Federal Court of Appeal | Cour d'appel fédérale

Date: 20250122

Docket: A-182-23

Citation: 2025 FCA 17

CORAM: **DE MONTIGNY C.J.**
LASKIN J.A.
WALKER J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

ROBERT MARCUS HIRSCHFIELD

Respondent

Heard at Vancouver, British Columbia, on April 16, 2024.

Judgment delivered at Ottawa, Ontario, on January 22, 2025.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: DE MONTIGNY C.J.
WALKER J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] In this appeal, the Crown seeks to set aside an order of the Federal Court (2023 FC 900, Manson J.), certifying the underlying action as a class proceeding.

[2] The respondent and proposed representative plaintiff Mr. Hirschfield, a Royal Canadian Mounted Police (RCMP) constable, was seriously injured in a car accident while on duty. He was granted a monthly disability benefits pension under the pension scheme for certain disabled members of the Canadian Armed Forces (CAF) and disabled members of the RCMP. He also brought a civil claim for damages, which was ultimately settled for payments totalling $750,000 plus a further sum for costs and disbursements.

[3] As a consequence of the settlement, Veterans Affairs Canada (VAC), which administers the disability pension scheme on behalf of the Minister of Veterans Affairs, advised Mr. Hirschfield that it would offset a portion of his civil damages award against his pension benefits. Its doing so substantially reduced the monthly amount of those benefits (from $865.69 to $41.29) and generated an overpayment of $43,743.80 in benefits already paid, which VAC sought to claw back.

[4] In his statement of claim, Mr. Hirschfield pleads that VAC has wrongfully included amounts for pecuniary damages in calculating the amounts that it offset, and that VAC has done so and is continuing to do so for other disability pension recipients who, along with Mr. Hirschfield, comprise the proposed class. He pleads that VAC's conduct renders the Crown liable to the proposed class members in systemic negligence, breach of fiduciary duty, and unjust enrichment.

[5] The Crown focuses its appeal on two of the five requirements for certification set out in Rule 334.16(a) of the *Federal Courts Rules*, S.O.R./98-106: (1) that the pleadings disclose a

reasonable cause of action and (2) that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact.

[6] With respect to the first of these two requirements, the Crown submits that the motion judge erred in failing to recognize that the issues raised by the pleadings are all matters of public law, not private law, so that the causes of action pleaded are all doomed to fail.

[7] With respect to the second requirement, preferable procedure, the Crown submits that the motion judge erred in finding that the requirement was met, when Parliament has granted to the members of the proposed class rights of review by and appeal to the Veterans Review and Appeal Board (VRAB) and has conferred on the VRAB "full and exclusive jurisdiction" (in the French version, "compétence exclusive") to hear, determine and deal with these reviews and appeals: *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (VRAB Act), ss. 18, 26.

[8] For the reasons set out below, I would allow the appeal, set aside the certification order, and dismiss the motion for certification. In brief, the essential character of the claims of Mr. Hirschfield and of the other proposed class members brings them squarely within the class of claims over which Parliament has vested exclusive jurisdiction in the VRAB. As a consequence, the Federal Court has no jurisdiction to consider the proposed class members' claims, the causes of action pleaded in the statement of claim are all doomed to fail, and a class action in the Federal Court cannot be the preferable procedure.

[9] In explaining why I reach this conclusion, I will first provide some further detail concerning the disability pension benefits scheme, Parliament's choice to vest in the VRAB decision-making authority under the scheme, Mr. Hirschfield's and some other class members' experience with the scheme, and the claims they seek to advance through the proposed class proceeding.

II. The disability pension benefits scheme

[10] Mr. Hirschfield's claim relates to the administration and adjudication of entitlement to disability pension benefits. These benefits were first provided under legislation enacted in 1919. They are now provided under Part III of the *Pension Act*, R.S.C. 1985, c. P-6. Their recipients are members and veterans of the CAF and the RCMP, and their eligible survivors and dependants. (I should note that the benefits scheme in issue in this case has been superseded, effective for claims arising in and after April 2006, by the scheme set out in the *Veterans Well-being Act*, S.C. 2005, c. 21. This appeal does not engage that scheme.)

[11] Applications for disability pension benefits under the *Pension Act* are made to "the Minister"—in practical terms, to VAC. In accordance with section 35 of the *Pension Act*, VAC determines the amount of a disability pension based on the degree to which an applicant's condition is related to the applicant's service and VAC's assessment of the extent of the disability. Pension benefit recipients receive non-taxable monthly disability pension benefits for life. A death payment and survivor's benefit may also be paid.

[12] An applicant who is dissatisfied with a VAC decision may request that it review the decision based on new evidence. There is no limit on the number of VAC reviews an applicant may request on this basis, and no limitation periods apply.

[13] By section 84 of the *Pension Act*, an applicant who is not satisfied with the results of a VAC decision, whether an initial decision or a decision made after a review, may apply to the VRAB for a review of the decision. Again, no limitation periods apply.

[14] The VRAB was established by the VRAB Act as an independent tribunal. Its members are appointed by the Governor in Council. Section 18 of the VRAB Act sets out the VRAB's jurisdiction in respect of applications for review. It gives the VRAB, as noted above, "full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the Pension Act […] and all matters related to those applications" (in the French version, "compétence exclusive pour réviser toute décision rendue en vertu de la Loi sur les pensions […] et pour statuer sur toute question liée à la demande de révision").

[15] By section 19 of the VRAB Act, an application for review is to be heard by a review panel of at least two members of the Board. By section 20, an applicant may present evidence and arguments to the review panel either by written submission or in person.

[16] By section 35, applicants for review are entitled to free legal advice and representation from the Bureau of Pensions Advocates—an organization of lawyers within VAC who specialize in reviews and appeals related to claims for illness and disability benefits. Applicants may also

choose to be represented by a service bureau of a veterans organization, or at their own expense by another representative of their choice.

[17] Regardless of whether and, if so, by whom an applicant is represented, the proceedings before a review panel, unlike proceedings typically held before courts and other tribunals, are ordinarily non-adversarial. Except where the VRAB has specifically given notice relating to a question of statutory interpretation (as discussed below), VAC is not entitled to participate in proceedings before the panel, and no one appears to defend the VAC decision or argue against the applicant's position. In addition, section 39 of the VRAB Act obliges the VRAB, like VAC, to give the applicant the benefit of the doubt: among other things, to draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant, and to resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

[18] By section 21 of the VRAB Act, a review panel may affirm, vary, or reverse VAC's decision, refer any matter back to VAC for reconsideration, or refer any matter not dealt with to VAC for decision. Subsection 23(1) authorizes a review panel, on its own motion, to reconsider a decision and either confirm it or amend or rescind it if it determines that an error was made with respect to any finding of fact or the interpretation of any law. Consistent with the overall approach of the legislation, no limitation period is prescribed.

[19] By section 25, an applicant who is dissatisfied with a decision of a review panel has a right of appeal to the VRAB. Section 26 confers on the VRAB "full and exclusive jurisdiction to hear, determine and deal with all appeals that may be made to the Board under section 25 […] and all matters related to those appeals" (in the French version, "compétence exclusive pour statuer sur tout appel interjeté en vertu de l'article 25, […,] ainsi que sur toute question connexe"). By subsection 27(1), an appeal is to be heard by a panel of the VRAB comprising at least three members, who must be different from the members of the review panel. Yet again, no limitation period applies.

[20] By subsection 28(1), an appellant may make a written submission to the appeal panel or appear before it in person or by representative. Like review proceedings, appeal proceedings are non-adversarial: VAC is, again, ordinarily not entitled to participate in proceedings before an appeal panel, and the appellant may, again, be represented in the same manner as in a VRAB review. Subsection 29(1) of the VRAB Act authorizes an appeal panel to affirm, vary or reverse the decision under appeal, refer any matter back to the person or review panel that made the decision for reconsideration, re-hearing or further investigation, or refer any matter not dealt with in the decision back to that person or review panel for a decision.

[21] By section 31, "[a] decision of the majority of members of an appeal panel is a decision of the Board and is final and binding."

[22] However, by subsection 32(1), an appeal panel may on its own motion reconsider a decision made by it and confirm, amend, or rescind the decision if it determines that an error was

made with respect to any finding of fact or the interpretation of any law, or may do so on application if the appellant alleges that an error was made with respect to any finding of fact or the interpretation of any law, or if new evidence is presented.

[23] Section 30 and subsection 37(1) of the VRAB Act provide specific mechanisms for the resolution of questions of statutory interpretation.

[24] By section 30, where an appellant raises a question of interpretation relating to the VRAB Act or certain other statutes, including the *Pension* Act, the VRAB may notify the persons or organizations prescribed in the *Prescribed Persons and Organizations Regulations*, S.O.R./96-68 (which include the Minister of Veterans Affairs, the Bureau of Pensions Advocates, and veterans organizations including the Royal Canadian Legion), and give them an opportunity to present arguments on the question before it makes a decision. By subsection 37(1), the Minister, the Chief Pensions Advocate (the executive director of the Bureau of Pensions Advocates), veterans organizations, or any interested person, may refer to the VRAB for a hearing and decision any question of interpretation relating to the VRAB Act or the *Pension Act*, among other statutes.

[25] Decisions of the VRAB, like those rendered by many other federal tribunals, are subject to judicial review by the Federal Court: *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2, 18, 18.1. In addition, subsection 18.3(1) of that statute authorizes the VRAB, like other federal tribunals, to refer at any stage of its proceedings any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

III. The statutory offset

[26] Section 25 of the *Pension Act* directs the Minister to reduce a pension recipient's disability benefits if the recipient has received compensation from certain other sources "in respect of the same death or disability for which the pension is payable." Compensation for this purpose includes "an amount arising from a legal liability to pay damages" (paragraph 25(a)) and an amount that is "payable to or in respect of the pensioner" under legislation such as a provincial workers' compensation statute (paragraph 25(b)).

[27] The requirement of an offset in these circumstances has been described as based on "a principle of fairness"—that if two members of the forces suffer the same disability, they should each end up with roughly the same compensation whatever its source (amended appeal book at p. 462)—and on the avoidance of "double recovery" (*100000517721* (*Re*) (26 November 2002) (VRAB) at pp. 10-12).

[28] Section 26 of the *Pension Act* prescribes the methodology through which the amount of the offset is determined. The starting point is the "compensatory amount," as calculated in accordance with subsection 26(1): "the amount remaining, after subtracting any taxes, of the amount collected referred to in paragraph 25(a) or of the compensation payable referred to in paragraph 25(b)." By subsection 26(2), the amount of the pension reduction is ordinarily the lesser of the pension and one half of the monthly value of the compensatory amount.

[29] Depending on the circumstances and the timing, the calculations may result (as in Mr. Hirschfield's case) in both a reduction of the monthly value as initially determined and an overpayment that the recipient is required to repay.

IV. Mr. Hirschfield's circumstances

[30] As noted above, Mr. Hirschfield was seriously injured in a car accident while on duty. He was granted a monthly disability benefits pension of $865.69, plus a lump sum payment of $15,775 for disability benefits owed in arrears.

[31] Some two and a half years later, he settled a civil claim for damages arising from the car accident. The amount of the settlement was $750,000, comprising (1) $201,000 for loss of housekeeping and cost of care; (2) $7,000 for special damages; (3) $184,000 for general damages for pain and suffering; and (4) $358,000 for loss of earning capacity. An additional amount of $41,000 was awarded for costs and disbursements.

[32] VAC advised Mr. Hirschfield that because of the settlement, it would be reducing his monthly disability benefits from $865.69 to $41.29, and that it had also calculated an overpayment of $43,743.80 over a five year period. In calculating these amounts, VAC took into account both the $184,000 general damages component of the settlement and the $358,000 component for loss of earning capacity.

[33] Mr. Hirschfield requested a departmental review by the VAC, in which he was represented by a member of the Bureau of Pensions Advocates. He submitted that VAC was

entitled to take into account in its calculations of the offset only the $184,000 general damages component of the settlement, and not the amounts received for loss of earning capacity.

[34] In making this submission, Mr. Hirschfield relied on the decision of the Federal Court in *Manuge v. Canada*, 2012 FC 499 at paras. 27, 38. There it was held that disability benefits under the *Pension Act* did not constitute "monthly income benefits" as that term was used in a group insurance plan for members of the CAF, and that rather than an indemnity for lost income, disability benefits "represent compensation for impairments to the activities in daily living including loss of function and for reductions in the quality of life."

[35] The departmental review confirmed VAC's initial decision. In setting out the basis for its conclusion, VAC observed that the *Pension Act* does not distinguish between economic and non-economic compensation in providing for offsets for third party liability compensation awarded, and that it differs in this respect from the *Veterans Well-being Regulations*, S.O.R./2006-50. Those regulations, part of the scheme governing the set of veterans benefits put in place in 2006, expressly state that only non-economic compensation is to be considered in calculating the statutory offset.

[36] The letter from VAC to Mr. Hirschfield advising him that the initial decision was confirmed advised him that he could ask VAC to review its decision if he had new evidence. It further advised him as follows:

> If you do not agree with this decision you may appeal to the [VRAB]. The Board is the arms-length tribunal that operates independently from the Department to provide a fair appeal process for disability benefits decisions.

> **Questions**
>
> If you wish to contact the Bureau of Pensions Advocates to discuss your review and appeal options, please call [telephone number].

[37] In response to the decision of the departmental review, Mr. Hirschfield did not avail himself of the further administrative remedies open to him. He did not seek a review by or appeal to the VRAB, raise a question of interpretation of the *Pension Act* for the VRAB's consideration and decision, or ask the VRAB to refer a question of interpretation to the Federal Court. Instead, he commenced the proposed class action that has led to this appeal.

[38] In his affidavit in support of his motion for certification (amended appeal book at p. 147), Mr. Hirschfield offered the following explanation of his decision to pursue a class action:

> I understand that the cost of pursuing this claim as an individual action would likely be, at minimum, tens of thousands of dollars—and likely significantly more. I cannot afford to pay lawyers on an hourly basis to advance this claim and, even if I could, it would not be economical for me to do so.

[39] Thus it appears that the only alternative to a class action that Mr. Hirschfield considered was an individual action. He did not refer to the availability of relief through the VRAB, or explain his decision not to pursue the remedies available in that forum. Nor did the only other proposed class member who swore an affidavit in support of the motion.

V. VRAB decisions in other cases

[40] Other *Pension Act* benefits recipients in situations comparable to Mr. Hirschfield's have brought the "compensatory amount" issue before the VRAB for a panel review, and have

succeeded in overturning VAC's decisions. In this appeal, we have been referred to ten cases since 2015 in which they have done so. In each of these proceedings, a VRAB review panel has concluded, based in large part on its adoption of the reasoning of the Federal Court in *Manuge*, that in calculating the statutory offset only the general damages component of a settlement or judgment, and not the amounts awarded for loss of earning capacity, may be included.

[41] For example, in *100003426931 (Re)*, 2018 CanLII 50587 (CA VRAB), the review panel stated:

> The Panel finds that Veterans Affairs Canada (VAC), when computing the amounts owed by the Applicant under Sections 25 and 26 of the *Pension Act*, erroneously used non-compensatory amounts (wage loss, health care expenses and future and past wage loss) in their calculations.
>
> … [T]he Panel finds that the Honorable Mr. Justice Barnes in the Federal Court case law of *Manuge* affirms that benefits from VAC are not intended to be a form of an income replacement but rather to "'provide compensation for reductions in the quality, and sometimes the quantity, of life experienced by the disabled', and not, as is commonly believed, to provide a form of income replacement."

[42] And in an earlier decision, *100002363092 (Re)* (23 October 2015) (CA VRAB), a VRAB panel described as "now settled law" the characterization of disability benefits set out in *Manuge*, and stated that "[w]age loss, both present and future, is and never was [sic] a part of the raison d'être, the justification, for an award under the Pension Act."

[43] Despite these VRAB decisions, VAC has continued to deduct pecuniary amounts in calculating the statutory offset under sections 25 and 26 of the *Pension Act*. Its doing so has given rise to the proposed class action, the certification motion, and this appeal.

VI. The proposed class action

[44] Mr. Hirschfield commenced a proposed class action on behalf of a proposed class now defined in the amended statement of claim as follows:

> All members and former members of the Canadian Armed Forces and Royal Canadian Mounted Police, and their spouses, common law partners, dependants, survivors, and orphans, who, at any time between May 14, 1953 and the present, received a pension under the *Pension Act* where that pension:
>
> (a) was reduced by a monthly amount pursuant to sections 25 and 26 of the Pension Act or their predecessor provisions; and
>
> (b) in calculating that reduction under section 26(2) or 26(3) of the Pension Act or their predecessor provisions, the Minister of Veterans Affairs (or their predecessor) included in the "compensatory amount" amounts collected by or in respect of the pensioner for Economic Compensation in respect of the same death or same disability for which the pension is payable.
>
> "Economic Compensation" excludes non-pecuniary damages.

[45] The size of the proposed class is not clear. There is reference in the record to a group comprising 154 individuals who, as of April 2022, had experienced a pension reduction that may be attributable to the receipt of economic compensation. But it is also suggested that out of the 154, there were 47 living proposed class members who have experienced reductions for that reason, ten of whom sought a panel review before the VRAB. The most that can be said at this point is that the size of the proposed class is at least 47, and may be 154 or more. These uncertainties are not material for the purposes of this appeal.

[46] Mr. Hirschfield describes his central allegation in the action as that in reducing his and other proposed class members' pensions under sections 25 and 26 of the *Pension Act,* VAC has

"erred operationally" by including, in the "compensatory amount" used to calculate the offset, not only non-pecuniary damages but also pecuniary damages collected by or in respect of the pensioner. He pleads that VAC is doing so despite the non-pecuniary nature of the disability pension benefits paid under the *Pension Act* and despite the decisions of the VRAB mentioned above.

[47] Accordingly, he pleads, the pension amounts received by the proposed class members have been less than the amounts properly payable. As a result, he submits, the Crown is liable to class members in systemic negligence, breach of fiduciary duty, and unjust enrichment. He seeks declarations to that effect as well as general damages, special damages, and punitive, exemplary, and aggravated damages, along with restitution.

[48] The systemic negligence Mr. Hirschfield pleads consists of wrongfully including, in the "compensatory amount" used to calculate the reduction of pension amounts payable under sections 25 and 26 of the *Pension Act*, amounts that he says should not have been included. In his view, the breach of fiduciary duty consists of the same allegedly wrongful inclusion. The unjust enrichment he pleads does so too, and in that connection he further pleads entitlement to restitution of "ill-gotten gains" equivalent to the difference between the amount of the disability pension benefits class members were owed and the amount paid out.

[49] Rule 334.16(1) of the *Federal Courts Rules* sets out five conditions that must be met for a proceeding in the Federal Court to be certified as a class proceeding:

(1) the pleadings disclose a reasonable cause of action;

(2) there is an identifiable class of more than one person;

(3) the claims raise common questions of fact and law;

(4) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions; and

(5) there is an adequate representative plaintiff or applicant.

[50] The motion judge found that all five conditions were met, and granted certification accordingly.

VII. Errors of the motions judge

[51] In its appeal to this Court, the Crown submits that in granting the certification order, the motion judge erred in two main respects—first, in finding that the pleadings disclose a reasonable cause of action, so that the first certification condition is met, and second, in finding that a class proceeding is the preferable procedure, so that the fourth certification condition is met too.

[52] I agree that the motion judge erred in this way. In my view, both errors are rooted in the failure of the motion judge to fully address the terms of the regulatory scheme governing the benefits in issue—in particular, the exclusive jurisdiction that it confers on the VRAB—and the "essential character" (or, as it is sometimes expressed, the "essential nature") of Mr. Hirschfield's claim.

[53] As the Supreme Court stated in *Vaughan v. Canada*, 2005 SCC 11 at para. 26, "[w]hen a benefit is conferred by statute or regulation, the conferring legislature is entitled to specify the machinery for its administration […], subject to a dissatisfied party having recourse to judicial review" (citation omitted).

[54] Where the legislature has so specified, and the essential character of a claim renders it subject to that machinery, it is through that machinery that the claim should be determined. "[T]hat an administrative tribunal should decide all matters whose essential character falls within the tribunal's specialized statutory jurisdiction, is now a well-established principle of administrative law:" *R. v. Conway*, 2010 SCC 22 at para. 30 (emphasis in original).

[55] As discussed in detail above, here Parliament has specified "machinery" to govern entitlement to the disability pension benefits in issue: it has specified that the benefits are to be administered in the first instance by VAC, and then, if necessary to resolve a dispute, by the VRAB—fully and exclusively—subject only to judicial review.

[56] Therefore, as stated in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14 at para. 39,

> [t]he key question […] is whether the essential character of [the] dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determing this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction not intended by the legislature.

[57] This test has been applied in a wide variety of contexts, including, among others, in labour relations (where the seminal case is *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at paras. 52-53); in taxation matters (see *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184); in the immigration context (see *Leahy v. Canada (Citizenship and Immigration)*, 2020 FCA 145); in workers' compensation matters (see *Gill v. WorkSafeBC*, 2017 BCCA 239); and in the context of statutory insurance benefits (see *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615). It applies whether the claim is put forward in a proposed class proceeding or in an individual action: see, for example, *Merchant* at para. 40; *Canada (Attorney General) v. Scow*, 2022 BCCA 275 at para. 85.

[58] The rationale in the labour cases "involves the recognition by the courts that they ought not intervene in the field of labour relations, where specialized tribunals have been established by legislators for settlement of disputes": *Canada v. Greenwood*, 2021 FCA 186 at para. 129, leave to appeal refused, 2022 CanLII 19060.

[59] A similar rationale prevails in the cases—*Merchant* being one example—in which the question to be considered has been whether, given their essential character, the claims in issue were properly within the purview of the ordinary courts or of the Tax Court of Canada. For example, in *Canada v. Addison & Leyen Ltd*., 2007 SCC 33, where a taxpayer attempted to circumvent the jurisdiction of the Tax Court by launching an application for judicial review in the Federal Court, the Supreme Court held (at para. 11) that the application could not succeed: the taxpayer was obliged to seek relief within the system of tax assessments and appeals that Parliament has established:

> The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada.

[60] Similar considerations apply where a claimant under a statutory benefit scheme attempts to bypass a tribunal established as part of that scheme and resort to the ordinary courts. For example, in *Davis v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 418 at paras.10-11, the Court of Appeal for British Columbia rejected the appellant's contention that she had a right to have her compensation claim determined by a civil jury. It noted that the right to compensation "is statutory, and it is the statute that determines how benefits are to be assessed. The statute prescribes a detailed administrative scheme for assessment of compensation, and specifically provides […] that the WCAT has exclusive jurisdiction to review compensation decisions […]."

[61] How then is the essential character or nature of a claim to be determined?

[62] In *Canada v. Domtar Inc*., 2009 FCA 218 at para. 28, this Court answered that question as follows:

> The correct approach to the determination of the essential nature of a claim is established by the decision of this Court in *Canada v. Roitman*, 2006 FCA 266, [leave to appeal refused, 2006 CanLII 41274]. That case stands for the proposition that in determining whether a court has the jurisdiction to entertain a claim [or whether jurisdiction rests with another court or tribunal], the question of the essential nature of the dispute must be based on a realistic appreciation of the practical result sought by the claimant. This was explained by Justice Décary, writing for this Court in *Roitman* (at paragraph 16):
>
> > A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the

> remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court.

[63] In *Roitman*, the claimant brought an action in the Federal Court, framed as a claim for damages for misfeasance in public office. The claimant alleged that the Minister of National Revenue had deliberately issued a notice of assessment of income tax knowing that the assessment was based on an incorrect interpretation of the law. The claim was struck out because despite its form as a claim for damages, it was essentially a challenge to the legal correctness and validity of an income tax assessment, a matter that, by statute, was within the exclusive jurisdiction of the Tax Court of Canada.

[64] This Court followed *Roitman* in *Domtar*. There Domtar had commenced an action in the Federal Court for a declaration that a provision of federal legislation enacted as part of the settlement of the softwood lumber dispute with the United States was unconstitutional, and an order requiring the Crown to repay Domtar the some $37 million it had paid under that provision, together with interest and costs. The legislation provided a procedure for claiming a refund of an amount paid, and a notice of assessment, objection, and appeal procedure similar to the procedure for claiming a refund of income tax paid. The appeal was to the Tax Court of Canada. Domtar did not file an application for a refund before the time provided for doing so expired.

[65] The Crown moved to strike out Domtar's statement of claim, submitting that the claim was essentially for recovery of the money Domtar had paid under the legislation. In response,

Domtar argued that its claim was in essence for a declaration of unconstitutionality, and that the monetary claim was only an ancillary remedy.

[66] The Court held (at para. 28) that *Roitman* had set out the correct approach to the determination of the essential nature of a claim—it must be "be based on a realistic appreciation of the practical result sought by the claimant." Applying that approach, it went on (at para. 30):

> [T]here is no doubt that Domtar's principal objective is to receive a return of the amount it paid pursuant to [the statutory provision]. There is no reason to believe that Domtar would be pursuing its claim unless it had the prospect of recovering that money. For that reason, I accept the argument of the Crown that essentially, Domtar is asserting a claim for a refund of money paid under the [Act]. That is the essential nature of its claim even though the claim is based on a constitutional challenge.

[67] Given that conclusion as to the essential nature of the claim, the Court concluded that the Tax Court had exclusive jurisdiction in respect of it under the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which ousted the jurisdiction of the Federal Court over matters arising under the softwood lumber legislation.

[68] This Court's decision in *Merchant* is also helpful in considering the essential character of the claims here. *Merchant* was a proposed class action, brought in the Federal Court by two law firms and four of their clients. They alleged that the Canada Revenue Agency should not have required the law firms to collect or remit GST on certain disbursements. They sought repayment of the amounts of GST that they alleged they should not have had to pay. They pleaded two common law causes of action, misfeasance in public office and restitution, and also claimed aggravated and punitive damages.

[69] The Federal Court struck out their statement of claim, for several reasons. One was that the cause of action in restitution was not available: Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15, established a scheme for obtaining rebates of tax that was not payable, and that scheme ousted any common law cause of action. A second was that the claim had been brought in the wrong court: while the action was commenced in the Federal Court, the Tax Court had been given exclusive jurisdiction to hear appeals relating to the recovery of money collected as GST.

[70] This Court upheld the Federal Court's decision on both grounds. It found that the proposed class action was properly characterized as an attempt to recover GST outside Part IX of the *Excise Tax Act*, and was therefore barred. In coming to this conclusion, the Court compared the compensatory relief sought in the proposed class action to the compensatory relief obtainable under the statute. It found it to be the same. It then considered whether the claim for aggravated and punitive damages affected the correctness of that conclusion. It found that it did not. The appellants were not seeking compensatory damages for the misconduct that they alleged. Their claim "[still sought] the recovery of GST outside of the Act, but with an added penalty due to the respondents' conduct" (Merchant at para. 26).

[71] The Supreme Court has approved and adopted the essential character test for purposes of determining the jurisdiction of the Federal Court: *Windsor (City) v. Canadian Transit Co*., 2016 SCC 54 at paras. 26-27. In doing so it compendiously restated the test as follows (citations omitted):

> The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" […]. The "statement of claim is not to be blindly read at its face meaning" […]. Rather, the court must "look beyond the words used, the facts alleged and the remedy sought and ensure ... that the

> statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court".

VIII. The essential character of Mr. Hirschfield's claims

[72] What, then, is the essential character of the claims made by Mr. Hirschfield here?

[73] These claims are framed as claims for common law damages. But as already noted, all of the claims are based on the alleged "operational" failure of VAC to calculate correctly the amounts payable to proposed class members under the *Pension Act* and decisions of the VRAB. That is the alleged systemic negligence. That is the alleged breach of fiduciary duty. That is the source of the alleged unjust enrichment. And that is the source of the alleged "ill-gotten gains": they comprise the difference between the pension amounts said to be owed to proposed class members under the *Pension Act* and the amounts that they have been or will be paid. Thus, to use the language of *Regina Police*, the claims all "[arise] either expressly or inferentially from [the] statutory scheme."

[74] *Roitman* and the other cases discussed above tell us that in determining the essential character of a claim, we must look beyond the words used, the facts alleged, and the remedy sought. When we do so here, it is apparent in my view that the essential character of Mr. Hirschfield's claims is to recover amounts that, it is asserted, should have been paid and should continue to be paid under the *Pension Act*, but (as in *Merchant*), "with an added penalty due to the respondents' conduct."

[75] It is also apparent, in my view, that Parliament has sought to confer on the VRAB, in sections 18 and 26 of the VRAB Act, a broad authority—described as "full and exclusive jurisdiction"—to deal with applications and appeals brought in pursuit of claims of this kind, and "all matters related to" those applications and appeals.

[76] Mr. Hirschfield did not suggest in argument that the word "exclusive" as enacted by Parliament in the VRAB Act bears any meaning other than its ordinary meaning. That ordinary meaning includes "excluding (some other) from participation" in English ((Oxford English Dictionary (December 1, 2024), sub verbo "exclusive", online: <https://www.oed.com/dictionary/exclusive_adj?tab=meaning_and_use#4966585>) and "qui appartien[t] à une seule personne" in French (Le Robert Dico en ligne, (December 1, 2024), sub verbo "exclusif", online: < https://dictionnaire.lerobert.com/definition/exclusif >).

[77] While contextual factors must, of course, still be considered, I see no contextual factors here that call for expanding or limiting the ordinary meaning of "exclusive."

[78] It follows that Mr. Hirschfield's claims and those of other proposed class members come within the "full and exclusive jurisdiction" of the VRAB, and that they may not be adjudicated—except by way of judicial review following a decision of the VRAB—in the Federal Court. It is self-evident that a procedure the Court has no jurisdiction to hear and determine cannot be a preferable procedure. In concluding (at paras. 69 to 75 of his reasons) that a class action would be the preferable procedure and that the VRAB would not be an adequate alternative, the motion judge erred in law in failing to address the breadth and exclusivity of Parliament's conferral of

authority on the VRAB, and their consequences for the jurisdiction of the Federal Court. Those consequences, in my view, are dispositive of this appeal.

IX. Other issues

[79] Because the test for certification requires that all of the five conditions set out in Rule 334.16(1) be met, the conclusion that the preferable procedure condition is not met renders it unnecessary to consider the other four conditions in the rule in order to resolve this appeal. In all of the circumstances, I would decline to do so.

[80] Nor is it necessary, in my view, to consider the potential application in this appeal of this Court's decision in *Canada (Attorney General) v. Bri-Chem Supply Ltd*., 2016 FCA 257. One of the issues addressed in *Bri-Chem* was the extent to which an administrator (such as VAC) whose actions are regulated by a tribunal (such as the VRAB) must follow tribunal decisions. Although this issue was touched upon in argument, it is also not necessary to deal with it given the disposition that I propose.

X. Proposed disposition

[81] I would allow the appeal, set aside the order of the motion judge and, giving the judgment that should have been given, dismiss the motion for certification. I see no circumstances that could justify an award of costs under Rule 334.39. I would therefore make no order as to costs.

"J.B. Laskin"
J.A.

"I agree.
Yves de Montigny C.J."

"I agree.
Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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