Federal Court of Appeal | Cour d'appel fédérale

**Date: 20191023**

**Docket: A-159-18**

**Citation: 2019 FCA 265**

[ENGLISH TRANSLATION]

**CORAM:** **DE MONTIGNY J.A.**
**RIVOALEN J.A.**
**LOCKE J.A.**

**BETWEEN:**

**PIERRE FOURNIER**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Montréal, Quebec, on October 16, 2019.

Judgment delivered at Ottawa, Ontario, on October 23, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RIVOALEN J.A.
LOCKE J.A.

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] The appellant is appealing from a decision by Justice St-Louis of the Federal Court (*Pierre Fournier (Veteran) v. Attorney General of Canada* 2018 FC 464 (Decision)). Although he was successful before the Federal Court and although his application for judicial review of a decision of the Appeal Panel of the Veterans Review and Appeal Board (VRAB) was allowed, Mr. Fournier brought an appeal before this Court because he is dissatisfied with the reasons on

which the judgment was based. He fears that those reasons will be prejudicial to him on the VRAB's reconsideration of his case.

[2] After having carefully examined the case and considered the parties' representations, I am of the opinion that the Court cannot grant the remedy sought by the appellant. In so doing, I do not wish to express any opinion concerning the reasons which led the Federal Court to its decision.

## I. The facts

[3] Mr. Fournier served in the Canadian Armed Forces from 1981 to 2014.

[4] In June 2006, he saw a physician at the Montreal Heart Institute for a personal health issue (restless leg syndrome); it is not disputed that his medical condition had nothing to do with his service in the Forces. This physician prescribed him quinine sulphate (quinine), and the prescription was accepted and approved the following day by the military physician at the Bagotville base where the appellant was stationed.

[5] About ten days after starting this treatment, Mr. Fournier began experiencing serious health problems and he went a number of times to the hospital on the military base. He was ultimately referred to the hospital in Chicoutimi, where an emergency room physician concluded that the appellant's problems were the result of taking quinine. He was told to immediately discontinue this medication. This recommendation was confirmed the same day by a dermatologist at the same hospital, and a diagnosis of drug-induced vasculitis was made on

July 22, 2006; two days later, a military physician confirmed that the quinine was responsible for this diagnosis. The condition resulted in permanent after-effects for the appellant, including the inability to stand for long periods of time, persistent leg pain, and considerable fatigue and stress.

## II. Statutory background

[6] It is section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21, renamed the *Veterans Well-being Act* (*the Act*) on April 1, 2018, that provides for the possibility for a member of the Forces to receive disability compensation. This provision reads as follows:

| | |
|---|---|
| […] | […] |
| **Pain and Suffering Compensation** | **Indemnité pour douleur et souffrance** |
| **Eligibility** | **Admissibilité** |
| **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 | **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)** a service-related injury or disease; or | **a)** soit par une blessure ou maladie liée au service; |
| **(b)** a non-service-related injury or disease that was aggravated by service. | **b)** soit par une blessure ou maladie non liée au service dont l'aggravation est due au service. |
| […] | […] |

[7] In the present case, the parties agreed that the drug-induced vasculitis with which the appellant is afflicted is not the result of an aggravation of the restless leg syndrome, but rather a disease separate and independent from the first. Consequently, paragraph 45(1)(a) applies.

[8] The phrase “service-related injury or disease” is defined in section 2 of *the Act*:

| | |
|---|---|
| […] | […] |
| **Interpretation** | **Définitions et interprétation** |
| **Definitions** | **Définitions** |
| **2 (1)** The following definitions apply in this Act. | **2 (1)** Les définitions qui suivent s’appliquent à la présente loi. |
| […] | […] |
| **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. (liée au service) | **b)** soit consécutive ou rattachée directement au service dans les Forces canadiennes. (service-related injury or disease) |
| […] | […] |

[9] Moreover, section 2.1 of the Act states that the purpose of the Act is to show appreciation to members and veterans for their service to Canada and that it must therefore be liberally interpreted so that the obligation in this regard may be fulfilled. Section 3 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, is to the same effect. Lastly, section 39 of that *Act* provides that the VRAB is to draw from the evidence every reasonable inference in favour of the applicant and resolve in favour of the applicant any doubt as to whether the applicant has established a case.

[10] In 1978, the Pension Review Board rendered a decision (Decision I-25) following an application by the Canadian Pension Commission regarding the interpretation of section 12 of the *Pension Act*, R.S.C. 1970, c. P-7 (subsequently repealed and replaced by section 21 of the

*Pension Act*, R.S.C. 1985, c. P-6). Just as the relevant provisions of the Act in the present case provide, this provision provided that a member of the Forces was entitled to a pension when he or she suffered a disability resulting from an injury or disease or an aggravation thereof that was a consequence of or directly related to military service.

[11] In that decision, the Board was careful to distinguish between a service-related disability and a disability that is not service-related. In the first case, any complications will be part and parcel of the service-related disability. In the second, negligence may create a new disability or contribute to the aggravation of the disability under treatment and give rise to pension entitlement. It therefore appears, as the Federal Court concluded, that negligence will be considered only where the original disability or disease was not service-related. The Board took care, moreover, to specify that mere medical error was not sufficient and that an element of negligence must be demonstrated (which could take the form of inadequate medical care, inadequate medical attention, inadequate medical management or the omission to take remedial action).

[12] In 1983, the Supreme Court was also called upon to rule on the meaning of the phrase "arose out of or was directly connected with" used in the *Pension Act* and the Act that applies here: *Mérineau v. The Queen*, [1983] 2 S.C.R. 362 (*Mérineau*). In that case, a member of the Forces had been admitted to a military hospital to convalesce after heart surgery that had been required in order to correct a condition from which he was suffering. As part of this convalescence, an agent of the Forces gave him a transfusion of the wrong blood type, which resulted in a permanent 80% disability.

[13] What is interesting in that case is that the plaintiff was not seeking a disability pension, but rather, had brought an action for damages against the Crown. Subsection 4(1) of the *Crown Liability Act* and section 88 of the *Pension Act* provided for Crown immunity from civil prosecution where the circumstances that caused the disability gave rise to a pension entitlement. It was therefore the serviceman who was arguing that the medical error had no connection with his military service, unlike the situation in the present case.

[14] In a terse judgment, the Supreme Court simply adopted the reasoning of Justice Pratte, dissenting in the Federal Court of Appeal, and stated that it agreed with the following passage from his reasons:

> There is certainly a link between the damage for which the appellant is claiming compensation and his status as a serviceman, but I think that link is too tenuous for one to say that the damage is directly connected to his military service.

[15] One year later, the Pension Review Board was asked to clarify the impact of *Mérineau* on its Decision I-25. In its Decision I-31, the Board said it was of the opinion that *Mérineau* could not have the effect of casting aside the interpretation adopted in its Decision I-25, notably because there was no indication that that decision had been brought to the Supreme Court's attention. The Board further noted that there was nothing in the dissenting judgment of Justice Pratte or in the Supreme Court's reasons to suggest that the intent was to enunciate a principle of general application. It must be understood that when the Federal Court rendered its decision dismissing Mr. Mérineau's action, the Canadian Pension Commission had yet to rule on his eligibility for a pension. By the time the case reached the Supreme Court, the Commission had rejected Mr. Mérineau's pension application. It is therefore "not unlikely", according to the Board, that the Supreme Court merely wanted to settle a particular situation fairly and give a

victim of negligence the right to bring an action for damages against the Crown. Indeed, the Supreme Court itself awarded $120,975 in damages to Mr. Mérineau.

[16] It was on the basis of these considerations that the Board concluded as follows its Decision I-31 in the following terms:

> The Board is satisfied that the declaration by the Supreme Court was given in circumstances where the exigencies of the case required an immediate decision without opportunity to consider the authority and obligations of those charged with the responsibility of administering the Pension Act.
>
> This is not to say that the Board is not bound by a statement of a court of superior jurisdiction where one of its pronouncements is the proper subject of review. What we do say is that in the circumstances of the Mérineau case the statement regarding pensionability was incidental to the real question, was made without an opportunity to consider its significance apart from the immediate issues in the case, and indeed can only be said to have been made per incuriam. That being so the Board is of the opinion that the decision of the Supreme Court of Canada was not intended to overrule its decision in I-25 and did not do so.
>
> Appeal Book, p. 353

## III. Background to proceedings

[17] The appellant first turned to the Department of Veterans Affairs to seek a pension under section 45 of *the Act*. This request was denied on May 2, 2007, on the ground that the drug-induced vasculitis was not service-related:

> [TRANSLATION]
>
> Although the documentation submitted establishes the diagnosis of drug-induced vasculitis, it provides no information to establish a causal link between the condition for which the claim was made and your military duties. Your service documents establish that your vasculitis is the result of taking quinine and do not establish that a service factor caused or aggravated the condition under consideration.
>
> Appeal Book, p. 171

[18] Dissatisfied with that decision, Mr. Fournier then turned to the VRAB, where his case was first heard by a review panel and then by an appeal panel. The appellant appeared before the Review Panel and argued that Forces' medical personnel had been negligent toward him. He relied in particular on the letter of a physician dated November 6, 2013, in which the physician confirms that the applicant's problems were caused by quinine and that, even in 2006, this substance should not have been prescribed to treat restless leg syndrome given the contraindications and adverse effects associated with it. On the other hand, the physician also maintains that the absence of a blood test prior to quinine being taken was not a factor in the occurrence of drug-induced vasculitis. Mr. Fournier filed as well other documentary evidence in support of his allegations of negligence.

[19] While the Review Panel accepted the facts presented in evidence by the appellant (in particular the fact that the prescription for quinine was accepted by the military physician without a blood test, as recommended by the pharmacist), it nonetheless concluded that the appellant had not proven medical negligence. In its opinion, it was not until 2010 that the negative effects of quinine in the treatment of restless leg syndrome were recognized. In accordance with Interpretation Decision I-25, which deals with the issue of whether disability caused by inadequate medical care gives rise to pension entitlement, the Panel therefore found that Mr. Fournier had not established [TRANSLATION] "that the military medical treatment deviated from or proved to be below the standard of care in effect at the time the treatments were provided" (Appeal Book, p. 181).

[20] Before the Appeal Panel, the appellant argued that the Act did not require proof of medical negligence as a condition for entitlement to compensation and that, in any case, the evidence adduced revealed such negligence. After a thorough analysis of the appellant's claims and the relevant case law, the Appeal Panel dismissed his claims and concluded that compensation could only be awarded [TRANSLATION] "if there is evidence establishing that a disability is the result of medical care that did not comply with the standard of care during the relevant period" (Appeal Book, p. 55). Applying that standard to the facts of this case, the Panel writes as follows:

> In the present case, the Appeal Panel noted that there was no credible evidence that the medical care provided, i.e., the prescription of a certain medication (quinine), failed to meet the standard of care required of a reasonably prudent and diligent physician at the time the medication was prescribed. The medication may have caused the Appellant's drug-induced vasculitis, but this fact, in and of itself, does not support the conclusion that this condition arose out of or was directly connected with his military service in the Canadian Forces as required by the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*. Furthermore, the fact that quinine would no longer be prescribed today in similar circumstances also does not provide a basis to conclude that the decision to prescribe this medication at the time constituted a departure from the standard of care during the relevant period.
>
> Appeal Book, p. 55 (Emphasis in original.)

[21] It is against this VRAB Appeal Panel decision that the appellant filed an application for judicial review before the Federal Court.

## IV. Impugned decision

[22] In his application for judicial review, the appellant reiterated the arguments he had made before the VRAB Appeal Panel, namely that he was not required to establish medical malpractice as if it was a civil liability case and that, in any event, the evidence was such that he

was able to meet this burden of proof. Just like the VRAB's two panels, the Court rejected the appellant's position that the mere involvement of members of Forces' medical personnel in the treatment of a personal condition is sufficient to establish a link between the consequences of this treatment and military service. The Court stated the following in this regard:

> [103] . . . the position of Mr. Fournier, who asks the Court to eliminate the requirement of proof of inadequate care to provide entitlement to the compensation set out in Decision I-25 appears to be untenable. Indeed, adopting such a position would lead to granting ALL members of the Forces suffering from a disability the entitlement to compensation even though Parliament restricted entitlement to compensation to the cases that are contemplated by section 45 of *the Act*.

[23] The Court nevertheless allowed the application for judicial review, stating that it was of the opinion that the Appeal Panel's decision was unintelligible and incorrect. In the eyes of the Court, the Appeal Panel could not both determine that Mr. Fournier's disability was not related to his service in the Forces so as to avail itself of Decision I-25 and then conclude that Mr. Fournier had not established that his disability was related to his service because no medical negligence was proven. The Court writes as follows:

> [105] In addition, the decision is unintelligible. Indeed, the Appeal Panel first determined that Mr. Fournier's disease is not related to his military service to consider the opportunity for compensation provided by Decision I-25, namely whether Mr. Fournier proved that his disability resulted from medical negligence committed by the Forces' medical staff.
>
> [106] And, paradoxically, having determined that the evidence did not make it possible to conclude that such medical negligence was in fact committed, the Appeal Panel concluded that Mr. Fournier therefore did not prove that the disease arose out of nor [*sic*] is directly connected with the service, so it is not related.

[24] It was on this basis that the Court allowed the application for judicial review. From the appellant's perspective, the problem lies in the fact that the Court went beyond what had been

pleaded by the parties and drew two conclusions that seem erroneous to him. The Court seems first of all to consider that Decision I-25 does not fall within the scope of section 45 of the Act, but is rather an enhancement of the pension scheme through pension entitlement even in the absence of a link to service. On the other hand, the Court also opined that Decision I-25 (and Decision I-31) is contrary to the decision of the Supreme Court in *Mérineau* and should therefore not be followed.

[25] Following its analysis, the Court therefore decided to refer the case back to the Appeal Panel, giving it the following instructions:

> [108] The Appeal Panel must shed light on the situation. *Inter alia*, it must specify whether the entitlement to compensation set out in Decision I-25 falls (1) within *the Act*, taking into account *Mérineau*, or (2) outside *the Act*, such as a bonus.
>
> [109] The Court will therefore refer the case back to the Appeal Panel so that it can review the situation in light of these reasons and enable the parties to submit the additional arguments that are required.

## V. Issue

[26] In his notice of appeal, the appellant asks this Court to uphold the judgment at first instance, that is, to allow the application for judicial review and refer the case back to the VRAB Appeal Panel, while at the same time intervening with respect to the reasons such that the reconsideration takes place [TRANSLATION] “on a principled basis”. More specifically, the appellant is asking us to declare that the Federal Court erred in concluding that Decision I-25 awards compensation for a disease that is not service-related, that the VRAB’s decision is incorrect in that it is not in conformity with *Mérineau*, and that medical malpractice must be demonstrated in order to establish a link with military service.

[27] The respondent, however, argues that the appellant cannot appeal the reasons for the decision rendered by the Federal Court and that this Court cannot therefore grant the remedy sought by the appellant. I shall therefore begin by addressing this first issue.

## VI. Analysis

[28] It is well established that only a judgment, and not the reasons for that judgment, can be appealed before this Court. Subsection 27(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is very clear in this regard, and the case law has given effect to that principle: see, in particular, *Ratiopharm Inc. v. Pfizer Canada Inc.*, 2007 FCA 261, at para. 6; *Canada (Attorney General) v. Dussault*, 2003 FCA 5, at para. 5; *Breslaw v. Canada (Attorney General)*, 2005 FCA 152, at para. 3; *Konecny v. Ontario Power Generation*, 2010 FCA 340, at para. 7. The appeal should therefore be dismissed for this reason alone.

[29] During the hearing, counsel for the appellant argued that Justice Boivin had dismissed a motion to strike based on this very reason that had been filed by the Attorney General (order of Justice Boivin dated on September 25, 2018). However, it is well established that a decision rendered on a preliminary motion, especially when it is unaccompanied by reasons, is not binding on the Court when it hears the case on the merits.

[30] Counsel for the appellant also argued that the reasons for the decision were in a sense incorporated into the judgment since the Federal Court ruled that the matter was to be returned to the VRAB Appeal Panel for reconsideration [TRANSLATION] “in accordance with these reasons.” However, such a statement does not seem sufficient to me to constitute a “direction”

within the meaning of paragraph 18.1(3)(b) of the *Federal Courts Act*. As this Court stated in *Canada (Citizenship and Immigration) v. Yansane*, 2017 FCA 48 (at para. 25), it matters little whether the decision to allow an application for judicial review and return a matter to an administrative decision maker for reconsideration contains such a statement or not because "it goes without saying that an administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis."

[31] I am therefore of the view that the addition of that statement in the formal judgment is not sufficient to incorporate therein the reasons in their entirety, much less to make of that statement a strict direction or even a directed verdict. If it were otherwise, reasons would always open up the possibility of an appeal.

[32] In closing, I would add the following brief remarks. On the one hand, the appellant's concern with regard to the import of the comments made by the Federal Court as to the scope of Decision I-25 strikes me as exaggerated. To be sure, the Federal Court does not appear to have accepted the interpretation thereof proposed by the appellant, which is that the disability resulting from the care provided by an agent of the Forces in the treatment of an initial, non-service-related, condition could constitute in case of negligence a new, service-related, disability. The Federal Court, relying on a passage from Decision I-25 ([TRANSLATION] "whose phrasing is not the most felicitous", concedes the appellant in paragraph 47 of his memorandum) that refers to this type of case as a non-service-related disability, instead seems to consider there to have been an enhancement of the scheme created by paragraph 45(1)(a) of the Act.

[33] Even though the interpretation proposed by the appellant does not seem to have been questioned since being put forward by the Board in 1978 and was not raised by the parties in the present case, and even though it appears, *a priori*, to be entirely defensible, it was nonetheless open to the Federal Court to question its validity. It will be for the VRAB Appeal Panel, however, as a specialized tribunal, to rule on this issue in light of the representations that may be made by the parties, as the Federal Court specifically invites it to do in the conclusion of its reasons (Decision at paras. 108 and 109, quoted at para. 25 above).

[34] The appellant also has concerns about the remarks made by the Federal Court regarding the impact of the decision in *Mérineau* on Decision I-25. Again, the appellant's fears appear to me to be unjustified and unfounded. Indeed, the Federal Court was simply reiterating a well-established principle in Canadian law, namely, the principle of *stare decisis*. I have difficulty seeing an error in the statement that *Mérineau* is a precedent that cannot be ignored and that the Board could not deviate from it in its Decision I-31 on the ground that the Supreme Court had rendered its decision *per incuriam*.

[35] That said, the Federal Court's remarks do not allow clear conclusions to be drawn as to the effect that *Mérineau* should be given with respect to the issues that Decision I-25 aimed at resolving. Nor do they make it possible to prejudge what the answer should be to the question of whether the involvement of military medical personnel in the treatment of Mr. Fournier's restless leg syndrome was sufficient to establish the required link between the disability arising from that treatment and military service. Again, paragraphs 108 and 109 leave these questions open, and the appellant will be able to make his representations on the two grounds he relied on in his

application for judicial review, i.e., that negligence was not required and that the actions taken by the agents of the Forces met that standard anyway.

## VII. Conclusion

[36] For all of the above reasons, I would dismiss this appeal, without costs.

"Yves de Montigny"
J.A.

"I agree.
Marianne Rivoalen J.A."

"I agree.
George R. Locke J.A."

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MARTINE ST-LOUIS DATED MAY 19, 2018, DOCKET NO. T-2238-16.**

| | |
|---|---|
| **DOCKET:** | A-159-18 |
| **STYLE OF CAUSE:** | PIERRE FOURNIER v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | OCTOBER 16, 2019 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | RIVOALEN J.A.<br>LOCKE J.A. |
| **DATED:** | OCTOBER 23, 2019 |

**APPEARANCES:**

| | |
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| Véronique Forest<br>Marie-Ève Sirois-Vaillancourt | FOR THE RESPONDENT |

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