Federal Court  Cour fédérale

**Date: 20150818**

**Docket: T-2012-14**

**Citation: 2015 FC 985**

**Ottawa, Ontario, August 18, 2015**

**PRESENT: The Honourable Mr. Justice Gascon**

**BETWEEN:**

**ROBERT JAMES THOMSON**

**Applicant**

**And**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

## JUDGMENT AND REASONS

## I. Overview

[1] On October 30, 1991, the applicant Mr. Robert James Thomson was a civilian passenger on a Canadian Forces aircraft flying over the Northwest Territories. He was on duty as an employee of the Department of National Defence involved in the management of retail outlets serving members of the Canadian Forces. The plane crashed. Mr. Thomson survived but he was very seriously injured in the accident. He became paraplegic, suffered multiple amputations due

to frostbite developed while awaiting rescue for 30 hours, and eventually developed post-traumatic stress disorder.

[1] Mr. Thomson elected to be compensated for his injuries under the *Flying Accidents Compensation Regulations*, CRC, c 10 [FAC Regulations or FACR]. The FAC Regulations were adopted under the *Aeronautics Act*, RSC 1985, c A-2 and prescribe compensation for bodily injury or death resulting from flights undertaken by civilian employees of the federal government in the course of their duties. In his application for entitlement, Mr. Thomson requested both a pension and, because of his high degree of disability, an assessment for special allowances, including an attendance allowance, a clothing allowance and an exceptional incapacity allowance [the Exceptional Incapacity Allowance].

[2] The Department of Veterans Affairs awarded Mr. Thomson a pension but denied his entitlement to the attendance and clothing allowances as well as to the Exceptional Incapacity Allowance, as these special allowances were found not to be included in the compensation scheme for FACR pensioners. Mr. Thomson appealed the decisions refusing the special allowances, first to the Entitlement Review Panel of the Veterans Review and Appeal Board [VRAB], and then to its Entitlement Appeal Panel. In all cases, Mr. Thomson's requests were denied as both instances of the VRAB concluded that entitlement to the special allowances arose under specific portions of the *Pension Act*, RSC 1985, c P-6 and had not been included in the list of benefits available to civilian pensioners under the FAC Regulations.

[3] This is an application for judicial review of the decision made in August 2014 by the Appeal Panel finding Mr. Thomson ineligible for the Exceptional Incapacity Allowance. Mr. Thomson contends that the Appeal Panel erred in its interpretation of the FAC Regulations and in concluding that he was not allowed to claim the Exceptional Incapacity Allowance. He further submits that the Appeal Panel's interpretation of the FAC Regulations infringes his rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11[*Charter*], thereby discriminating against him on the basis of his severe disability. Mr. Thomson is asking the Court to set aside the Appeal Panel decision and to return it to the VRAB with guidance regarding the interpretation of the FAC Regulations, or to declare that the Appeal Panel's interpretation results in discriminatory treatment in violation of section 15 of the *Charter* and to direct the Panel to adopt an interpretation that complies with the *Charter*.

[4] In response, the Attorney General of Canada submits that the Appeal Panel's decision is reasonable in this case, both with respect to its interpretation of the relevant legislation and regulations and in its assessment of Mr. Thomson's *Charter* claim. The Attorney General asks the Court to dismiss Mr. Thomson's application without costs.

[5] This application raises three issues:

A. What is the applicable standard of review?

B. Did the Appeal Panel unreasonably interpret and apply the FAC Regulations in concluding that Mr. Thomson was not allowed to claim the Exceptional Incapacity Allowance?

C. Did the Appeal Panel commit a reviewable error in denying Mr. Thomson's *Charter* claim and in concluding that not having access to the Exceptional Incapacity Allowance was not discriminatory?

[6] For the reasons that follow, while I sympathize with Mr. Thomson and his dramatic circumstances, I must dismiss the application. I cannot conclude that the Appeal Panel's decision regarding the interpretation of the FAC Regulations was unreasonable or that its disposition of Mr. Thomson's claim resulted in a discriminatory treatment in violation of section 15 of the *Charter*. I acknowledge that Mr. Thomson raises numerous valid concerns regarding the treatment of his claim for compensation when compared to the treatment received by members of the Canadian Forces in similar situations. However, this is something that only Parliament and the legislature, not this Court, can ultimately address.

## II. Background

[7] Mr. Thomson's ordeal and story is an exceptional one. He is the one and only civilian survivor of a qualifying airplane accident to apply for compensation under the FAC Regulations. His total pensionable assessment resulting from his injuries was 181%, including 100% for paraplegia, 56% for amputations and 25% for post-traumatic stress disorder. He was awarded a pension with a disability assessment of 156%, but no other allowances.

[8] For several years, Mr. Thomson has been involved in various and lengthy proceedings with the VRAB and the Department of Veterans Affairs in order to obtain what he feels should be the proper compensation for his losses, both pecuniary and non-pecuniary. In essence,

Mr. Thomson contends that the narrow approach taken by the VRAB in interpreting the FAC Regulations results in a profound injustice and inequality: severely disabled civilian pensioners like him end up receiving the same compensation as moderately disabled civilian pensioners and are denied the additional amounts that are otherwise awarded to severely disabled pensioners from the Canadian Forces. This is particularly unfair in his case, says Mr. Thompson, as he suffered his massive injuries in the exercise of his duties as a civilian providing support services to the Canadian military.

[9] In fact, as Mr. Thomson ably presented it at the audience before this Court, the Appeal Panel's approach means that Mr. Thomson is not receiving the level of compensation that he would have likely received under numerous other organized schemes compensating for personal injury in Canada, all of which include provisions covering both pecuniary and non-pecuniary losses. In that respect, Mr. Thomson referred to tort law, to the workers' compensation legislations, to the *Government Employees Compensation Act*, RSC 1985, c G-5, and to the provisions covering Canadian Forces pensioners under the *Pension Act*.

[10] He asserts that it cannot have been Parliament's intention to compensate civilian FACR pensioners injured in the service of their country differently from similarly disabled Canadian Forces pensioners who are covered by the *Pension Act*.

## A. *The legislative framework*

[11] Mr. Thomson's application essentially raises issues of legislative interpretation, so it is important to first discuss and summarize the relevant legislative and regulatory provisions. The main elements are found in the FAC Regulations and the *Pension Act*.

[12] The FAC Regulations apply to civilian victims of airplane accidents. They were adopted to prescribe compensation for bodily injury or death resulting from flights undertaken in the course of duty by persons employed in the public service of Canada who are not members of the Canadian Forces. Conversely, the compensation regime for members of the Canadian Forces is elaborated in the *Pension Act*. The Court observes that, by choosing to be compensated under the FAC Regulations, a federal government employee becomes ineligible to receive benefits or compensation under any other act, regulation or order.

[13] Section 3 of the FAC Regulations describes the type of compensation made available to civilian victims of a flying accident. It reads as follows:

| | |
|---|---|
| 3. (1) Subject to subsections (2) and (3) and section 4, where | 3. (1) Sous réserve des paragraphes (2) et (3) et de l'article 4, dans le cas |
| (*a*) an employee dies or is injured as a direct result of a non-scheduled flight undertaken by him in the course of his duties, or | *a*) d'un employé qui décède ou est blessé en conséquence directe d'un vol non régulier entrepris par lui dans l'exercice de ses fonctions, ou |

| | |
|---|---|
| (*b*) a civil aviation inspector dies or is injured as a direct result of any flight undertaken by him for the purpose of determining the competency of flight crew personnel, inspecting commercial air operations or monitoring in-flight cabin procedures in use in commercial air operations, | *b*) d'un inspecteur de l'aviation civile décédant ou étant blessé par suite d'un vol qu'il a entrepris pour contrôler les capacités professionnelles d'un équipage, pour inspecter une exploitation aérienne commerciale ou pour surveiller, en vol, le personnel navigant d'une telle exploitation, |
| compensation is payable for his death or injury in an amount equal to the pension that would have been awarded to or in respect of him in accordance with the rates set out in Schedule A or B to the *Pension Act*, whichever is applicable, as increased by virtue of Part V.1 of that Act, if his death or injury had arisen out of or was directly connected with military service in peace time. | une indemnité est payable à l'égard de son décès ou de ses blessures, et le montant de l'indemnité est égal à la pension qui aurait été accordée à lui-même ou à son égard, conformément aux taux indiqués aux annexes A ou B de la *Loi sur les pensions*, selon le cas, augmentée en vertu de la Partie V.1 de ladite Loi, si son décès ou ses blessures avaient été causés au cours de son service militaire en temps de paix ou avaient été reliés directement à un tel service. |
| […] | […] |

[14] Under the FAC Regulations, the compensation payable to Mr. Thomson is therefore specifically defined as "an amount equal to the pension that would have been awarded" to him if his injuries had arisen out of military service in peace time. However, while "pension" is not defined in the FAC Regulations, section 3 indicates that the amount of such pension is equal to what would have been awarded "in accordance with the rates set out in Schedule A or B [now Schedule I or II] to the *Pension Act*, whichever is applicable". Schedule I refers to the scale of pensions for disabilities, whereas Schedule II deals with pensions for death. The FAC

Regulations are silent as to the application of other forms of allowances to flying accidents pensioners covered by these regulations.

[15] The *Pension Act* is a federal legislation adopted to provide pensions and other benefits to members of the Canadian Forces. It was designed specifically for the members of the military and does not apply to non-military pensioners. The pensions and benefits offered vary depending on the specific type of military service, status as prisoner of war, age and other factors. A specific part, namely Part III, deals with pensions, including pensions for disabilities or for death, whereas another one, Part IV, relates to the Exceptional Incapacity Allowance. For the purposes of this application, the relevant provisions of the *Pension Act* are the definitions contained in section 3 and the Schedules I and II (formerly Schedules A and B) to which section 3 of the FAC Regulations specifically refers. Also worth mentioning are sections 38 and 72 describing certain types of compensation available to members of the Canadian Forces.

[16] The relevant definitions contained in section 3 of the *Pension Act* read as follows:

| | |
|---|---|
| 3. (1) In this Act, | 3. (1) Les définitions qui suivent s'appliquent à la présente loi. |
| […] | […] |
| "award" means a pension, compensation, an allowance or a bonus payable under this Act; | « compensation » Pension, indemnité, allocation ou boni payable en vertu de la présente loi. |
| […] | […] |

| | |
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| "pension" means a pension payable under this Act on account of the death or disability of a member of the forces, including a final payment referred to in Schedule I; | « pension » Pension payable en vertu de la présente loi en raison du décès ou de l'invalidité d'un membre des forces, y compris un paiement définitif visé à l'annexe I. |
| […] | […] |

[17] The Court observes that, in the *Pension Act*, "award" includes more than only a "pension", and covers notably a pension, compensation and an allowance. "Pension" refers to a pension payable on account of death or disability, while Schedules I and II to the legislation respectively set out the scale of "pension" payable for disability or for death, as the case may be. Although there is no definition of the word "allowance" in the *Pension Act*, Part IV of this act regroups two provisions (sections 72 and 73) related to "Exceptional Incapacity Allowance" whereas Schedule III provides for rates for the payment of various allowances, including the Exceptional Incapacity Allowance.

[18] In Part III regarding pensions, several provisions deal with the payment of pensions for disabilities, including section 38 which establishes access to an attendance allowance, "in addition to the pension or compensation" provided:

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| 38. (1) A member of the forces who has been awarded a pension or compensation or both, is totally disabled, whether by reason of military service or not, and is in need of attendance shall, on application, in addition to the pension or compensation, or pension and compensation, be | 38. (1) Il est accordé, sur demande, à un membre des forces à qui une pension, une indemnité ou les deux a été accordée, qui est atteint d'invalidité totale due à son service militaire ou non et qui requiert des soins une allocation pour soins au taux fixé par le ministre en |

| | |
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| awarded an attendance allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III. | conformité avec les minimums et maximums figurant à l'annexe III. |
| […] | […] |

[19] Section 72 describes the conditions allowing the award of an Exceptional Incapacity Allowance, specifically recognizing the entitlement of a member of the Canadian Forces to such allowance. It reads as follows :

| | |
|---|---|
| 72. (1) In addition to any other allowance, pension or compensation awarded under this Act, a member of the forces shall be awarded an exceptional incapacity allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III if the member of the forces | 72. (1) A droit à une allocation d'incapacité exceptionnelle au taux fixé par le ministre en conformité avec les minimums et maximums de l'annexe III, en plus de toute autre allocation, pension ou indemnité accordée en vertu de la présente loi, le membre des forces qui, à la fois : |
| (a) is in receipt of | a) reçoit : |
| (i) a pension in the amount set out in Class 1 of Schedule I, or | (i) soit la pension prévue à la catégorie 1 de l'annexe I, |

| | |
|---|---|
| (ii) a pension in a lesser amount than the amount set out in Class 1 of Schedule I as well as compensation paid under this Act or a disability award paid under the Canadian Forces Members and Veterans Re-establishment and Compensation Act, or both, if the aggregate of the following percentages is equal to or greater than 98%: | (ii) soit, d'une part, une pension moindre et, d'autre part, l'indemnité prévue par la présente loi, l'indemnité d'invalidité prévue par la Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes ou ces deux indemnités, lorsque la somme des pourcentages ci-après est au moins égale à quatre-vingt-dix-huit pour cent : |
| (A) the extent of the disability in respect of which the pension is paid, | (A) le degré d'invalidité pour lequel la pension lui est versée, |
| (B) the percentage of basic pension at which basic compensation is paid, and | (B) le pourcentage de la pension de base auquel l'indemnité lui est versée, |
| (C) the extent of the disability in respect of which the disability award is paid; and | (C) le degré d'invalidité pour lequel l'indemnité d'invalidité lui est versée; |
| (b) is suffering an exceptional incapacity that is a consequence of or caused in whole or in part by the disability for which the member is receiving a pension or a disability award under that Act. | b) souffre d'une incapacité exceptionnelle qui est la conséquence de l'invalidité pour laquelle il reçoit la pension ou l'indemnité d'invalidité prévue par cette loi ou qui a été totalement ou partiellement causée par celle-ci. |

[20] The Court further notes that sections 3 and 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18, direct the VRAB to liberally construe and interpret the applicable legislation and regulations in the exercise of its functions, in recognition of Canada's obligations to those

who have served the country. Evidence presented to the VRAB shall be looked at and considered in favour of the applicants or appellants.

[21] Turning to section 15 of the *Charter*, it enumerates grounds of discrimination and provides, at subsection 1, that every individual is "equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

**B. *The Appeal Panel decision***

[22] Even though Mr. Thomson's accident dates back to 1991, the Appeal Panel's decision denying his request for an Exceptional Incapacity Allowance was only issued in August 2014, further to a hearing that took place in June 2014.

[23] In its decision, the Appeal Panel referred extensively to the prior proceedings leading to a decision of the Minister of Veterans Affairs [the Minister], issued in April 2008, and to the VRAB Review Panel decision issued in October 2013. They both concluded that Mr. Thomson was not eligible for an Exceptional Incapacity Allowance under the *Pension Act* as no entitlement to any form of special allowances arose through the FAC Regulations.

[24] Specifically, the Appeal Panel's decision quoted the Minister's statement that section 3 of the FAC Regulations provides only for compensation in accordance with the rates set out in Schedules A and B (now Schedules I and II) of the *Pension Act*, which do not include the

Exceptional Incapacity Allowance (as it is only found under Schedule III). The Review Panel had arrived at the same conclusion as the Minister. In addition, the Review Panel's decision highlighted the definition of the word "pension" in section 3 of the *Pension Act*: it is a "pension payable on account of the death or disability of a member of the forces." This definition makes no reference to allowances, unlike the broader term "award" defined as including pensions, compensation and allowances. According to the Review Panel, this choice of a more restricted term was intentional on the part of the drafters and means that Mr. Thomson, as a civilian FACR pensioner, was not eligible to receive the Exceptional Incapacity Allowance.

[25] Stated differently, both the Minister and the VRAB Review Panel had concluded that there was no legislative authority permitting the Department of Veterans Affairs to grant the benefit requested by Mr. Thomson.

[26] The Appeal Panel then addressed each of Mr. Thomson's submissions made at the hearing before it.

[27] More specifically, the Appeal Panel considered Mr. Thomson's contention that the Review Panel's decision was contrary to established policy regarding severely disabled pensioners. The Appeal Panel rejected that argument as the applicable legislation (the *Pension Act*) relates to members of the Canadian Forces who are exceptionally incapacitated, reflecting the government's commitment to these members and its efforts to compensate their suffering. It found that the Review Panel's decision properly reflected this understanding and the distinction

made by Parliament between pensioners who are or were members of the Canadian Forces and those who are civilian FACR pensioners.

[28] The Appeal Panel also considered the Review Panel's interpretation of section 3 of the FAC Regulations and affirmed its findings, based on the clear language used in the regulations. The Appeal Panel emphasized that, though its discretion requires it to liberally construe legislative provisions and view evidence in the most favourable light for Mr. Thomson, it does not permit it "to read the words of section 3 of the FAC Regulations as though the limitation 'in accordance with the rates set out in Schedule A or B to the Pension Act' did not exist." The Appeal Panel further confirmed the Review Panel's interpretation of the words "pension", "allowance", "compensation" and "award", stating that the word "pension" in the FAC Regulations was specifically used "for the sole purpose of limiting the compensation to such pension, and not to other awards, or allowances."

[29] The Appeal Panel further addressed Mr. Thomson's criticism of the Review Panel for failing to adopt the common law compensation principle of *restitutio in integrum*, agreeing that this principle does not apply within the specific legislative framework put in place by the *Pension Act* and the FAC Regulations. Statutory compensation schemes such as this one can, and often do, place limits on compensation that would otherwise result from the common law.

[30] Finally, the Appeal Panel discussed Mr. Thomson's claim that denying him the Exceptional Incapacity Allowance offended his section 15 *Charter* rights, but found that it did not in fact discriminate against him on the basis of his severe disability. The Appeal Panel first

noted that Mr. Thomson was not seeking a declaration that the statutory provision is unconstitutional, and looked at whether the denial of the Exceptional Incapacity Allowance was discriminatory towards him.

[31] In its analysis, the Appeal Panel followed the direction of the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*] and examined a) whether the denial of the allowance imposed differential treatment between Mr. Thomson and others, b) whether the differential treatment was based on one of the *Charter*'s enumerated grounds, and c) whether the denial had a purpose or effect that is discriminatory. In its analysis, the Appeal Panel selected disabled pensioners under the *Pension Act* as the appropriate comparator group and noted (at page 12 of the Decision) that:

> The Panel finds that this Appellant is not part of that group of persons. As has already been stated, this application is not adjudicated under the *Pension Act*. It is adjudicated under the *Flying Accident Compensation Regulations*. The Appellant is not a former member of the forces who is a pensioner under the *Pension Act*; he is a flying accident pensioner under the regulations made pursuant to the *Aeronautics Act*. Under like circumstances, other disabled flying accident pensioners would be entitled to the same benefits as the Appellant – namely, a pension in accordance with the rate set out in the Schedules to the *Pension Act*.
>
> The Panel finds that there is no discrimination against the Appellant on the basis of his disability; in fact, he is receiving a pension **because he is a disabled person** who was able to bring himself with the application of the *Flying Accident Compensation Regulations*. The Appellant is not entitled to the benefits he is seeking because he is not part of the same group to whom he is comparing himself. [emphasis in original]

[32] The Decision concluded by affirming, in light of these considerations, the Review Panel's decision denying Mr. Thomson's eligibility for the Exceptional Incapacity Allowance.

## III. Analysis

### A. *What is the applicable standard of review?*

[33] The issues raised by Mr. Thomson involve the Appeal Panel's interpretation and application of the FAC Regulations and whether such interpretation results in differential discrimination in violation of the *Charter*.

[34] On the interpretation of the regulations, Mr. Thomson submits that the applicable standard of review is correctness as this is not an issue within the particular expertise of the VRAB (*Chief Pensions Advocate v Canada (Attorney General)*, 2006 FC 1317 [*Chief of Pensions*]; *Trotter v Canada (Attorney General)*, 2005 FC 434 at para 13 [*Trotter*]). The Attorney General responds that both the FAC Regulations and the *Pension Act* are pieces of legislation closely connected to the Appeal Panel's function and as such, the tribunal's interpretation should be presumed to be a question of statutory interpretation subject to deference on judicial review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta's Teachers' Association*, 2011 SCC 61 at para 34 [*Alberta Teachers*]; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 13; *Fanous c Gauthier*, 2014 QCCA 1731 at paras 15-19).

[35] I agree with the Attorney General that reasonableness is the appropriate standard for this first issue. Though the Federal Court's decisions in *Chief of Pensions* and *Trotter* seem to indicate otherwise, these decisions were released prior to the Supreme Court's seminal decision in *Dunsmuir* which established that "deference will usually result where a tribunal is interpreting

its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at para 54). Since that decision, the principle that reasonableness should apply to questions of law involving the interpretation of a tribunal's "home statute" has evolved into a strong presumption that may only be rebutted in certain exceptional circumstances, such as "questions of law that are of central importance to the legal system as a whole or are outside the [decision-maker's] expertise" (*Alberta Teachers* at para 30).

[36] Though they cannot be directly qualified as being the Appeal Panel's home statutes, both the FAC Regulations and the *Pension Act* are nevertheless regulations and legislation closely connected to the VRAB's functions, with which it is familiar. In *Lapalme v Canada (Attorney General)*, 2012 FC 820, this Court indeed recently confirmed the link between the VRAB and the *Pension Act*, and applied a reasonableness standard to the VRAB's interpretation of this statute (at para 16).

[37] With respect to his *Charter* argument, Mr. Thomson made no specific written submissions regarding the applicable standard of review, but his approach at the oral hearing suggests that he views the standard of review as being correctness. However, the *Charter* issue raised by Mr. Thomson in this application is not a constitutional challenge to the validity of the law; instead, it relates to the discretionary administrative decision made by the Appeal Panel that involves interpreting a statutory FACR provision in light of the *Charter*, and the application of the *Charter* to the particular facts of Mr. Thomson. In addition, the Supreme Court recently confirmed that the courts should not adopt a correctness standard in every case that implicates *Charter* values. In circumstances where the discretion of a decision-maker is involved, the

standard of reasonableness applies to the review of administrative decisions that engage *Charter* protections (*Doré v Barreau du Québec*, 2012 SCC 12 at paras 36, 45 [*Doré*]; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 39-42 [*Loyola*]; *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 504 at para 20).

[38] Deference is therefore in order where a tribunal acting within its specialized area of expertise interprets the *Charter* and applies the *Charter*'s provisions to the particular facts of a given case in order to determine whether a claimant has been discriminated against (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46).

[39] In light of the foregoing, I find that the applicable standard of review on the *Charter* issue raised by Mr. Thomson in this application should also be reasonableness as the matter involves determining whether the interpretation of legislative provisions within the expertise of the Appeal Panel results in discriminatory treatment in violation of a *Charter* provision. As stated by the Supreme Court in *Doré*, the task for the Court on judicial review of such decisions involving *Charter* issues is to decide whether, "in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (at para 57). In both the recent *Doré* and *Loyola* cases, the Supreme Court reviewed the tribunal's decisions using this reasonableness and proportionality framework.

[40] When reviewing a decision on the standard of reasonableness, the analysis is focused on the existence of justification, transparency and intelligibility within the decision-making process.

Findings involving questions of fact or mixed fact and law should not be disturbed provided that the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). As noted by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, there might be more than one reasonable outcome but "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (at para 59).

[41] A reasonableness review may sometimes look similar to a correctness review in situations where there is a narrow range of reasonable options, for example when a question of statutory interpretation leaves only one single reasonable option (*McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38 [*McLean*]).

[42] Furthermore, while the reasonableness standard means that the reasons must in fact or in principle support the conclusions reached, the reasons do not have to include all arguments, case law or details that the reviewing court would have liked or preferred to see. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court has established that an alleged insufficiency of reasons is no longer a stand-alone basis for granting judicial review; reasons need not be fulsome or perfect, and need not address all of the evidence or arguments put forward by a party or in the record. The decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible acceptable

outcomes (*Newfoundland Nurses* at para 16). The reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*., 2012 SCC 65 at para 3).

### B. *Did the Appeal Panel unreasonably interpret and apply the FAC Regulations in concluding that Mr. Thomson was not allowed to claim the Exceptional Incapacity Allowances?*

[43] Mr. Thomson contends that the Appeal Panel incorrectly interpreted section 3 of the FAC Regulations and that a liberal, contextual approach to the text of the regulations would lead to the conclusion that he is entitled to the Exceptional Incapacity Allowance. In his opinion, the Appeal Panel's interpretation is illogical, unreasonable and contrary to the stated object of the FAC Regulations. Given the remedial and ameliorative objective of the regulations, the Appeal Panel should have resolved all difficulties using a generous interpretative approach, viewing the legislative silence regarding the Exceptional Incapacity Allowance as not necessarily prohibiting an eligibility to it (*Arial v Canada (Attorney General)*, 2010 FC 184 at paras 33-40 [*Arial*]; *Manuge v Canada*, 2012 FC 499 at para 64; *Arial Estate v Canada (Attorney General)*, 2011 FC 848).

[44] I cannot agree with Mr. Thomson's position. The issue here is whether the Appeal Panel's interpretation of the FACR provisions is reasonable. I conclude that, in view of the express language used by Parliament in section 3, the Appeal Panel's interpretation of the relevant provisions of the FAC Regulations and of the *Pension Act* falls within the range of

reasonable possible outcomes. In fact, it was the only reasonable interpretation of the FAC Regulations in light of the statutory wording.

**(1) Mr. Thomson's position**

[45] Mr. Thomson developed a solid three-pronged argument in support of his proposed interpretation.

[46] First, Mr. Thomson argues that the Appeal Panel erred in relying on the plain meaning rule to interpret the scope of the words "allowance" and "pension." Neither the FAC Regulations nor the *Pension Act* define "allowance" and as such, no plain meaning interpretation is possible. With respect to the word "pension", even though it is narrowly defined in the *Pension Act*, Mr. Thomson contends that, since the term is not defined in the legislation pursuant to which the FAC Regulations have been adopted (i.e., the *Aeronautics Act*), the Appeal Panel should have relied on the common usage of the term, which embraces the notion of allowances.

[47] Second, Mr. Thomson submits that the Appeal Panel's understanding of section 3 of the FAC Regulations runs contrary to the modern, contextual approach endorsed by the Supreme Court in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 [*Rizzo*] and followed by this Court in *McCague v Minister of National Defence*, 2001 FCA 228 [*McCague*]. That approach would have required the Appeal Panel to read the provision's grammatical and ordinary sense in harmony with the legislative scheme, the object of the act and the intention of Parliament, in accordance with Drieger's "modern principle" to statutory interpretation (*Construction of Statutes*, 2nd ed. 1983 at p. 87). In this case, the grammatical and ordinary sense of the words "the pension that

would have been awarded" permits an expansive, yet plausible interpretation that includes allowances, because these are awarded as an integral part of the monthly pension payments made under the *Pension Act*. Mr. Thomson adds that Parliament did not intend to strictly limit compensation only to a pension as other benefits are available to civilian flying accident pensioners under other provisions of the FAC Regulations. Lastly, with regard to the object of the regulations and the intention of Parliament, Mr. Thomson cites various governmental memoranda related to the adoption of the FAC Regulations, suggesting that these documents indicate that the regulations were intended to provide adequate compensation coverage to civilian FACR victims on the same basis as members of the Canadian Forces.

[48] Third, Mr. Thomson affirms that the Appeal Panel's decision is contrary to the established policy of the VRAB, as the word "pensioner" is used inconsistently in the VRAB materials, sometimes including civilian FACR pensioners and sometimes not.

**(2) The statutory language**

[49] Statutory interpretation starts with the language used by the legislator.

[50] As stated by this Court in *Wise v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1027 at para 17, quoting from the Supreme Court in *R v DAI*, 2012 SCC 5 at para 26 [*DAI*], "the first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision before turning to external evidence". It was thus certainly reasonable for the Appeal Panel to first consider and interpret the words

"compensation", "pension" and "allowances" according to their plain meaning and in their grammatical context of section 3 of the FAC Regulations.

[51] In this case, the plain meaning of the words indicates that section 3 of the FAC Regulations grants Mr. Thomson a "compensation" rather than a "pension" and/or "allowances". Moreover, this compensation is defined as "an amount equal to the pension that would have been awarded […] in accordance with the rates set out" in two specific schedules of the *Pension Act* dealing with disability or death.

[52] The express incorporation by reference of those Schedules A and B (now Schedules I and II) leads to the inescapable conclusion that the amounts payable as "pension" under the FAC Regulations do not include the "allowances" listed in Schedule III. The Exceptional Incapacity Allowance is only covered by Schedule III and it is the object of a particular section (section 72) and Part (Part IV) of the *Pension Act*, distinct and separate from the provisions of that act dealing with pensions.

[53] The FAC Regulations provide for payment of compensation in accordance with certain identified schedules of the *Pension Act*. They do not contain any other provisions or reference for the payment of other benefits or allowances under the *Pension Act*. Civilian FACR pensioners do not otherwise have access to the benefits described in that legislation intended to specifically cover members of the Canadian Forces. The Appeal Panel could not have ignored that specific language and it was reasonable for it to assume that the use of these words by Parliament was intentional. A distinction was made, in clear language, between pensioners who are or were

members of the Canadian Forces and are covered by the *Pension Act*, and pensioners who are civilians and are covered by the FAC Regulations.

[54] The Court understands that this results in Mr. Thomson being treated differently from a Canadian Forces pensioner under the *Pension Act* in the same situation. It produces some inequality between military pensioners and civilian pensioners suffering from a severe disability. But Mr. Thomson was neither a member of the Canadian Forces nor a veteran of the Canadian Forces. His situation is partly considered within the *Pension Act* solely because section 3 of the FAC Regulations incorporates by reference the amounts of pension as they are set out in Schedules I and II. However, no other provision, schedule or part of the *Pension Act*, including Schedule III on allowances, has been incorporated by Parliament in the FACR. Section 3 of the FAC Regulations expressly grants "compensation" to civil employees of the federal government, but it does not grant "allowances" (including an Exceptional Incapacity Allowance) as these terms are described in the *Pension Act*.

[55] This is the law that this Court has to apply. I am mindful of the fact that this leads to differentiated treatment between severely disabled victims of flying accidents who are members of the Canadian Forces compared to those who are civilian employees of the federal government, but this is what Parliament has decided to adopt with the FAC Regulations. Nowhere does the *Pension Act* provide, implicitly or otherwise, for equality of compensation between military and non-military members. This is not something that this Court (or the Appeal Panel) can change without usurping the role and functions of Parliament. The limitations established by the regulations and the legislation are insurmountable.

[56] As the words used in section 3 of the FAC Regulations and the intention of Parliament are clear, there was no need for the Appeal Panel to go beyond the plain meaning of those words to determine their significance. In the circumstances, I find that it was reasonably open to the Appeal Panel to look to the *Pension Act*'s definitions since this legislation is directly referred to in the relevant section of the FAC Regulations and to base its decision on the fact that "pension" does not include "allowance" whereas the broader term "award" does. Moreover, as noted by the Appeal Panel, the entirety of section 3 of the FAC Regulations, when read together, indicates quite plainly that Schedules I and II of the *Pension Act* are incorporated into the FAC Regulations, but that Schedule III is not. The Appeal Panel's interpretation therefore not only falls within the range of possible, acceptable outcomes, it may in fact be the only reasonable outcome available (*McLean* at para 38).

[57] It cannot be said that the statutory provision is ambiguous. Ambiguity means that words are reasonably capable of more than one meaning. It is not the case here with respect to section 3 of the FAC Regulations. Parliament has simply decided not to extend compensation of civilian FACR pensioners to allowances covered in Schedule III of the *Pension Act*.

[58] I would add that the result cannot be qualified as absurd either, as it reflects the different focuses of the FAC Regulations and the *Pension Act*: the former relates to the compensation for civilian victims of flying accidents whereas the latter applies to injured members of the Canadian Forces. Mr. Thomson, or even this Court, may disagree with this differentiated treatment, and there may be arguments to be made about its unfairness. However, the legislative language is clear and this Court has no authority to change it. Only Parliament has.

[59] Similarly, I acknowledge that the Appeal Panel's interpretation may lead to compensation being less than what it could have been in a common law context for a severely disabled person like Mr. Thomson. But, as rightly noted by the Appeal Panel and the Attorney General, Parliament has enacted regulations intended to cover civilian victims of flying accidents in the course of duty, thus ousting the common law parameters. It was within Parliament's powers to set its own limits on the compensation available under this legislative scheme. The common law compensation principle discussed by Mr. Thomson applies only in the context of torts and contracts and not where Parliament has seen fit to adopt compensation legislation. Statutory compensation may indeed be – and sometimes are – less than what would have been granted by a court of law under the common law compensation principles (*Prentice v Canada (Royal Canadian Mounted Police)*, 2005 FCA 395 at para 35; *Pasiechnyk v Saskatchewan (WCB)*, [1997] 2 SCR 890 at para 23). Again, this is a choice made by Parliament.

[60] Had Parliament wanted to provide civilian pensioners under the FAC Regulations with the same pension and benefits as those granted to members of the Canadian Forces, it would have done so clearly and unmistakably, without reservation, as it did for example in the *RCMP Superannuation Act*, RSC 1985, c R-11 which incorporates all provisions of the *Pension Act*, including the definition of "awards". It has not done so here, and this Court must respect that.

[61] I am therefore forced to conclude that Mr. Thomson has not demonstrated that the Appeal Panel's interpretation of the FAC Regulations is unreasonable. Mr. Thomson's proposed and preferred interpretation of the legislation is not a basis for an intervention by the Court. In order to extend to civilian employees like Mr. Thomson the Exceptional Incapacity Allowance

otherwise available to members of the Canadian Forces or to veterans from the Canadian Forces, a legislative amendment to the FAC Regulations or to the *Pension Act* would be necessary. Once again, only Parliament, and not this Court, can do that.

### (3) The extrinsic evidence

[62] Generally, ambiguity is a prerequisite for considering external evidence (such as parliamentary debates or proposals underlying a legislation or regulation) in interpreting legislative provisions. The first principle of statutory interpretation is that one must look to the plain words of the provision, and only where ambiguity arises may it be necessary to resort to external factors (*DAI* at para 26; *Romero v Canada (Minister of Citizenship and Immigration)*, 2014 FC 671 at para 105). However, the Court notes that, even when the plain language of legislation is clear and unambiguous, it may nevertheless be possible to consider external evidence to determine Parliament's intent and to interpret the scope of a provision. Mr. Thomson has indeed ably referred to case law to that effect.

[63] For example, in *Rizzo* at para 34, the Supreme Court confirmed that courts can turn to external aids, such as legislative debates, as a tool for determining legislative intent. Some Supreme Court cases suggest that the rule established in *DAI* in fact applies only after there has been some determination of parliamentary intent. In *CanadianOxy Chemicals Ltd. v Canada (Attorney General)*, [1999] 1 SCR 743 at para 14, the Supreme Court found that genuine ambiguity arises only where there are "two or more plausible readings, each equally in accordance with the intentions of the statute", implying that the Court must first consider the statute's intent before determining whether there is ambiguity (*Bell ExpressVu Limited*

*Partnership v Rex*, 2002 SCC 42 at para 29). Similarly, in *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at para 95, the Court stated that "[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids."

[64] In light of that, I have considered Mr. Thomson's argument regarding extrinsic evidence on the legislative intent behind the FAC Regulations, even though section 3 can hardly be considered as ambiguous. However, even taking into account the extrinsic and contextual evidence leading to the adoption of the FAC Regulations, I still conclude that it would not render the Appeal Panel's interpretation of section 3 of the regulations unreasonable.

[65] Mr. Thomson argues, based on the Treasury Board documents dating from 1974, that Parliament's intent in modifying the FAC Regulations and in adding the current language of section 3 was to provide compensation equal to that which would be payable to military pensioners under the *Pension Act* if the death or injury was compensable under that act. Mr. Thomson contends that no reference was intended to be made to the schedules as limiting the scope of compensation for civilian FACR pensioners. Mr. Thomson also pointed to other documents referring to the intent of providing of "adequate compensation coverage" to FACR pensioners.

[66] However, as noted by the Attorney General, the Treasury Board documents mentioned by Mr. Thomson were developed in the context of adding an amendment to the FAC Regulations in

1974. The Treasury Board document of December 5, 1974 indicates that this amendment proposal was meant to add a new group of employees to the scope of the FACR coverage; its objective or purpose was not to extend or to modify the scope of the benefits offered to FACR pensioners, which were restricted by the reference to pensions calculated using the rates set out in Schedules A and B of the *Pension Act*. I therefore do not agree that the contextual evidence referred to by Mr. Thomson supports the view that Parliament's intent in amending the FAC Regulations in 1974 was necessarily to compensate civilian FACR pensioners on the exact same basis as the military pensioners under the *Pension Act*, and to mirror for them all compensation offered to members of the military injured in peacetime. I instead conclude that the extrinsic evidence on the record does not allow me to find unreasonable the interpretation retained by the Appeal Panel based on the express statutory language of the FAC Regulations.

[67] Stated differently, given the express and specific statutory language established by Parliament in section 3 of the FAC Regulations, the use of what may be read as more expansive terminology in exchanges between department officials prior to the adoption of the revised FAC Regulations is not sufficient to render the Appeal Panel's interpretation unreasonable.

[68] I finally note that the Appeal Panel specifically mentioned in its decision that, in accordance with section 39 of the *Veterans Review and Appeal Board Act*, it looked at the evidence in the best possible light for Mr. Thomson. However, that does not mean that it could ignore the language of the FAC Regulations. I further observe that, contrary to the situation in the *Arial* decision, the FAC Regulations do not themselves contain a provision similar to section 2 of the *Pension Act*, which expressly provides that this legislation shall be construed and

interpreted liberally in recognition of the obligation to provide compensation to members of the Canadian Forces (at paras 33-34). This is yet another indication that Parliament has elected to treat civilian FACR pensioners differently than members of the Canadian Forces.

[69] As much as I sympathize with the plight of Mr. Thomson resulting from his catastrophic accident in October 1991, and even if I might have been inclined to come to a conclusion different from that of the Appeal Panel had I been in its position, I am unable to conclude that the Appeal Panel committed an unreasonable error in interpreting and applying the FAC Regulations and in determining that Mr. Thomson was not allowed to claim the Exceptional Incapacity Allowance.

[70] Mr. Thomson certainly has valid and compelling arguments to claim that inequality of treatment between severely disabled civilians injured in the service of their country and members of the Canadian Forces suffering from a similar condition cannot be morally or humanly justified, especially in a highly exceptional case like his where he survived a plane crash in the exercise of his duties providing support to the Canadian military. However, only Parliament can change that through a legislative amendment. It is at that level that Mr. Thomson should voice his concerns.

### C. *Did the Appeal Panel commit a reviewable error in denying Mr. Thomson's Charter claim and in concluding that not having access to the Exceptional Incapacity Allowance was not discriminatory?*

[71] Mr. Thomson also contends that the Appeal Panel erred in rejecting his claim that its interpretation of the FAC Regulations discriminates against him as a severely disabled person, in violation of his rights under subsection 15(1) of the *Charter*.

[72] I cannot agree with Mr. Thomson's *Charter* arguments either. I recognize that this portion of the Appeal Panel decision may not be as clear as it could have been. However, when read as a whole and in the context of the decision, I cannot conclude that the Appeal Panel committed a reviewable error in its assessment of Mr. Thomson's *Charter* claim. Instead, given the nature of the decision and the statutory and factual contexts of this case, I find that the decision of the Appeal Panel does not lead to a discriminatory result in violation of the *Charter* protections raised by Mr. Thomson.

#### (1) Mr. Thomson's position

[73] In essence, Mr. Thomson argues that whereas less severely injured flying accident victims under the FAC Regulations are fully compensated for their losses by the amounts granted as compensation under Schedules I and II of the *Pension Act*, more severely injured people such as himself do not receive full compensation because the amounts granted as pension are insufficient on their own, without the Exceptional Incapacity Allowance, to account for their loss. This differential treatment perpetuates the pre-existing disadvantage of severely disabled

persons and reinforces stereotypes relating to their helplessness and need for charity. It is thus a violation of section 15 of the *Charter* on discrimination.

[74] Mr. Thomson further contends that, in assessing his claim, the Appeal Panel erroneously chose the wrong comparator group, identifying disabled members of the Canadian Forces as the comparator group rather than the "flying accident victims less seriously injured than himself" he had proposed. In its decision, the Appeal Panel indeed said that Mr. Thomson submits "that he is being treated unequally or differently from disabled pensioners under the *Pension Act*" and found that Mr. Thomson was not part of that group as he is not a member of the forces who is a *Pension Act* pensioner.

[75] Mr. Thomson relies heavily on the Supreme Court decision in *Auton (Guardian ad item of) v British Columbia (Attorney General)*, 2004 SCC 78 [*Auton*], where the Court stated that, in a subsection 15(1) analysis, "the starting point is the comparator chosen by the claimants" (at para 52). By choosing the wrong comparator group, the Appeal Panel skewed the entire analysis since "failure to identify and then compare the appropriate comparator group crucially taint[s] the whole of the discrimination analysis" (*British Columbia (Ministry of Education) v Moore*, 2008 BCSC 264 at para 147 [*Moore*]).

[76] I pause to note, at the outset, that Mr. Thomson is not challenging the constitutionality of section 3 of the FAC Regulations and is not seeking to invalidate the provision. Neither had he raised the constitutional issue before the Appeal Panel. He is instead looking for a declaration that the Appeal Panel's interpretation of the provision (found to be reasonable by this Court)

results in discriminatory treatment in contravention of section 15 of the *Charter* and to direct the Panel to adopt an interpretation that complies with the *Charter*. I add that, since Mr. Thomson is not raising a constitutional challenge based on a section 15 *Charter* ground, the Appeal Panel could not have been expected to conduct the same type of detailed *Charter* analysis developed by the Supreme Court in cases adjudicating section 15 challenges and discussing the potential invalidity of legislative provisions based on a *Charter* infringement.

**(2) The source of distinction**

[77] Turning to Mr. Thomson's argument, I first observe that there is some confusion, in Mr. Thomson's own submissions to the Appeal Panel and to this Court, as to which group he was in fact comparing himself to and as to the source of the distinction he is contesting. For example, in his submissions, Mr. Thomson states:

> "What Parliament cannot, and I submit did not, do is to violate the Charter by providing for selective access that results in differential treatment for civilians based on a particular level of disability" (page 242, Applicant's Record);
>
> "[Differential] treatment occurs because it is the Entitlement Review Panel that accepts an interpretation where slightly to moderately injured flying accident pensioners are to be comprehensively compensated for their injuries, in a manner identical to members of the military, yet severely disabled flying accident pensioners are not. It is this interpretation that gives rise to the discrimination under s. 15" (page 243 Applicant's Record);
>
> "The enumerated ground that forms the basis of discrimination is that of severe disability. The effect of this discrimination is that slightly or moderately injured pensioners are fully and equitably compensated for their non-pecuniary losses whereas severely disabled pensioners are provided with limited or nil compensation for their non-pecuniary losses" (page 244, Applicant's Record);

> "[The] Entitlement Review Board considers that military paraplegics are 'better' or 'more appropriate' presumably in the sense that their loss is associated with acts of courage and sacrifice whereas a civilian, whose loss is identical, is not deemed to be as worthy and is thus marginalized" (page 245, Applicant's Record).

[78] Mr. Thomson further argues that "civilian federal employees who are slightly to moderately injured, and those killed in airplane crashes, receive comprehensive compensation in an amount equal to the compensation awarded to members of the military who are injured or killed on duty in peacetime", hereby comparing the situation of those FACR pensioners to that of military pensioners under the *Pension Act*. And then he adds that "severely disabled survivors are not eligible to receive the mandated proportionate compensation" which is otherwise provided to military pensioners under the *Pension Act*.

[79] The comparison between slightly to moderately disabled and severely disabled pensioners appears convoluted with the comparison between military and non-military status. The alleged distinction claimed by Mr. Thomson to exist between, on the one hand, slightly to moderately injured FACR pensioners and, on the other hand, severely disabled FACR pensioners in fact results from the difference arising when each group is compared to the respective situations of military pensioners under the *Pension Act* suffering from a similar disability; slightly to moderately injured civilian pensioners receive the same compensation as their military counterparts whereas the severely disabled civilian pensioners do not. This is where lies the root of the discrimination alleged by Mr. Thomson.

[80] In other words, when distilled, Mr. Thomson's argument and approach on the issue of discriminatory treatment boil down to a comparison of his situation to the similarly disabled pensioners from the Canadian Forces.

[81] In light of the foregoing, I do not agree that the Appeal Panel committed a reviewable error in its analysis or that it did not consider the right comparator group of other less disabled FACR pensioners as suggested by Mr. Thomson. Given the arguments made by Mr. Thomson, it was reasonable for the Panel to consider and look at military disabled pensioners as the comparator group identified by Mr. Thomson, as this is where the actual source of Mr. Thomson's alleged discrimination is residing. According to Mr. Thomson's reasoning, severely disabled pensioners like him suffer from discrimination because the slightly or moderately injured FACR pensioners are compensated like their military counterparts, whereas severely disabled pensioners are not.

[82] I further observe that, after having referred to the "disabled pensioners under the *Pension Act*", the Appeal Panel mentioned that "[under] like circumstances, other disabled flying accident pensioners would be entitled to the same benefits as" Mr. Thomson. This indicates that, in any event, the Appeal Panel did not only compare Mr. Thomson's situation to disabled military pensioners but that its analysis also considered other disabled FACR pensioners. By doing so, it in fact extended its assessment to the comparator group that Mr. Thomson claims should be the right one.

[83] I am therefore satisfied that the Appeal Panel did consider all the arguments put forward by Mr. Thomson and that it more specifically turned its mind to whether Mr. Thomson ended up having been subject to differential treatment in comparison to slightly or moderately injured FACR pensioners. In stating that, under similar circumstances, other disabled FACR pensioners would be entitled to the same benefits as Mr. Thomson, namely a pension in accordance with the rates set out in the Schedules to the *Pension Act*, the Appeal Panel assessed the situation of all disabled FACR pensioners and found that they all had access to the same benefits, no matter their level of disability.

[84] Contrary to the cases cited by Mr. Thomson in the context of constitutional challenges, this is therefore not a situation where it can be said that a wrong choice of the comparator group tainted the Appeal Panel's discrimination analysis (*Moore* at para 147). In its analysis, the Appeal Panel in fact looked to both the disabled pensioners under the *Pension Act* and to the other slightly or moderately disabled FACR pensioners identified by Mr. Thomson. As such, it cannot be said that the Appeal Panel's statements that "the Appellant submits that he is being treated unequally or differently from disabled pensioners under the *Pension Act*" and "the Applicant is…not part of the same group to whom he is comparing himself" cannot be reasonably supported by the submissions on the record.

**(3) The approach to section 15**

[85] I also find that the conclusion of the Appeal Panel's analysis of Mr. Thomson's *Charter* claim was a possible acceptable outcome in light of the proper interpretation of section 3 of the FAC Regulations: there was no discrimination on the basis of a section 15 *Charter* ground. There

is perhaps unequal treatment between severely disabled civilian FACR pensioners and severely disabled military pensioners, but this does not constitute discrimination based on a section 15 enumerated ground or on an analogous ground. It is simply the reflection of a choice made by Parliament to provide benefits to a certain group and not to others. The Appeal Panel therefore did not commit a reviewable error in finding that there was no discrimination against Mr. Thomson on the basis of his disability and it cannot be said that its interpretation of section 3 of the FAC Regulations amounted to an unequal and discriminatory denial of benefits contrary to section 15 of the *Charter*.

[86] Discrimination is an "elusive concept" (*Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158 at para 45 [*Miceli-Riggins*]. It cannot simply be equated with inequality. The *Charter* does not prohibit all forms of inequality, and distinctions are not all discriminatory and contrary to section 15. Section 15 is a tool for combating those forms of inequality that are discriminatory.

[87] The recent case law of the Supreme Court has summarized in two questions the test to be met in order to raise a section 15 challenge: 1) does the law create a distinction based on an enumerated or analogous ground?; 2) does the distinction create a disadvantage by perpetuating prejudice or stereotypes (*Quebec (Attorney General) v A*, 2013 SCC 5 at para 185; *Withler v Canada (Attorney General)*), [2011] 1 SCR 396 at paras 30-31 and 61-66 [*Whitler*]; *R. v Kapp*, 2008 SCC 41 at para 17 [*Kapp*]). This two-stage approach has been followed by the Federal Court of Appeal and this Court (*Miceli-Riggins*; *Y.Z. v Canada (Citizenship and Immigration)*, 2015 FC 892).

[88] More recently, in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, the Supreme Court summarized its jurisprudence on section 15 of the *Charter* as follows, at paras 16-21:

> [16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the Charter requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).
>
> [17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.
>
> [18] The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec v. A*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group: *Quebec v. A*, at para. 331.
>
> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground

> or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> [20] The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. […]
>
> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.
>
> [Emphasis in original]

[89] Before turning to the application of the test to the present case, I make one further observation. Distinctions arising under social benefits legislations will not lightly be found to be discriminatory (*Runchey v Canada (Attorney General)*, 2013 FCA 16 at para 113 [*Runchey*]). The Supreme Court has confirmed this over and over again (*Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development*) 2011 SCC 37 at para 41, *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para 55 [*Gosselin*]).

[90] While exclusion from participation in benefits programs "attracts sympathy", the "inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group." (*Gosselin* at para 55). As stated by the Supreme Court in *Auton* (at para 41), a

finding of discrimination cannot be based upon a distinction in the offering of benefits or services not provided under a legislation or regulation, as this results from a legislative choice of Parliament to extend, or not to extend, a particular benefit. Parliament is free to target benefits or social programs, "provided the benefit itself is not conferred in a discriminatory manner". Furthermore, in *Withler*, the Supreme Court held that the assessment of whether social benefits legislation offends section 15 must be conducted sensitively, keeping front of mind the social challenges the architects of the legislation attempted to solve (at para 67).

[91] Accordingly, "one cannot simply conclude there is a section 15 violation from the fact that social benefits legislation leaves a group, even a vulnerable group, outside a certain benefits scheme" (*Miceli-Riggins* at para 59).

[92] Legislative schemes such as the FAC Regulations or the *Pension Act*, which are ameliorative in nature and attempt to address the needs of different groups, will not lightly be found to be discriminatory since distinctions arising under benefits legislation are common. In this case, Mr. Thomson is complaining about not having access to a benefit that the law has <u>not</u> conferred to civilian disabled pensioners in his situation. It is not a case where there is unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion, as was the case in *Elbridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

[93] Turning to the test elaborated by the Supreme Court, its first part asks whether, on its face or in its impact, the denial of the Exceptional Incapacity Allowance to Mr. Thomson creates a

distinction based on an enumerated or analogous ground of discrimination. The Supreme Court has stated that "inherent in the word 'distinction' is the idea that the claimant is treated differently than others" (*Withler* at para 62). But that is it not enough. The distinction has to be based on an enumerated or analogous ground.

[94] Section 3 of the FAC Regulations does not make a distinction between slightly, moderately or severely disabled FACR pensioners as they are all denied access to the Exceptional Incapacity Allowance, no matter what is the degree of their disability. Section 3 of the FAC Regulations effectively draws a distinction between civilian FACR pensioners and military pensioners under the *Pension Act*, by denying access to the Exceptional Incapacity Allowance to the former. I am of the view that this does not constitute a denial of substantive equality to disabled civilian FACR pensioners as it is not based upon an enumerated or analogous ground of discrimination.

[95] Not being a member of the military does not constitute a discriminatory distinction under section 15 of the *Charter*. It is clearly not an enumerated ground. Nor is it an analogous ground. Indeed, grounds that have not been found to be analogous to a section 15 ground and been rejected by the Supreme Court include being covered by workers' compensation legislation (*Reference Re Workers' Compensation Act, 1983 (Newfoundland) ss 32 & 34*, [1989] 1 SCR 922), individuals subject to military law (*R v Généreux*, [1992] 1 SCR 259) and individuals employed as RCMP officers (*Delisle v Canada (Deputy Attorney General)*, [199] 2 SCR 989). Not being a member of the military falls in the same category.

[96] There is no discrimination as the term is understood under section 15. There is simply a special coverage afforded to members of the Canadian Forces, and not to FACR pensioners. Section 15 of the *Charter* does not protect a right to identical treatment, it protects against discrimination based on an enumerated or analogous ground (*Runchey* at para 101). In other words, not having access to the Exceptional Incapacity Allowance because Mr. Thomson is not a member of the military is not an exclusion based on an enumerated ground of discrimination or on an analogous ground.

[97] In view of that conclusion, it is not necessary to consider the second part of the test developed by the Supreme Court. I would simply note that, when a person is denied benefits such as the Exceptional Incapacity Allowance under the FAC Regulations, one does not conclude that prejudice or stereotypes are perpetuated, "that the person is not an equal member of Canadian society, is deserving of less worth, or does not belong with the rest of us" (*Miceli-Riggins*, at para 84). It is rather a reflection of the fact that, as is the case for many others, that person does not have access to certain benefits under a non-universal scheme because some qualification requirements are not met.

[98] Consequently, I find that the Appeal Panel's interpretation does not violate subsection 15(1) of the *Charter* and that the Appeal Panel did not err in concluding that not having access to the Exceptional Incapacity Allowance was not discriminatory.

### (4) The *Auton* test

[99] Finally, even under the approach developed in the *Auton* decision for constitutional challenges based on section 15 grounds, Mr. Thomson's argument would fail. In order to prove discrimination, Mr. Thomson had to demonstrate to the Appeal Panel that it should answer positively each of the three questions set out by the Supreme Court (at para 26):

> (1) Is the claim for a benefit provided by law? If not, what relevant benefit is provided by law?
>
> (2) Was the relevant benefit denied to the claimants while being granted to a comparator group alike in all ways relevant to benefit, except for the personal characteristic associated with an enumerated or analogous ground?
>
> (3) If the claimants succeed on the first two issues, is discrimination established by showing that the distinction denied their equal human worth and human dignity?

[100] With both the comparator group identified as "disabled pensioners" by the Appeal Panel or as "slightly or moderately injury" pensioners proposed by Mr. Thomson, the result of this analysis would be the same. Using the severely injured members of the Canadian Forces as a comparator group, the answer to the first question would have been no since Mr. Thomson would be comparing his situation, governed by the FAC Regulations, with that of people governed by another legislative scheme, the *Pension Act*, which does not apply to him. This would have ended the analysis.

[101] Using the comparator group as worded by Mr. Thomson (i.e., less severely injured victims covered by the FAC Regulations), the answer to the first question would have been yes. The benefit provided for in the FAC Regulations for all levels of disabled FACR pensioners is

compensation in an amount equal to the pension which would be payable under the *Pension Act*. However, the answer to the second question would necessarily have been no since the only benefits denied to Mr. Thomson are the allowances provided under Schedule III of the *Pension Act*, including the Exceptional Incapacity Allowance. But these allowances are also denied to all members of the comparator group, as they are denied to all civilian employees under the FAC Regulations, no matter what is the level of their disability.

[102] In order to be successful in his *Charter* arguments, Mr. Thomson would have needed to demonstrate that FACR pensioners other than severely disabled pensioners would have been entitled to benefits that would not have been accessible to him because of his status as severely handicapped. This is not the case.

[103] The Appeal Panel could perhaps have provided more details on its analysis of the comparator groups but the reasonableness-proportionality standard requires the Court to extend deference to the decision-maker, as long as the process and outcome fit comfortably with the principles of justification, transparency and intelligibility. I find that this is the case here as, no matter how the comparison is done, the Appeal Panel's interpretation of section 3 of the FAC Regulations does not result in treatment discriminatory on one of the *Charter* grounds.

## IV. Conclusion

[104] For the above mentioned reasons, I must dismiss Mr. Thomson's application as I cannot conclude that the Appeal Panel's decision regarding the interpretation of the FAC Regulations

was unreasonable and not within the range of acceptable possible outcomes, or that its interpretation led to a discriminatory treatment in violation of Mr. Thomson's *Charter* rights.

[105] Once again, I acknowledge that Mr. Thomson raises numerous valid concerns regarding the treatment of his claim for compensation when compared to the treatment received by members of the Canadian Forces in a similar situation. However, this is something that should be raised with Parliament and the legislature, as only them, and not this Court, can ultimately address those.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed, without costs.

"Denis Gascon"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2012-14 |
| **STYLE OF CAUSE:** | ROBERT JAMES THOMSON v CANADA (ATTORNEY GENERAL) |
| **PLACE OF HEARING:** | MONTREAL, QUEBEC |
| **DATE OF HEARING:** | MAY 6, 2015 |
| **JUDGEMENT AND REASONS:** | GASCON J. |
| **DATED:** | AUGUST 18, 2015 |

**APPEARANCES:**

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| William F. Pentney<br>Deputy Attorney General of Canada<br>Montreal, Quebec | FOR THE RESPONDENT |