Federal Court  Cour fédérale

Date: 20211101

Docket: T-343-21

Citation: 2021 FC 1157

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 1, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

MICHEL GÉLINAS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] Michel Gélinas is a veteran who served in the Canadian Armed Forces (CAF) for 28 years prior to his medical release on December 12, 2012. On August 23, 2007, while deployed to Afghanistan, Mr. Gélinas experienced severe psychological trauma after learning about the death of a comrade-in-arms. As part of this action against Her Majesty the Queen,

Mr. Gélinas alleges that the manner in which he was treated, or not treated, in the hours following said incident, and the subsequent conduct of Crown servants in response to his pursuit of the truth surrounding the circumstances of the incident, caused him serious material, physical and moral injury. He is seeking compensatory and punitive damages.

[2] This judgment involves the defendant's motion to strike Mr. Gélinas's amended statement of claim. The defendant submits that the statement of claim is barred under section 9 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [*CLPA*], because Mr. Gélinas receives a "pension or compensation" related to his service and the events of August 23, 2007.

[3] As explained in more detail in this judgment, I allow the defendant's motion and strike Mr. Gélinas's amended statement of claim. The relevant statutory provisions, and the judgments of the Supreme Court of Canada and Federal Court of Appeal, require this outcome. While certain aspects of Mr. Gélinas's statement of claim stem from the actions that were taken after the events of August 23, 2007, and even after his release from the CAF, the facts on which his claim for damages is based are the same as the ones on which his compensation was awarded. The treatment of Mr. Gélinas on August 23, 2007, and the various responses from Crown servants thereafter are intrinsically related to the factual basis that led to his compensation payment. It is therefore plain and obvious that section 9 of the *CLPA* prohibits his claim.

II. Issue and analytical framework

[4] The defendant is seeking to strike Mr. Gélinas's amended statement of claim under paragraph 221(1)(a) of the *Federal Courts Rules*, SOR/98-106. Said paragraph stipulates that

"[o]n motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend" on the ground that it "discloses no reasonable cause of action or defence, as the case may be".

[5] When the Court analyzes a motion to strike, it applies the principles that are well-established in the case law. Justice Pentney of this Court recently summarized these principles in a clear and concise manner: *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040, at paras 13–17. I adopt his summary of these principles:

> [14] . . . [T]he law governing a motion to strike seeks to protect the interests of the plaintiff in having his or her "day in court," while also taking into account the important interests in avoiding burdening the parties and the court system with claims that are doomed from the outset. In order to achieve this, the courts have developed an analytical approach and a series of tests that apply in considering a motion to strike.
>
> [15] The test for a motion to strike sets a high bar for defendants, and the onus is on the defendant to satisfy the Court that it is plain and obvious that the pleading discloses no reasonable cause of action, even assuming the facts alleged in the statement of claim to be true: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at p 980. Rule 221(2) reinforces this by providing that no evidence shall be heard on a motion. . . .
>
> [16] The facts set out in the statement of claim must be accepted as true unless they are clearly not capable of proof or amount to mere speculation. The statement of claim must be read generously, and mere drafting deficiencies or using the wrong label for a cause of action will not be grounds to strike a statement of claim, particularly when it is drafted by a self-represented party.
>
> [17] Further, the statement of claim must set out facts that support a cause of action – either a cause of action previously recognized in law, or one that the courts are prepared to consider. The mere fact that a cause of action may be novel or difficult to establish is not, in itself, a basis to strike a statement of claim. Related to this, the claim must set out facts that support each and every element of a statement of claim.

[Emphasis added.]

[6] The same principles have been described by Justice Martineau in *Lafrenière,* a case raised by the defendant which bears significant similarities with Mr. Gélinas's case and which I will come back to: *Lafrenière v Canada (Attorney General)*, 2019 FC 219 [*Lafrenière (FC)*] at paras 55–57, affirmed on this point in 2020 FCA 110 [*Lafrenière (FCA)*] at para 37, application for leave to appeal dismissed in 2021 CanLII 20330 (SCC).

[7] The only issue raised by the defendant's motion, therefore, is whether it has established that it is "plain and obvious" that Mr. Gélinas's amended statement of claim discloses no reasonable cause of action, even assuming the facts alleged in the statement of claim to be true.

III. Analysis

A. *Procedural background*

[8] Mr. Gélinas commenced this action on February 22, 2021. His initial statement of claim sought compensatory and punitive damages and raised allegations of negligence and discrimination under the *Canadian Human Rights Act*, RSC 1985, c H-6. On March 24, 2021, the defendant filed a Notice of Motion seeking to strike the statement of claim and to dismiss the action.

[9] Further to a case management conference on June 29, 2021, Case Management Judge Tabib authorized Mr. Gélinas to serve and file an amended statement of claim. It was filed on July 12, 2021. In accordance with the order of Case Management Judge Tabib, the defendant

filed a demand for particulars, to which Mr. Gélinas replied. The defendant then filed this motion to strike.

B. *Mr. Gélinas's amended statement of claim and nature of the case*

[10] Mr. Gélinas's amended statement of claim is thorough and detailed. Mr. Gélinas is not represented by counsel, but the nature of his claim and the allegations upon which his claim is based are clear from his amended statement of claim.

[11] Mr. Gélinas is claiming damages from the defendant in the amount of $2,000,000 for material, physical and moral harm, as well as $1,500,000 in punitive damages. The harms alleged by Mr. Gélinas stem from events that began during his deployment in Afghanistan in August 2007. On the morning of August 23, 2007, Mr. Gélinas was informed by a subordinate that a certain master warrant officer had died in an explosion the day before. This master warrant officer was a former co-worker of Mr. Gélinas and his next door neighbour at his family home. The news of the death affected Mr. Gélinas greatly. He lost consciousness and has no recollection of the next six or so hours that followed, except for brief moments of lucidity.

[12] Mr. Gélinas alleges that during and after those six hours, the defendant's representatives broke several military rules and directives to which they were subject. He alleges, among other things, that he was left alone in his room, that he did not receive medical assistance, that he was not referred to specialized care services, and that he was advised to forget about what had happened.

[13] After the events of August 23, 2007, Mr. Gélinas suffered permanent and immense stress during his mission in Afghanistan until his return in February 2008. His physical and psychological problems worsened over the following years. Mr. Gélinas underwent psychological and psychiatric treatment. The medical exam marking his release from the CAF is dated December 12, 2012.

[14] Mr. Gélinas's amended statement of claim describes his efforts before and after his release to obtain more information about what happened on August 23, 2007. These efforts include a request to the Minister of National Defence that an investigation be undertaken to obtain clarification and uncover the truth of the events of August 23, 2007. This request was ultimately denied on February 3, 2015, in a letter stating that [TRANSLATION] "the military chain of command had decided not to conduct an investigation into how the plaintiff was treated in Afghanistan".

[15] Shortly after this refusal, Mr. Gélinas wrote to the Minister again, expressing his desire to come to a financial arrangement since the request for an investigation had been refused. This request was denied on February 10, 2016, in a letter from legal counsel. The letter mentioned, among other things, the CAF's position that the Crown was not responsible for the events of August 23, 2007, and that Mr. Gélinas's claim was inadmissible under section 9 of the *CLPA*.

[16] Mr. Gélinas alleges that his psychological and physical health has been severely damaged as a result of the failures and violations of the rules and directives since August 23, 2007. After his release from the CAF, the harm he had suffered was compounded by the conduct of Crown

servants with respect to his claims. Mr. Gelinas aptly summarized the nature of his claim in the following sentence in paragraph 22(b) of his amended statement of claim [TRANSLATION]: “The plaintiff’s claim is related to the failure to provide medical treatment from the start, as a result of the decisions made by the Crown servants involved on that August 23, 2007, as well as the failure of the military authorities to investigate”. He also alleges that the February 10, 2016, letter from the CAF’s legal counsel denying his claim aggravated his psychological condition so much that he attempted suicide.

[17] Mr. Gélinas is claiming compensatory damages for the physical harm, moral damages and loss of earnings before and after his release. In this regard, he acknowledges a decrease in the amounts claimed to reflect the compensation he has already received from Veterans Affairs Canada [VAC]. Mr. Gélinas’s amended statement of claim also seeks punitive damages in light of the conduct of the defendant’s representatives, including the lack of independence and impartiality of the CAF justice system and the denial of the request for an administrative investigation.

[18] In her request for clarification, the defendant sought the legal basis for Mr. Gélinas’s claim, including the relevant statutory provision, referring to three aspects of the statement, namely, (i) the failure to provide medical treatment from the start on August 23, 2007; (ii) the lack of a military investigation; and (iii) the letter of February 10, 2016. Mr. Gélinas responded, in general and to each of the three aspects in particular, by referring to Bill C-77. Upon receiving Royal Assent on June 21, 2019, this bill became *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 [*Act to amend the*

NDA]. In particular, Mr. Gélinas refers to section 71.12 and subsection 189.1(12) of the *National Defence Act*, RSC 1985, c N-5 [*NDA*], provisions that were introduced by the *Act to amend the NDA*.

C. *Overview of arguments*

[19] The defendant raises three main arguments in her motion to strike. First, she argues that the case is inadmissible because of the Crown's immunity under section 9 of the *CLPA* and sections 45 and 46 of the *Veterans Well-being Act*, SC 2005, c 21 [*VWA*] (formerly the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*). Second, she alleges that the action is without legal basis and, in particular, that the provisions of the *Act to amend the NDA* or the *NDA* cited by Mr. Gélinas cannot support his case. Third, she claims that the action is barred by the passage of time since the events described in the statement of claim, even on application of the most generous limitation regime.

[20] Mr. Gélinas replies that his causes of action are not related to the compensation he has received from VAC, that the impugned Crown acts are unrelated to his military service, and that no claim is available under the *Compensation Act* with respect to these acts. He also denies that there is no legal basis, referring to the *NDA*, the *Civil Code of Québec* [*CCQ*] and the Defence Administrative Order and Directive DAOD 7026-1, *Management of Administrative Investigations*. As for the issue of limitation, Mr. Gélinas argues that the starting point of the limitation period should be February 3, 2015, the date of the Minister of National Defence's final response; that he repeatedly notified the defendant of the Crown servants' problematic conduct on August 23, 2007; that he always wanted to obtain the truth about those actions; and that a

suicide attempt in October 2016 following the February 10, 2016, letter had the effect of suspending the limitation period.

[21] For the following reasons, I conclude that the defendant's first argument, the application of section 9 of the *CLPA*, is dispositive. Hence, I need not address the defendant's other arguments, but I will make a few comments.

D. *Mr. Gélinas's claim is plainly and obviously barred by the CLPA*

(1) Section 9 of the *CLPA* and *Sarvanis* of the Supreme Court of Canada

[22] Section 9 of the *CLPA* provides that

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 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.	**9** Ni l'État ni ses préposés ne sont susceptibles de poursuite pour toute perte – 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.
[Emphasis added.]	[Je souligne.]

[23] The Supreme Court of Canada assessed this provision in *Sarvanis v Canada*, 2002 SCC 28. In *Sarvanis*, the plaintiff was an inmate in a federal penitentiary who sustained permanent

injuries while working in a barn of the prison farm. He sued the Crown in tort. The Crown claimed that section 9 of the *CLPA* barred the claim because the plaintiff was receiving Canada Pension Plan (CPP) disability benefits.

[24] The Supreme Court concluded that section 9 requires that "such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred" [emphasis added]: *Sarvanis* at para 28. Justice Iacobucci, for the Court, noted that section 9 "reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof": *Sarvanis* at para 28. It is not the head of damages that is important in that respect, but the loss or the factual basis: *Sarvanis* at para 29.

[25] Ultimately, the Supreme Court concluded in *Sarvanis* that a CPP disability benefit is not contingent on the occurrence of a specific event at all, but only on the disabled condition. Notably, the Supreme Court had previously determined that CPP disability payments are not indemnity payments: *Canadian Pacific Ltd v Gill et al,* [1973] SCR 654 at 670; *Sarvanis* at para 33. The pension the plaintiff was receiving did not therefore have the same factual basis as his action against the Crown, and the suit was not barred by section 9: *Sarvanis* at paras 31–39. In summarizing the scope of section 9, Justice Iacobucci held as follows at paragraph 38:

> Simply put, s. 9 of the *Crown Liability and Proceedings Act* establishes Crown immunity where the very event of death, injury, damage or loss that forms the basis of the barred claim is the event that formed the basis of a pension or compensation award.

[26] According to the *Sarvanis* analysis, the issue whether Mr. Gélinas's claim is barred by section 9 of the *CLPA* depends on whether the pension paid to him under the *VWA* has the same factual basis as his action. To answer this question, we must turn to the relevant provisions of the *VWA*.

(2) Sections 45 and 46 of the *VWA* and *Lafrenière* of the Federal Court of Appeal

(a) Clarification on the amendments to the legislation

[27] I will begin this part of the analysis with an overview of certain recent amendments to the relevant legislation, given the references made by the parties in their written submissions. These amendments, and therefore this discussion, do not affect the merits of the case because the relevant aspects of the legislation remain unchanged. This discussion is therefore included for purposes of clarification and accuracy.

[28] In their written submissions, the parties make reference to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, or the "*Compensation Act*". However, this statute was renamed the *Veterans Well-being Act* on April 1, 2018, by the *Budget Implementation Act, 2017, No. 1*, SC 2017, c 20, ss 270, 299: *Fournier v Canada (Attorney General)*, 2019 FCA 265 at para 6. This name change does not affect the analysis at all, so I will use the current name of the Act, *VWA*, even if it bore another title when Mr. Gélinas began receiving compensation.

[29] The year after the change in title, amendments were made to the *VWA* to introduce the concept of "pain and suffering compensation" instead of "disability award", as of April 1, 2019: *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, Summary and ss 142, 185; *VWA*, ss 2 ("*compensation*", "*disability award*"), 45; see, *e.g.*, *100003525191 (Re)*, 2019 CanLII 45617 (CA VRAB). Transitional provisions regarding disability awards and pain and suffering compensation were put in place: *VWA*, ss 130–133.

[30] Mr. Gélinas confirms in his amended statement of claim that he has been receiving VAC benefits since January 2014. At that time, benefits paid under section 45 of the *Compensation Act* were disability awards. Mr. Gelinas also confirmed in his amended statement of claim that he is now receiving an income replacement benefit as well as pain and suffering compensation, which is the compensation now paid under section 45 of the *VWA*. There is no dispute that Mr. Gelinas has received, and continues to receive, compensation under section 45 of the *VWA*.

[31] In her submissions, the defendant has reproduced the former sections 45 and 46, which make reference to disability awards. In the following analysis, I refer to the current sections 45 and 46. The only amendment made to these provisions is the replacement of the words "disability award" with "pain and suffering compensation". This amendment does not change in any relevant manner the central analysis of the application of section 9 of the *CLPA*.

(b) Scope of the provisions

[32] Subsections 45(1) and 46(1) of the *VWA* read as follows:

Pain and Suffering Compensation

Eligibility

45 (1) The Minister may, on application, pay pain and suffering compensation to a member or a veteran who establishes that they are suffering from a disability resulting from

(a) a service-related injury or disease; or

(b) a non-service-related injury or disease that was aggravated by service.

. . .

Consequential injury or disease

46 (1) For the purposes of subsection 45(1), an injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of

(a) a service-related injury or disease; or

(b) a non-service-related injury or disease that was aggravated by service.

(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or

Indemnité pour douleur et souffrance

Admissibilité

45 (1) Le ministre peut, sur demande, verser une indemnité pour douleur et souffrance au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :

a) soit par une blessure ou maladie liée au service;

b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.

. . .

Blessure ou maladie réputée liée au service

46 (1) Pour l'application du paragraphe 45(1), est réputée être une blessure ou maladie liée au service la blessure ou maladie qui, en tout ou en partie, est la conséquence :

a) d'une blessure ou maladie liée au service;

b) d'une blessure ou maladie non liée au service dont l'aggravation est due au service;

c) d'une blessure ou maladie qui est elle-même la conséquence d'une blessure ou maladie visée par les alinéas a) ou b);

d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).	**d)** d'une blessure ou maladie qui est la conséquence d'une blessure ou maladie visée par l'alinéa c).
. . .	. . .

[33] Subsection 2(1) of the *VWA* includes definitions of some of the terms used in subsections 45(1) and 46(1):

Definitions	**Définitions**
2 (1) The following definitions apply in this Act.	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
aggravated by service, in respect of an injury or a disease, means an injury or a disease that has been aggravated, if the aggravation	***due au service*** Se dit de l'aggravation d'une blessure ou maladie non liée au service que est :
(a) was attributable to or was incurred during special duty service; or	**a)** soit survenue au cours du service spécial ou attribuable à celui-ci;
(b) arose out of or was directly connected with service in the Canadian Forces.	**b)** soit consécutive ou rattachée directement au service dans les Forces canadiennes.
disability means the loss or lessening of the power to will and to do any normal mental or physical act.	***invalidité*** La perte ou l'amoindrissement de la faculté de vouloir et de faire normalement des actes d'ordre physique ou mental.
service-related injury or disease means an injury or a disease that	***liée au service*** Se dit de la blessure ou maladie :
(a) was attributable to or was incurred during special duty service; or	**a)** soit survenue au cours du service spécial ou attribuable à celui-ci;

(b) arose out of or was directly connected with service in the Canadian Forces.	**b)** soit consécutive ou rattachée directement au service dans les Forces canadiennes.

[34] At issue in *Lafrenière* was the interplay between section 45 of the *VWA* and section 9 of the *CLPA*. Mr. Lafrenière was a military journalist in the CAF. In September 2009, he was informed, without explanation, that he had been relieved of his duties. He was subsequently advised that the decision related to an investigation into his production and distribution of DVDs using military facilities without his obtaining prior approvals: *Lafrenière* (CAF) at paras 6–8. While he was still waiting for a more detailed explanation, Mr. Lafrenière filed a grievance requesting, among other things, a written explanation of why he was relieved of his duties as a journalist, and why the investigation was still ongoing. He also filed a harassment complaint against a superior, which was allowed in part. The grievance was also allowed in part, without financial compensation. In the meantime, Mr. Lafrenière was released from the CAF for medical reasons: *Lafrenière* (CAF) at paras 6, 9–13.

[35] Even before his release, Mr. Lafrenière had been receiving disability benefits under sections 45 and 46 of the *Compensation Act* for physical and psychological consequences that were related to his service in the CAF or that were aggravated by his service in the Forces. His application for disability benefits was related to the events that occurred in fall 2009 and to the psychological issues that arose from the investigation: *Lafrenière (FC)* at paras 58–59; *Lafrenière (FCA)* at para 23.

[36] Mr. Lafrenière commenced an action for damages against the Crown. His allegations involved acts (a) at the time of his suspension in September 2009; (b) during the military investigation which took place from September 2009 to March 2012; and (c) leading to the delays in the handling of his grievance and harassment complaint: *Lafrenière (FCA)* at para 26; *Lafrenière (FC)* at para 78. Mr. Lafrenière argued that the damages he was claiming in his action were not covered by his pension: *Lafrenière (FCA)* at para 41.

[37] Justice Martineau of this Court concluded that any damage arising from the allegations in the first two categories, i.e., those related to the suspension in September 2009 and those related to the military investigation prior to his release, constituted a loss with the same factual basis as the disability benefits. In applying *Sarvanis*, he concluded that these claims were barred by section 9 of the *CLPA*: *Lafrenière (FC)* at paras 65–67, 71, 79. On the other hand, Justice Martineau found that the allegations in the third category, those related to the handling of the grievance and harassment complaint after Mr. Lafrenière's release, were not covered by section 9: *Lafrenière (FC)* at para 80.

[38] The Federal Court of Appeal upheld Justice Martineau's decision on the first two categories of allegations: *Lafrenière (FCA)* at para 47. However, the Court of Appeal concluded that Mr. Lafrenière's statement of claim should have been struck out in its entirety, including the allegations in the third category. According to the Court of Appeal, the processing of the grievance and of the harassment complaint was "intrinsically related to the factual basis which gave rise to the payment of the pension or disability award" and was part of the "same set of facts". Section 9 of the *CLPA* also applied to bar these allegations and thus the entire statement:

Lafrenière (FCA) at paras 64–66. Mr. Lafrenière's statement was therefore struck out in its entirety, without possibility of amendment.

[39] Several binding principles emerge from the Supreme Court's decision in *Sarvanis* and the Federal Court of Appeal's decision in *Lafrenière (FCA)*:

- Section 9 of the *CLPA* has a broad interpretation to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated: *Sarvanis* at para 29; *Lafrenière (FCA)* at para 45.

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

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

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

(3) Application of principles to Mr. Gélinas's amended statement of claim

[40] As summarized above, Mr. Gélinas alleges in his amended statement that Crown servants broke several rules and directives during the events of August 23, 2007. These breaches are listed in paragraph 10 of the amended statement. Mr. Gélinas alleges that this [TRANSLATION] "abhorrent behaviour by his brothers in arms" caused stress and physical and psychological distress. His psychological and psychiatric counselling revealed a central element, i.e., a failure of his being treated from the start when he was questioning the conduct of his peers in Afghanistan. The difficulties he encountered in searching for the truth about the events of August 23, 2007, including the CAF's refusal to investigate and to grant his request for a financial settlement, compounded his psychological and moral distress.

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

[42] Mr. Gélinas argues that section 9 does not apply because he is receiving compensation for [TRANSLATION] "*unspecified anxiety disorder* related to the trauma he suffered in Afghanistan" [emphasis added by Mr. Gélinas]. He submits that his claim is not related to the trauma caused by the death of his comrade-in-arms, but to the unfairness and negligence on the

part of Crown servants, including violations of rules, the *CCQ* and the *NDA*. He refers to an observation by the chair of the VAC board that they are not [TRANSLATION] "the righters of wrongs". However, the Supreme Court of Canada and the Federal Court of Appeal have held that it is not the heads of damages raised in an action that matter, but the factual basis. In this case, the factual basis for the action is the same as the factual basis for compensation.

[43] Mr. Gélinas also argues that the actions of government employees, such as abandoning him in his room and failing to provide medical care, are not "service-related" and therefore, cannot form the basis of compensation under section 45 of the *VWA*. I disagree. The events of August 23, 2007, occurred during Mr. Gélinas's military deployment to Afghanistan. At issue is whether he was treated or not after receiving the news conveyed to him by a subordinate. In my view, whether we are talking about a failure or an alleged breach of rules or directives, the actions of the CAF members and the effect they had on Mr. Gélinas are directly related to his service in the CAF. It should be noted that the definition of "service-related" in the *VWA* is quite broad, covering any illness that "arose out of" service in the CAF.

[44] I reach the same conclusion with respect to the allegations regarding the Crown servants' subsequent actions, including refusing to launch an investigation and refusing Mr. Gélinas's request for financial compensation. While these acts did not take place in Afghanistan and were committed after Mr. Gélinas's release, they are intrinsically linked to the events of August 23, 2007, and his military service. In my view, this conclusion is required as a result of the Court of Appeal's similar conclusion in *Lafrenière (FCA)*. The damages arising from the alleged mismanagement in Mr. Lafrenière's situation, including his grievance and his harassment

complaint, were recognized by the Court of Appeal as relating to the same factual basis as his compensation. I am unable to distinguish Mr. Lafrenière's claim in this regard from Mr. Gélinas's claim based on the processing of his requests for an investigation and for compensation.

[45] Nor can I accept Mr. Gélinas's argument that this is not "double recovery" because he was not referred to the medical care that all military personnel should receive. The double recovery referred to by the Supreme Court in *Sarvanis* is a claim for damages when compensation is already being received. It does not involve other resources and is not a comparison to what other individuals receive.

[46] The fact that Mr. Gélinas is proposing to subtract the benefits he has received from the amounts claimed also does not affect the question of "double recovery". Section 9 of the *CLPA* is clear that no proceedings lie against the Crown "in respect of a claim if a pension or compensation has been paid . . . in respect of the . . . loss in respect of which the claim is made". The fact that a plaintiff is claiming more than the amount of the plaintiff's compensation cannot affect the immunity from actions conferred by section 9.

[47] I therefore conclude that it is plain and obvious that section 9 bars Mr. Gélinas's action in its entirety. His amended statement of claim must be struck out without possibility of amendment.

E. *The defendant's other arguments*

[48] Given my conclusions on the application of section 9 of the *CLPA*, it is not necessary to deal with the defendant's other two arguments, namely, the lack of a basis for the cause of action and limitation. It seems appropriate, however, to make some brief observations on these arguments.

[49] The defendant argues that the provisions of Bill C-77 cited by Mr. Gélinas do not give the action any legal basis. I agree that the provisions cited do not appear to provide a valid legal basis. In particular, section 71.12 and subsection 189.1(12) have not come into force. In the consolidation of the *NDA* published by the Minister of Justice, section 71.12 and section 189.1, including subsection 189.1(12), are found under the heading "Amendments Not in Force", indicating that a date for their coming into force has not been fixed by order in council pursuant to subsection 68(1) of the *Act to amend the NDA.*

[50] In any event, these provisions do not appear to create liability for the Crown per se. The two sections concern courts martial: section 189.1 deals with pleas; and section 71.12 provides that "[e]very victim has the right to have the court martial consider making a restitution order against the offender". Even if these provisions were in force, they relate to proceedings before a court martial and not to actions for damages before this Court. Contrary to Mr. Gélinas's submission, the fact that a court martial could have been convened following an investigation does not create a cause of action through these provisions.

[51] That said, I do not accept the defendant's assertion that Mr. Gélinas has not identified any other legal basis for his action. A generous reading of the statement, as is necessary in a motion to strike, especially when the plaintiff is acting on the plaintiff's own behalf, reveals references to the [TRANSLATION] "negligence" of Crown servants. Although Mr. Gélinas did not cite negligence on the part of the Crown in his response to the defendant's request for clarification, which focused on [TRANSLATION] "statutory provisions", he did raise the issue of negligence in his application, as well as allegations that Crown servants [TRANSLATION] "committed misconduct". In her motion, the defendant did not address whether it is plain and obvious that the allegations raised in the amended statement of claim do not disclose a reasonable cause of action for negligence.

[52] With respect to the application of limitation regimes, Mr. Gélinas has raised several arguments concerning the date on which he became aware of his cause of action and the periods during which limitation should be considered to be suspended. Without determining these complex issues, I note that this Court has mentioned the difficulty of determining such issues on a motion to strike. The observation of Barnes J. in *Whaling v Canada (Attorney General)*, 2018 FC 748 at paragraph 12, seems relevant:

> I accept the Defendant's point that a Statement of Claim may be struck where the cause of action it asserts is clearly and irretrievably out of time: see *Bassij v Canada*, 2008 FC 1090, [2008] FCJ No 1378, and the authorities therein cited. It is also settled law that a private claim founded on constitutional rights must still comply with statutory limitation periods. But these points do not detract from the underlying premise that, in the face of a pleaded limitations defence, the cause of action must be doomed to fail. It is simply not the case that, on a motion to strike, the Court is entitled to resolve difficult issues about whether the asserted defence actually applies or when time begins to run. This is particularly true for a relatively novel cause of action.

[Emphasis added; citations omitted.]

F. *Legal fees*

[53] The defendant is seeking legal fees. As the prevailing party, the defendant is typically entitled to its costs, but the Court has full discretionary power over the determination of any issue of costs: *Federal Courts Rules*, s 400.

[54] In support of his point, Mr. Gélinas raises the fact that the matter was the subject of special management and that he is representing himself. I agree with the defendant that the fact that Mr. Gélinas is representing himself does not mean that costs cannot be awarded: *Canjura v Canada (Attorney General)*, 2021 FC 1022 at para 27, citing *Martinez v Canada*, 2020 FCA 150 (Assessment Officer) at paras 11–15. However, I will take into account the fact that Mr. Gélinas is representing himself in determining the amount of the award of costs: *McMullen v Canada (Attorney General)*, 2021 FC 516 at para 10. Considering the nature of the action, the information in the amended statement of claim on Mr. Gélinas's financial means, and the factors listed in section 400, I conclude that an award of $500.00 in costs, including disbursements and taxes, is justified in the circumstances.

IV. Conclusion

[55] Mr. Gélinas has clearly set out the basis of his claim against the defendant in his amended statement of claim. There is no question on the facts pleaded that Mr. Gélinas has significant health challenges that he blames on the events of August 23, 2007, and the actions of Crown servants during and after those events. However, it is clear from Mr. Gelinas's allegations that

this is the same factual basis upon which his compensation under section 45 of the *VWA* is based. Under section 9 of the *CLPA*, as interpreted and applied by the Supreme Court of Canada and the Federal Court of Appeal, no proceedings lie against the Crown or a servant of the Crown in respect of this loss. The amended statement of claim must be struck out and the action dismissed.

JUDGMENT in T-343-21

THE COURT ORDERS AS FOLLOWS:

1. The defendant's motion is allowed.
2. The plaintiff's amended statement of claim is struck out without possibility of amendment and the plaintiff's action is dismissed.
3. Costs in the amount of $500.00, including disbursements and taxes, shall be payable to the defendant by the plaintiff.

"Nicholas McHaffie"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-343-21
STYLE OF CAUSE:	MICHEL GÉLINAS v HER MAJESTY THE QUEEN

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

JUDGMENT AND REASONS:	MCHAFFIE J
DATED:	NOVEMBER 1, 2021

WRITTEN SUBMISSIONS:

Michel Gélinas	ON HIS OWN BEHALF
Antoine Lippé Margarita Tzavelakos	FOR THE DEFENDANT

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Attorney General of Canada Montréal, Quebec	FOR THE DEFENDANT