. The plaintiffs feel that they had no choice, at that point, but to [TRANSLATION] "take the necessary measures to be able to obtain compensation for the harm caused by the infringement of their rights."

[42] The parallel is clear between the event for which compensation was paid to Mr. Arial and his spouse under the Act and the one on which this civil liability action is based, that is, a loss or damages providing entitlement to payment of a pension or compensation out of the Consolidated Revenue Fund—in this case, the losses and damages suffered by Mr. Arial during his military service—, which pension or compensation allows for the payment of an additional award when the processing of the pension application is affected by administrative delays or difficulties beyond the control of the pension applicant. In this case, recall that the plaintiffs were ultimately granted entitlement to payment of the maximum compensation (*Arial FCA*, at paragraph 35).

[43] That parallel did not escape Prothonotary Tabib, who, as we have seen, found that the plaintiffs' action was an abuse of process because they were seeking, for essentially the same reasons, to recover the same amounts and sums that they had unsuccessfully tried to recover through the administrative process set forth in the Act. That finding is just as relevant for the purposes of the defendant's motion to strike as it was for the Board's motion. Where Prothonotary Tabib saw, rightfully in my view, an abuse of process as defined in *Figliola*, above, we must also see, in light of the preceding, an estoppel under section 9 of the CLPA, regardless of the nature of the heads of damages claimed by the plaintiffs in this case, and even if those heads of damages are not the same as those compensated by the pension (*Sarvanis*, at paragraph 29).

[44] It is important to keep in mind here that the vast majority of the plaintiffs' allegations against the authorities responsible for applying the Act are against the Board, as seen in paragraph 94 of their statement of claim. The plaintiffs seem to be criticizing the Board for having failed to correct, as they wanted, the [TRANSLATION] "original" error made in 1996 by Department officials, when it had the authority and duty to do so, and thus for having failed to comply with Justice Shore's judgment in *Arial 2011*. I also note that the plaintiffs' action, insofar as it is directed against the Board, was deemed inadmissible by Prothonotary Tabib.

[45] Apart from that [TRANSLATION] "original" fault, the only allegations against the Department are therefore summarized as (i) having failed to respond after being advised on three occasions that the Board had changed Sonia's testimony twice; (ii) having changed, along with the Board, the wording of the pension application for the duodenal ulcer, which included the problem of gastroesophageal reflux (GER), by making a decision solely on the basis of the GER; (iii) having disregarded the pension officer job description and manual, thus contravening the Act; and (iv) having failed to meet the deadlines despite numerous requests (see statement of claim, at paragraphs 94(a), (b), (c), (f) and (o)).

[46] Once again, these failures are related to the adequacy of the compensation paid to the plaintiffs under the Act. Most, if not all, of them were, or could have been, the subject of a remedy under the Act. Therefore, they cannot be dissociated from "an event already compensated" (*Sarvanis*, at paragraph 29). Under section 9 of the CLPA, they therefore cannot constitute a civil liability action against the defendant.

[47] Having found that the claims by Mr. Arial and his spouse are barred by section 9 of the CLPA, I must now examine the claim by their daughter, Sonia, which is essentially related to her position as representative of her parents. As I stated above, that claim ($410,084.33) accounts for more than half of the damages sought in the action. It includes an amount of $300,000.00 for hours worked defending the case and an amount of $100,000.00 for [TRANSLATION] “lost wages, leave and illness associated with the case.” The rest is related to various disbursements (court costs, photocopies, legal consultation, medical expenses, medication, etc.) associated with defending the case.

[48] The defendant submits that the damages sought by Sonia are related to the event for which a pension was paid and therefore also fall under section 9 of the CLPA. It also submits that these amounts are in the nature of costs, within the meaning of rule 400, and that it was up to Mr. Arial and his spouse to claim them, as permitted by the Rules, in the various remedies they initiated to assert their rights under the Act.

[49] I agree that Sonia’s claim is related to the event for which a pension was paid in this case to Mr. Arial and that it is essentially in the nature of costs, which is an argument in favour of its inadmissibility. However, I find that the claim is inadmissible in another regard. As I already stated, for all practical purposes, Sonia is seeking to be compensated for her representation efforts, which, it must be noted, were considerable. She has demonstrated exemplary dedication and tenacity. She defended the interests of her parents tooth and nail in a case where the roadblocks were numerous and, in some instances, avoidable. The Court can only commend this ongoing effort.

[50] However, is that enough to justify an action against the defendant by Sonia, who essentially acted as the agent of her parents, a mandate that must be assumed to have been gratuitous, pursuant to article 2133 of the *Civil Code of Québec*? I do not believe so. In fact, from the time she took over from her parents in 1999 in their efforts with the authorities responsible for applying the Act, Sonia has acted on their behalf. In that regard, she developed no legal relationship to the defendant regarding the enforcement of the Act. It was thus essentially for, and on behalf of, her parents that she invested some 6,000 hours that she alleges to have spent on the case. Her dealings with the defendant were always part of her mandate as representative. At no time did Sonia deal with the defendant on her own behalf.

[51] For a legal relationship to be established between Sonia and the defendant under the CLPA, at least three elements must be present: a fault, damage, and a causal connection between the fault and the damage (Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 8th ed, vol 1, Cowansville, Éditions Yvon Blais, at page 115 [*Baudouin and Deslauriers*]). Moreover, for there to be a causal connection, the damage must be “direct,” meaning that it must have been the logical, direct and immediate result of the fault. This principle is indicative of the will of the Quebec courts, since it is civil law that serves here as the suppletive law pursuant to section 3 of the CLPA, to [TRANSLATION] “limit the scope of causation and accept as causal only the event or events having a close logical and intellectual connection with the damage complained of by the victim” and thus to exclude from causality the “indirect” or [TRANSLATION] “repercussive” harm, meaning the [TRANSLATION] “damage resulting from damage”, or damage of which [TRANSLATION] “the immediate source is not the fault itself but some other injury already caused by the fault” (*Baudouin and Deslauriers*, at pages 720–721).

[52] In this case, there is no doubt, in my view, that the source of the harm Sonia alleges to have suffered is the harm caused to her parents as a result of the defendant's actions toward them, and not the actions themselves. For example, it is difficult to understand, in a case that proved more complicated and arduous than anticipated because of the opposing party's actions, how a lawyer could sue that party to cover his or her fees and recover damages allegedly suffered in carrying out that mandate. That right instead belongs to the client, if he or she is able to demonstrate that the opposing party acted in an objectionable manner in exercising its right to take legal action (*Hinse v Canada (Attorney General)*, 2015 SCC 35, at paragraph 170). This is therefore damage suffered by the client, not by the lawyer, as the client's agent.

[53] As it is currently worded, Sonia's claim is related solely to her position as a representative, nothing more, and concerns only the [TRANSLATION] "damage resulting from damage", meaning that, on that basis as well, it has no chance of success.

[54] Does the fact that Sonia's claim and those of her parents are alternatively based on subsection 24(1) of the Charter rescue the cause? The answer is no, as we saw in *Dumont*, *Sherbanowski* and *Hardy Estate*. Section 9 of the CLPA refers to <u>all</u> damages related to an event for which compensation has been or could have been paid (*Sarvanis*, at paragraph 29). Moreover, the plaintiffs do not allege how, or even under what provision(s), the defendant is liable under the Charter in this case. The statement of claim is totally silent in that regard. That in itself is a bar to this alternative ground. As the Federal Court of Appeal recently reiterated in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*], a plaintiff must plead, or risk his or her pleading being struck, "in summary form but with sufficient detail, the

constituent elements of each cause of action or legal ground raised." In other words, the pleading must be sufficiently detailed to "tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso*, at paragraph 19).

[55] This requirement, set out in rule 174, applies equally to matters related to the Charter. It is imperative (*Mancuso*, at paragraphs 20–21). However, it is lacking in this case.

[56] Like all my colleagues before me, I sympathize with the plaintiffs, and this judgment will certainly not assuage their frustration. However, my role is to assess the situation based on the law. Here, in my view, the plaintiffs' claim must fail.

[57] It may be that the Act is not generous enough when compensating veterans whose cases encounter significant and repeated delays that are beyond their control. However, as noted by Justice Gauthier, as she then was, in *Cadotte v Canada (Veterans Affairs)*, 2003 FC 1195, at paragraph 22, it is important to recall that, despite its limitations, "the veterans' pension scheme under the Act is a very generous one". It is also important, to put everything in perspective, to keep in mind the reasons behind the limitations to the retroactivity of the payment of pensions and compensation granted under the Act. To that end, I will quote the Court's remarks in that regard in *Leclerc v Canada (Attorney General)*, [1998] FCJ No. 153, 150 FTR 1:

> [18] Just as the provisions of the Act must be interpreted in such a way as to maximize payments for the benefit of pensioners, so subsection 39(1) is clear as to its effects in the context of this case. The purpose of that section is to limit the retroactive effect of any pension awarded to a maximum of three years. The only exception to this limitation is the one set out in subsection 39(2), which allows the Board to make an additional award in an amount not exceeding the cumulative annual value of two years pension.

> [19] The limitation thus imposed on the retroactive payment of pensions is made necessary by the legislative scheme established for the benefit of pensioners. The effect of the scheme is that once a pension is awarded it is always reviewable, and in the course of such reviews the Board may have regard to any new evidence and amend its earlier findings of fact or of law in the event that it considers them to be erroneous. The reason why Parliament instituted a scheme that allows pensioners to present any new fact or legal argument, at any time, that could affect the amount of the pension paid to them, is to maximize the benefit derived from pensions and also to recognize the fact that disabling physical conditions may change over time. From the standpoint of the payer, however, this means that the financial burden associated with the pension scheme is never ascertained with finality, and it is in this context that Parliament deemed it advisable, through subsection 39(1), to put a time limit on the retroactive effect of awarding a pension.
>
> [Footnotes omitted]

[58] Once again, some might claim that the scheme created by the Act is not generous enough for people who, like Mr. Arial, had to face so many difficulties—they who made the ultimate sacrifices for their country—for them to obtain what they were ultimately entitled to under the Act. However, it is up to Parliament, not the Court, to correct the situation, if it deems such correction warranted.

[59] The defendant's motion will therefore be granted, and the plaintiffs' action struck, insofar as it is directed against the defendant. Like Prothonotary Tabib, I find that the action must be struck without possibility of amendment because it contains flaws that cannot be remedied by amendments.

[60] The defendant was seeking costs only in the event that its motion were challenged. Technically, it would therefore be entitled to costs, as its motion was challenged, and

subsequently granted. However, exercising my discretion under rule 400, I find that this case does not lend itself to the award of costs against the plaintiffs.

[61] Each party shall therefore pay their own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The motion is granted;
2. The plaintiffs' action, insofar as it is directed against "Her Majesty the Queen in Right of Canada on behalf of the Department of Veterans Affairs" is struck without possibility of amendment;
3. Without costs.

"René LeBlanc"

Judge

Certified true translation
This 10th day of June 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1505-15
STYLE OF CAUSE:	MAURICE ARIAL (VETERAN – DECEASED), MADELEINE ARIAL (ESTATE), MADELEINE ARIAL (IN HER PERSONAL CAPACITY) AND SONIA ARIAL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA ON BEHALF OF THE DEPARTMENT OF VETERANS AFFAIRS AND THE VETERANS REVIEW AND APPEAL BOARD
PLACE OF HEARING:	QUEBEC CITY, QUEBEC
DATE OF HEARING:	NOVEMBER 16, 2016
ORDER AND REASONS:	LEBLANC J.
DATED:	MARCH 10, 2017

APPEARANCES:

Sonia Arial	FOR THE PLAINTIFFS
Marieke Élodie Bouchard	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

None	FOR THE PLAINTIFFS
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