Federal Court  Cour fédérale

Date: 20171207

Docket: T-1004-17

Citation: 2017 FC 1124

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 7, 2017

PRESENT: The Honourable Madam Justice Roussel

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

Defendant

ORDER AND REASONS

I. Introduction

[1] In a motion filed under paragraphs 221(1)(a) and 221(1)(f) and section 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], the Attorney General of Canada, on behalf of the defendant,

Her Majesty the Queen in right of Canada, is seeking to have the plaintiff's entire statement of claim struck out without leave to amend. The motion is also seeking to have the style of cause amended to have "Her Majesty the Queen in right of Canada" designated as the defendant.

[2] In that statement of claim introduced on July 10, 2017, the plaintiffs seek compensation for faults and violations allegedly committed against them by representatives of the Department of Veterans Affairs [DVA] in processing applications for pensions and other allowances filed by the plaintiff, the late Maurice Arial [Mr. Arial], and, following his death, by his surviving spouse, Madeleine Arial [Ms. Arial], under the *Pension Act*, RSC, 1985, c P-6 [PA]. Their daughter, Sonia Arial, who is also a plaintiff, obtained leave to represent her mother by order of this Court on August 15, 2017.

[3] The defendant submits that the statement of claim must be struck out without leave to amend on the grounds that it reveals no reasonable cause of action and constitutes an abuse of process.

[4] After examining the documentation submitted by the parties and their written submissions, the Court finds that the motion should be granted, for the reasons that follow.

II. Background

[5] The facts underlying this case date back over twenty (20) years and led to numerous proceedings before the Veterans Review and Appeal Board [VRAB], this Court and the Federal Court of Appeal (*Arial v. Canada*, 2017 FC 270 [*Arial 2017*]; Order by Madam

Prothonotary Mireille Tabib, docket T-1505-15, April 25, 2016; *Arial v. Canada (Attorney General)*, 2014 FCA 215; *Arial v. Canada (Attorney General)*, 2013 FC 602 [*Arial 2013*]; *Arial v. Canada (Attorney General)*, 2010 FC 184; *Arial v. Canada (Attorney General)*, 2012 FC 353; *Arial v. Canada (Attorney General)*, 2011 FC 848; and Order by Justice Danièle Tremblay-Lamer, docket T-1739-10, December 16, 2010).

[6] For the purposes of this motion, there is no need to relate the entire factual background, which is reiterated in *Arial 2017* and in *Arial 2013*. The following should be noted.

[7] Mr. Arial is a veteran who served in the Canadian Navy during the Second World War. In March 1996, he filed his first disability pension application for stomach problems related to his military service. In the absence of a medical report, Mr. Arial's file was closed on September 27, 1996.

[8] On October 13, 1999, Mr. Arial appointed his daughter as his designated representative.

[9] After a number of years, multiple proceedings and his death on September 25, 2005, Mr. Arial's entitlement to a full pension and an attendance allowance was recognized, but only retroactively. The effective date of the pension granted to Mr. Arial was set as October 30, 2004, three (3) years prior to the date on which it was granted, on October 30, 2007 (paragraph 56(1)(a.1) of the PA). He was also granted an additional award of twenty-four (24) months, in accordance with subsection 56(2) of the PA, because of administrative difficulties and delays beyond the plaintiffs' control.

[10] On September 4, 2015, the plaintiffs introduced an action before the Federal Court against the defendant, in which they sought compensation for the faults allegedly committed against them by VRAB and DVA officials in processing the pension and allowance applications filed by Mr. Arial under the PA and continued by Ms. Arial following his death.

[11] In October 2015, the VRAB and the defendant, Her Majesty the Queen in right of Canada, on behalf of the DVA, each filed a motion to strike the statement of claim without leave to amend.

[12] On April 25, 2016, Madam Prothonotary Tabib granted the VRAB's motion and struck out the plaintiffs' action against it, without leave to amend, judging that the action was an abuse of process and that it was contrary to the VRAB's immunity. At the same time, she issued a directive inviting the parties to make additional submissions regarding paragraph 35 of the Reasons of the Honourable Mr. Justice Yvan Roy in *Arial 2013*, which seemed to leave the door open to a cause of action for liability in the circumstances of this case.

[13] After hearing the parties on November 16, 2016, Justice René Leblanc granted the motion to strike the action brought against Her Majesty the Queen in right of Canada on behalf of the DVA without leave to amend, finding that it had no chance of success and that it constituted an abuse of process (*Arial 2017*, at paragraph 25).

[14] According to LeBlanc J. (*Arial 2017*, at paragraphs 29–30), section 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [CLPA] constitutes an estoppel to the

plaintiffs' cause of action for liability, as that provision prevents double recovery of all damages arising from a single event for which a pension or allowance has already been granted. That estoppel also applies to a head of damage that "did not match the apparent head of damages compensated for in that pension" (*Sarvanis v. Canada*, 2002 SCC 28, at paragraph 29). The purpose of this principle is to avoid "Crown liability under ancillary heads of damages for an event already compensated" [*Ibid*].

[15] LeBlanc J. subsequently addressed the claim by Sonia Arial and found that there was no legal relationship between her and the defendant under the CLPA. As her claim was essentially related to her role as her parents' representative, she cannot be compensated for damages that arise, not from the fault itself, but from another harm (*Arial 2017*, at paragraphs 49–51).

[16] Lastly, LeBlanc J. rejected the plaintiffs' argument based on subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*] on the grounds that section 9 of the CLPA refers to all damages related to an event for which compensation has been or could be paid. He also notes that the plaintiffs do not allege how or under what provisions the defendant is liable under the *Canadian Charter* (*Arial 2017*, at paragraph 54).

[17] Neither the order by Madam Prothonotary Tabib nor the order by LeBlanc J. were appealed by the plaintiffs.

[18] On July 10, 2017, the plaintiffs brought another action to claim damages for faults and violations allegedly committed by DVA officials, based on the CLPA, the *Canadian Charter* and the *Charter of Human Rights and Freedoms*, CQLR, c C-12 [*Quebec Charter*]. In general, they accuse the officials of having failed or refused to provide Mr. Arial and his spouse with the assistance and support set out in subsection 81(3) of the PA, thus failing to meet their [TRANSLATION] "contractual and extra-contractual obligations, their duty of diligence and their duty as trustee to the plaintiffs." They argue that, were it not for the misconduct of the DVA officials, Mr. Arial would have been granted the right to the full pension and an allowance retroactive to March 1996, and Sonia Arial would not have had to spend more than 6,000 hours defending the case and incurring costs, including medical costs and lost wages. They therefore seek to [TRANSLATION] "obtain damages for the abhorrent faults not compensated by the system."

[19] This latest statement, which is the most recent stage in a long legal saga, is the subject of this motion to strike filed by the defendant.

III. Analysis

[20] In support of its motion to strike, the defendant alleges that the plaintiffs' statement of claim reveals no reasonable cause of action within the meaning of paragraphs 221(1)(a) and (f) of the Rules, for three (3) reasons: (1) it is *res judicata* under article 2848 of the *Civil Code of Québec*, CQLR, c C-1991 [CCQ]; (2) section 9 of the CLPA constitutes an estoppel, as the alleged failures by the DVA cannot be dissociated from "an event already compensated"; and (3)

the action is statute-barred because, under article 2925 of the CCQ, which applies through section 32 of the CLPA, the prescribed limitation period is three (3) years.

[21] The Court is of the opinion that the principle of *res judicata* disposes of the entire dispute and that there is therefore no need to address the two (2) subsequent grounds raised by the defendant.

[22] It is well-established that an order may be issued to strike an action, in whole or in part, on the grounds that it reveals no reasonable cause of action within the meaning of paragraph 221(1)(a) of the Rules if, assuming that the facts set out in the statement of claim are true, the Court is satisfied that it is plain and obvious that the action has no reasonable chance of success (*Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959, at page 979; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at paragraphs 17, 21–22; *Arial 2017*, at paragraph 5).

[23] The principle of *res judicata* is set out in the first paragraph of article 2848 of the CCQ (Book Seven, Evidence), which reads as follows:

2848. The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.	**2848.** L'autorité de la chose jugée est une présomption absolue; elle n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, lorsque la demande est fondée sur la même cause et mue entre les mêmes parties, agissant dans les mêmes qualités, et que la chose demandée est la même.

[24] In *Roberge v. Bolduc*, [1991] 1 SCR 374 [*Roberge*], the Supreme Court of Canada interpreted the scope of the principal of *res judicata*. In order for the principle of *res judicata* to apply, two (2) types of conditions are needed: first, conditions pertaining to the judgment and, second, conditions pertaining to the action. As for the judgment, "the court must have jurisdiction over the matter, the judgment must be definitive, and it must have been rendered in a contentious matter" (*Roberge*, at page 404). As for the action, it must have a triple identity, that is, "the identity of parties, object, and cause" (*Roberge*, at page 409).

[25] When all these conditions are met, the authority of *res judicata* is an "absolute" presumption under article 2848 of the CCQ. Unlike the doctrine of issue estoppel recognized in common law, the Court cannot exercise its discretion to refuse to apply the principle of *res judicata*, as that principle is codified under Quebec law (*Timm v. Canada*, 2014 FCA 8, at paragraphs 25–27).

[26] Upon reviewing the plaintiffs' statement of claim in this case and that which was struck out in docket T-1505-15, the Court finds that it is "plain and obvious" that this action brought by the plaintiffs has no reasonable chance of success because of the application of the principle of *res judicata*.

[27] First, the conditions pertaining to the judgment as defined in *Roberge* are met. The Federal Court has jurisdiction to hear an action for damages against the Crown. By granting the defendant's motion to strike the plaintiffs' action in *Arial 2017*, Leblanc J. made a definitive decision in a contentious matter. The plaintiffs did not appeal that decision.

[28] As for the conditions pertaining to the action, the Court is of the opinion that there is identity of parties, object, and cause.

[29] In *Roberge*, the Supreme Court of Canada defined the identity of parties as the same parties acting in the same qualities (*Roberge*, at page 409). In this case, the plaintiffs are once again plaintiffs and are acting in the same qualities as in their previous action in *Arial 2017*. Although the VRAB is no longer named as a defendant in this case, the defendant is still being pursued for the DVA's acts or omissions. Therefore, there is identity of the parties in the actions brought in dockets T-1505-15 and T-1004-17.

[30] Regarding the identity of object, this is defined as the immediate legal benefit sought, the right whose implementation is desired, the remedy sought or the object pursued (*Roberge*, at pages 413–414). The defendant submits that both cases consist of an action for pecuniary, moral, punitive and exemplary damages arising from the Crown's civil liability. On the contrary, the plaintiffs argue that they are no longer seeking compensation for "the loss" and that their action is now based on subsection 24(2) of the *Canadian Charter*, the object of which, according to the plaintiffs, differs from that of the PA.

[31] In the action brought in 2015, Mr. Arial was seeking pecuniary damages in the amount of $345,117.56, non-pecuniary damages for injury to honour and human dignity and for loss of choice, and punitive damages. The amount for the latter two (2) heads of damages was left to the discretion of the Court. Ms. Arial was seeking pecuniary damages of $47,015.83, non-pecuniary damages for injury to honour and human dignity and for added responsibilities, and punitive

damages. Like her spouse, she left it to the Court to determine the amount for those damages. Lastly, Sonia Arial was seeking $410,084.33 in pecuniary damages for the 6,000 hours she spent defending the case, Court administrative fees, medical costs, and the loss of wages, holidays and sick leave as a result of the case. She was also seeking non-pecuniary damages for moral prejudice, stress, injury to honour and human dignity, and punitive damages. In both cases, the amounts sought were left to the Court's discretion.

[32] In this case, Mr. and Ms. Arial are no longer seeking pecuniary damages. However, they are still seeking punitive and exemplary damages. The prejudices alleged by Mr. Arial are the infringement of the fundamental rights protected by the *Canadian Charter* and the *Quebec Charter*, frustration, discomfort, worry, psychological distress, loss of independence and loss of choice. Ms. Arial alleges injury to human dignity, integrity and honour, added responsibilities, exhaustion, a sense of powerlessness regarding the illness and psychological distress. In both cases, the amounts are quantified as follows: [TRANSLATION] "$1,750/month—amount updated in 2017" without any further clarification. They are also seeking punitive damages in the amount of [TRANSLATION] "$600/month—amount updated in 2017". The damages sought by Sonia Arial are exactly the same as those sought in the case in 2015, with the exception of an amount of more than $10,000.00 for lost wages. She is also seeking an amount of $50,000 per year as punitive damages, alleging abuse of rights or authority.

[33] Although Mr. and Ms. Arial are no longer seeking pecuniary damages in this case, that nuance is insufficient in itself to differentiate the objects of the two (2) actions. In both cases, the plaintiffs are seeking compensation for the prejudice arising from the same allegations, namely

that they were unfairly deprived of their right to the full retroactivity of the amounts sought as pension or other allowances. It is recognized in the jurisprudence that it is not necessary for the two actions to seek identical orders: it will suffice if the object of the second action is implicitly included in the object of the first (*Roberge,* at page 414).

[34] Moreover, the Court notes that, in ruling that the plaintiffs' action in *Arial 2017* was contrary to section 9 of the CLPA, LeBlanc J. noted that the plaintiffs were seeking damages in an amount left to the Court's discretion for injury to honour and human dignity in both cases, and for "loss of choice" in the case of Mr. Arial and "added responsibilities" in the case of Ms. Arial. He noted that the claims by Mr. and Ms. Arial both arose from the fact that, were it not for the alleged faults by the VRAB and the DVA, they would have been awarded compensation retroactive to March 1996 under the PA. He also noted the consistency between the event for which compensation had been granted to Mr. and Ms. Arial under the PA and the one on which their cause of action for liability was based, "i.e. loss or damage providing entitlement to a pension or allowance from the Consolidated Revenue Fund—in this case, the losses and damages suffered by Mr. Arial during his military service—, which pension or allowance 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 person applying for the pension." He subsequently noted that "the plaintiffs were not ultimately granted the right to payment of the maximum compensation (Arial FCA, at para 35)."

[35] Finally, identity of cause is defined as the legal characterization of the facts alleged (*Roberge,* at page 416). In both cases, the actions are based on the Crown's civil liability under

the CLPA, namely the faults and violations committed by DVA officials. According to the plaintiffs, those officials allegedly failed in their duty to provide aid and assistance to Mr. Arial, in light of his age, precarious health and level of education. That failure to provide aid and assistance allegedly resulted in delays in the processing of the applications for pensions and other allowances, justifying the award of damages.

[36] The plaintiffs distinguish between the two (2) actions by adding sections 7 and 15 and subsection 24(1) of the *Canadian Charter* and subsection 49(1) of the *Quebec Charter*. They also refer to breaches of procedural fairness and natural justice. However, the Court considers the distinctions made by the plaintiffs to be insufficient to conclude that there is no identity of cause. First, the facts and allegations underlying the action are the same as in the previous action. Second, the plaintiffs do not demonstrate how the rules of procedural fairness and natural justice were violated. The only allegations found in the statement of claim in this regard concern [TRANSLATION] "the Minister's decisions" on the pension and allowance applications the plaintiffs filed as part of the administrative process. However, the plaintiffs would have had to raise those allegations in the numerous applications for judicial review filed with this Court. Finally, the Court notes that the plaintiffs raised these provisions in their reply record in *Arial 2017* and that LeBlanc J. ruled on the application of subsection 24(1) of the *Canadian Charter*. The plaintiffs were obligated to put forth all their best arguments in the first proceeding and cannot put forth arguments that should have been raised previously after the judgment is rendered (*Werbin v. Werbin*, 2010 QCCA 594 (QL), at paragraph 8; see also *Roberge*, at page 402, on the definitive nature of the judgment).

[37] In short, the plaintiffs' actions are based on the same facts that they allege give rise to their entitlement to compensation. Consequently, the Court is of the opinion that there is also identity of cause between the actions brought in dockets T-1505-15 and T-1004-17.

[38] In the presence of this triple identity, the Court has no choice but to find that the principle of *res judicata* applies in this case.

IV. Conclusion

[39] Satisfied that the principle of *res judicata* applies in the action brought by the plaintiffs, the Court finds that it is plain and obvious that the plaintiffs' action has no reasonable chance of success. For these reasons, the defendant's motion is granted, with costs, and the plaintiffs' statement of claim is struck out, without leave to amend, as an amendment cannot resolve the defect.

ORDER in T-1004-17

THE **COURT ORDERS AND RULES** that:

1. The plaintiffs' entire statement of claim is struck out, without leave to amend;
2. The style of cause is amended to designate the defendant as "Her Majesty the Queen in right of Canada";
3. With costs.

"Sylvie E. Roussel"
Judge

Certified true translation
This 20th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1004-17
STYLE OF CAUSE:	MAURICE ARIAL (VETERAN – DECEASED) ET AL. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ROUSSEL J.
DATED:	DECEMBER 7, 2017

ORAL AND/OR WRITTEN SUBMISSIONS BY:

Sonia Arial	FOR THE PLAINTIFFS (REPRESENTING THEMSELVES)
Virginie Harvey	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Montréal, Quebec	FOR THE DEFENDANT