Federal Court  Cour fédérale

Date: 20120501

Docket: T-463-07

Citation: 2012 FC 499

Ottawa, Ontario, May 1, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DENNIS MANUGE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a Class proceeding brought by the Plaintiff, Dennis Manuge, on behalf of approximately 4,500 former members of the Canadian Forces (the Class).

[2] What is in issue in the proceeding is the legality of the Defendant's policy of reducing long-term disability (LTD) benefits payable to disabled Canadian Forces (CF) members under the CF Service Income Security Insurance Plan (SISIP) Policy 901102 by the monthly amounts payable to those members under the *Pension Act*, RSC 1985, c P-6. The Class argues that this offset of

benefits is not contractually justified and that it also violates section 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.

[3] To their credit, the parties have agreed to have the contractual aspect of their dispute resolved on a preliminary basis by way of a motion brought under Rule 220 of the Federal Courts Rules, SOR/98-106 [Rules]. To that end, they have submitted an Agreed Statement of Facts and have posed the following questions of law for determination:

> 1. Are the pension payments made pursuant to section 21 of the *Pension Act*, "total monthly income benefits" as that term is described in section 24(a)(iv) of Part III(B) of SISIP Policy 901102?
>
> 2. Are the pension payments made pursuance to section 21 of the *Pension Act*, "monthly pay in effect on the date of release from the Canadian Forces" as that term is described in section 23(a) of Part III(B) of SISIP Policy 901102?

[4] Central to the dispute is the interpretation of Article 24 of the SISIP Policy and, in particular, whether monthly benefits payable to disabled CF members under the *Pension Act* are "monthly income benefits" as that phrase is used in the SISIP Policy. The relevant provision reads as follows:

24. Other Relevant Sources of Income	24. Autres sources de revenu
a. <u>The monthly benefit payable at Section 23 shall be reduced by the sum of:</u>	a. <u>Le montant de la prestation mensuelle versée selon l'article 23 doit être réduit du total des montants suivant :</u>
(i) the monthly income benefits payable to the	(i) de la prestation de revenu mensuelle versée

member under the Canadian Forces Superannuation Act; and	au membre en vertu de la Loi sur la pension de retraite des Forces canadiennes; et
(ii) the Primary monthly income benefits payable to the member under the Canada or Quebec Pension Plans (including retroactive payments covering the period during which such benefits were prefunded under this Division 2); and	(ii) de la prestation de revenu mensuelle versée au membre en vertu du Régime des pensions du Canada ou de la Régie des rentes du Québec (y compris les versements rétroactifs pour la période pendant laquelle ces prestations ont été financées en vertu de la présente section 2); et
(iii) the employment income of the member unless the member is participating in a rehabilitation program approved by the Insurer in which case the monthly benefit will be reduced in accordance with Section 28; and	(iii) du revenu d'ernploi du membre, sauf si ce dernier participe à un programme de réadaptation approuvé par l'Assureur auquel cas la prestation mensuelle sera réduite conformément aux dispositions de l'article 28; et
(iv) the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments covering the period during which such benefits were prefunded under this Division 2).	(iv) de la prestation de revenu mensuelle totale versée au membre en vertu de la *Loi sur les pensions* (y compris les indemnités de personnes à charge et les versements rétroactifs pour la période pendant laquelle ces prestations ont été financées en vertu de la présente section 2).

[Emphasis added]

> Agreed Statement of Facts (8 September 2011) at p 41 ("SISIP Policy 901102", Part III(B), art 24) [SISIP Policy].

[5] The Class argues that their *Pension Act* payments are non-indemnity disability benefits intended to compensate CF members for impairments to their quality of life and limitations on their activities of daily living. Because these payments are not a form of income replacement, they are not caught by the benefit offset in Article 24(a)(iv) of the SISIP Policy which only permits the deduction of "monthly income benefits".

[6] The Defendant argues that the contracting parties, the Chief of Defence Staff (CDS) and Manulife Financial (Manulife), intended to offset these benefits and, in the context of the entire scheme, that intention was manifest in the specialized language they used. According to the Defendant, Article 24 of the SISIP Policy is simply an integration of benefits provision common to many LTD insurance policies.

The SISIP Policy and the Pension Act

[7] André Bouchard is the President of SISIP Financial Services. His affidavit provides helpful historical background for the development of SISIP since its inception in 1969 and, for the most part, that history is undisputed.

[8] SISIP was created because existing benefits programs accessible to CF members were thought to be inadequate. SISIP was developed to provide "a group insurance plan that would ensure that a disabled member or surviving depend[a]nts could maintain a reasonable standard of living in the event of a disability or death": Motion Record of the Defendant (Motion to Determine

Questions of Law) (28 October 2011) at p 28 ("Affidavit of André Bouchard" (28 October 2011) at para 8) [Affidavit of André Bouchard]. The specific rationale for SISIP is contained in the following passage from a briefing memorandum prepared for the CDS in June 1969:

> 2. Extensive study of the various forms of insurance coverage provided by government indicated that more than fifty percent of Canadian Forces personnel are inadequately protected by the Pension Act and the Canadian Forces Superannuation Act, even though entitlements under these acts are supplemented by benefits under either the Canada or Quebec Pension Plans. One of the more distressing aspects of this situation is that surviving widows and children of personnel killed off duty or who suffer a non-service disability during their first ten years of service, are left with little or, in many instances, no income whatsoever with which to raise a family or indeed to exist. Similarly, widows and children of personnel with more than ten years service are required to accept an overnight reduction in previous service income, ranging from 90% to 65% depending upon the length of service of the husband. Obviously, some form of added protection is required to:
>
> (a) provide an income to the widow and children of the deceased or disabled serviceman who has insufficient service to qualify for a service annuity;
>
> (b) supplement the income from CFSA and Canada or Quebec Pension Plans paid to the disabled serviceman and the survivors of the deceased serviceman to a level of approximately 60-80% of his pay on death or disablement.
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> Affidavit of André Bouchard, Exhibit "A" at p 35 ("Brief for CDS on the Servicemen's Income Security Insurance Plan (SISIP)" (June 1969) at s 2).

[9] It is perhaps of some historical significance that the SISIP Policy, as initially proposed, was seen as an income replacement supplement to the *Canadian Forces Superannuation Act*, RSC 1985, c C-17 [*CFSA*], and the Canada and Quebec Pension Plans and separate from benefits payable under the *Pension Act*.

[10] SISIP was created under section 39 of the *National Defence Act*, RSC 1985, c N-5, a provision that authorizes the CDS to create programs for the benefit of CF members. Since its inception, SISIP has been administered through a contract between the CDS and a private insurer (now Manulife). Initial funding came entirely from voluntary premium payments from participating members, but subsequent changes over the years have substantially reduced the percentage contributions made by CF members. Since 2009, CF members pay 15% of the LTD premiums for non-service-related disabilities and nothing for service-related disabilities. For regular members of the CF who enlisted after April 1, 1982, participation in SISIP is mandatory and, since 1999, participation by CF reserve members is also required.

[11] As initially conceived, the SISIP LTD benefit was reduced by amounts received by disabled CF members under the *CFSA* and the Canada and Quebec Pension Plans. Also, if a member qualified for benefits under the *Pension Act* on the basis of injury or death due to military service, nothing was payable under the SISIP Policy.

[12] In 1971, CF members injured in "Special Duty Areas" were allowed to collect *Pension Act* benefits notwithstanding their continued service in the CF.

[13] In 1975, the basic SISIP LTD benefit was raised from 60% to 75% of a member's income at the time of release and monthly increments for dependant children were eliminated.

[14] In 1976, in recognition of the inadequacy of the monthly *Pension Act* benefits, SISIP LTD coverage was expanded to include service-related disabilities. It was at that point that the SISIP and

the *Pension Act* schemes came together. According to Mr. Bouchard, it was also at that point that benefits payable under the *Pension Act* "were added to the list of applicable reductions" under the SISIP Policy to prevent the "stacking" of payments from two federally-funded sources as well as for reasons of "cost and equity": Affidavit of André Bouchard at para 24.

[15] Mr. Bouchard's affidavit provides the following additional rationale for the concern about the "stacking" of benefits:

> Discounting LTD benefits to take into account other sources of income is a common feature of both public and private LTD insurance plans, and is consistent with the objective of long term disability insurance. Section 24(a)(iv) of Part III(B) of SISIP Policy 901102 (Exhibit "C") is the provision that allows for the deduction of other income from SISIP LTD benefits ("the set-off provision").
>
> [Emphasis added]
>
> Affidavit of André Bouchard at para 19.

[16] In October 2000, the *Pension Act* was amended to provide benefits to all members disabled from military service injuries however occurring. Those disabled members who were able to continue their military service were permitted to collect *Pension Act* benefits in addition to their salaries.

[17] In 2006, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [*New Veterans Charter*], became law. It replaced the monthly *Pension Act* benefits with a one-time lump sum award which is not deductible from the SISIP benefit. That change was not made retroactive so as to apply to members of the Class.

[18] Mr. Bouchard characterizes the SISIP Policy as a contract between the CDS and Manulife with benefits payable on a strictly contractual basis. He deposes that SISIP is an income replacement scheme which guarantees a disabled CF member 75% of salary at the time of his or her release. The SISIP benefits are not compensation for the gravity of one's injuries or for the loss of personal abilities. According to Mr. Bouchard, the *Pension Act* offset in Article 24 is "required for the proper functioning of a disability insurance scheme" and to prevent the theoretical potential for a disabled member receiving "more funds in income replacement than he or she ever earned as an employee": Affidavit of André Bouchard at para 34. The SISIP Policy was not designed to bear the entire burden of an income loss associated with a disability; instead, it shares that burden with other programs such as the Canada Pension Plan, the *CFSA* and the *Pension Act*. In short, Mr. Bouchard apparently believes that the benefits payable under the *Pension Act* are in the nature of income replacements and are appropriately deducted from the SISIP benefits as a means of avoiding a double-recovery for lost income.

[19] I accept Mr. Bouchard's characterization of the SISIP as an income replacement scheme. In fact, it appears to be classic indemnity insurance intended to replace a percentage of a CF member's lost income due to an inability to work.

[20] The *Pension Act* provides pensions and other benefits to CF members except to the extent that there is an entitlement to a lump sum award under the *New Veterans Charter*. For members of the Class, the *Pension Act* applies and not the *New Veterans Charter*.

[21] Section 2 of the *Pension Act* recognizes the Government of Canada's (Canada) obligation to compensate CF members who have been disabled or who have died in the service of Canadians. This responsibility is met by giving a liberal construction to the language of the statute and by giving the benefit of any doubt in the weighing of evidence to disabled veterans: see *Pension Act*, s 5(3)(c). Section 3 of the *Pension Act* defines disability as "the loss or lessening of the power to will and to do any normal mental or physical act".

[22] Section 35 of the *Pension Act* provides that the amount of a disability pension shall be determined in accordance with the assessment of the extent of the disability and is based on a set of instructions and a table of disabilities made by the Minister of Veterans Affairs. Under section 35(4), a *Pension Act* pension is not to be reduced because a disabled member "undertook work or perfected themself in some form of industry" and, indeed, a *Pension Act* disability benefit is payable regardless of whether a disabled CF member continues in active service.

[23] The 2006 Table of Disabilities (Table) provides the following introduction:

> The Table of Disabilities is the instrument used by Veterans Affairs Canada to assess the degree of medical impairment caused by an entitled disability. The Table of Disabilities has been revised using the concept of medical impairment based on a per condition methodology. The relative importance of that body part/body system has been a consideration in the development of criteria to assess the medical impairment resulting from the entitled disability. The Disability Assessment will be established based on the medical impairment rating, in conjunction with quality of life indicators which assess the impact of the medical impairment on the individual's lifestyle.
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> Agreed Statement of Facts (8 September 2011) at p 321 ("Table of Disabilities" (January 2006) at p 1, also available online: <http://www.veterans.gc.ca/public/pages/dispen/2006tod/pdf_files/tod_total_2006.pdf >).

[24] According to the principles of assessment found in the Minister's Table, the definition of disability in the *Pension Act* and the *New Veterans Charter* requires both medical (impairment) and non-medical (quality of life) assessments. Medical impairment is made up of the physical loss or alteration of any body part or system and the resulting functional loss. The quality of life assessment examines a person's ability to participate in activities of independent living, the ability to take part in recreational and community activities and the ability to initiate and take part in personal relationships. A major consideration in determining the quality of life effects is the degree to which a disability has affected the usual or accustomed activities of the person being assessed.

[25] Although an assessment of the activities of independent living includes both domestic and employment routines, the Minister's Table makes it clear that one's entitlement to a pension is not dependent on a finding that a person cannot work.

[26] Once medical and quality of life ratings have been assessed, they are added to produce the disability assessment from which the amount of the monthly *Pension Act* benefit is derived. The Table includes a disability scale measured in 20 increments from 5% to 100% disability. At each increment, a basic pension benefit is indicated which is proportionate to the degree of disability sustained.

[27] What is clear from the *Pension Act* and the Minister's Table is that the monthly benefit payable to disabled members of the CF is not intended to be a form of income replacement. Instead, it is designed to compensate for the loss of amenities of life and for the personal limitations and

sacrifices that arise from disabling injuries. This is not entirely lost on the Defendant. According to a 2004 Reference Paper prepared by Veterans Affairs Canada, the purpose of *Pension Act* disability benefits is 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: Affidavit of Sergeant John G. Bartlett (22 September 2011), Exhibit "B" at p 8 ("Reference Paper: The Origins and Evolution of Veterans Benefits in Canada, 1914-2004" (March 2004) at p 5, also available online: <http://www.veterans.gc.ca/eng/forces/nvc/reference>).

Issues

[28] Are the pension payments made pursuant to section 21 of the *Pension Act*, "total monthly income benefits" as that term is described in Article 24(a)(iv) of Part III(B) of SISIP Policy 901102?

[29] Are the pension payments made pursuant to section 21 of the *Pension Act*, "monthly pay in effect on the date of release from the Canadian Forces" as that term is described in Article 23(a) of Part III(B) of SISIP Policy 901102?

Discussion

[30] To answer the questions posed on this motion, the Court is called to construe Article 24 of the SISIP Policy and, in particular, to determine whether a disability pension payable under the *Pension Act* is included in the phrase "the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments covering the period during which such benefits were prefunded . . .)".

[31] Both parties agree that the principles of construction that apply to insurance contracts are applicable: see Plaintiff's Memorandum of Fact and Law: Motion to Determine Questions of Law (22 September 2011) at para 128; Motion Record of the Defendant (Motion to Determine Questions of Law) (28 October 2011) at p 6 ("Defendant's Memorandum of Fact and Law" at para 16). The Defendant argues, however, that the members of the Class are not parties to the contract and they must accept the interpretation of the SISIP Policy that the CDS and Manulife have adopted. In effect, the Defendant submits that CF members are strangers to the contract who are entitled to enforce the agreement but only on the terms that the CDS and Manulife accept, relying on the authority of *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129, [1998] SCJ no 59 (QL) [*Eli Lilly*], where the Court held at paragraph 53 that it was not open to a non-contracting party to rely on the doctrine of *contra proferentem* to undermine a contractual interpretation accepted by the contracting parties. The Defendant also contends that the historical evolution of the SISIP Policy as described by Mr. Bouchard confirms Canada's intent to deduct the *Pension Act* disability benefits from SISIP LTD income.

[32] I do not accept that members of the Class are strangers to the SISIP Policy and legally incapable of advancing their own interpretation of the contractual language. *Eli Lilly* is distinguishable. It involved a licensing agreement in which the non-contracting party had no interest. By their very nature, policies of insurance are different; a beneficiary may be an insured party to the policy but even a non-contracting beneficiary has a legal interest sufficient to have the policy enforced and to argue for any interpretation that would be open to either of the contracting parties. The fact that the SISIP Policy is a group policy and that the CDS and Manulife are named parties does not support an argument that the covered CF members are not entitled to rely upon any

of the interpretive rules that apply to insurance contracts generally: see *Co-operators Life Insurance Co v Gibbens*, 2009 SCC 59 at para 28, [2009] 3 SCR 605; *Ryan v Sun Life Assurance Co of Canada*, 2005 NSCA 12 at para 26, 230 NSR (2d) 132 [*Ryan v Sun Life*]; *St-Laurent v Sun Life Assurance Co of Canada* (1989), 101 NBR (2d) 354, [1989] NBJ no 535 (QL) (CA); *Hoult Estate v First Canadian Insurance Corp*, [1995] ILR 1-3125 at paras 17-18, 1994 CarswellBC 841 (WL Can) (SC); *Milner v Manufacturer's Life Insurance Co*, 2006 BCSC 1571 at para 16, [2006] BCJ no 2787 (QL) [*Milner v Manufacturer's Life*]; *Canada Life Assurance Co v Donohue* (1999), 46 OR (3d) 82 at para 15, [1999] OJ no 3549 (QL) (Sup Ct J) [*Canada Life v Donohue*].

[33] Indeed, in the context of the extant contractual relationship between the CDS and Manulife where the entire risk is underwritten by the CDS and managed by Manulife, the *de facto* insurer is the CDS and the *de facto* insureds are CF members. This is consistent with the history of the SISIP Policy which was drafted by the CDS and imposed by the CDS on CF members. CF members have always paid or contributed to the cost of the program and the SISIP Policy expressly recognizes their status as insureds: see for example SISIP Policy, Part I, art 27; SISIP Policy, Part III(A), arts 52-53. In particular, Article 52 describes how "an eligible member becomes insured" under the LTD plan. This express recognition of CF members as insureds under the SISIP Policy and their premium contributions are inconsistent with the Defendant's argument that the only insured party is the CDS. In this context, it is the insured CF members and Canada, through the CDS, that have competing interests. Manulife is, in effect, a largely, if not entirely, disinterested third party that would have no apparent interest in contesting the views of its commercial partner on whose behalf it administers the plan.

[34] The Defendant's argument that the interpretation of Article 24 may be aided by the contractual history and Treasury Board motives outlined by Mr. Bouchard is similarly misguided. It may well have been the CDS's intention to set off the *Pension Act* disability benefit from the SISIP LTD benefit. But the SISIP Policy is not a statutory instrument to be interpreted by means of a search for a Parliamentary intent. In interpreting a contract of insurance, the search is not for the subjective intent of either contracting party but, rather, for the common intent of both parties which, hopefully, can be found in the language they have employed and from the overall context in which that language is to be applied. This point was well expressed by Justice Thomas Cromwell in *Ryan v Sun Life*, above, at paragraph 24:

> 24 I mention this because the parties and the Chambers judge referred to evidence concerning the exchange of drafts and correspondence between the parties relating to this new subrogation clause. While there can be little doubt from a review of this material that the insurer's objective in advancing the language which was subsequently adopted was to give it the right to share in all types of damages, the issue is not what the insurer intended. Rather, as Iacobucci, J. emphasized in Eli Lilly, the question is what was the contractual intent of the parties. This is to be determined from the words they used in light of the surrounding circumstances. Evidence of the subjective intent of one of the parties has no independent place in this endeavour; it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous: Eli Lilly at paras. 54-55.

[35] In *Milner v Manufacturer's Life*, above, the Court similarly inferred what the insurer was attempting to accomplish in the drafting of a collateral source integration provision but rejected the insurer's interpretation because of a lack of clarity in the policy language. In short, what the drafter of a policy may have had in mind is not the issue. The question is what the language employed would objectively mean to the parties.

[36] Accordingly, the Defendant's reliance on the 1976 SISIP Policy amendment is misconceived: see above at para 14. Although Mr. Bouchard deposes that this change was made in recognition of an overlap that arose when the SISIP Policy coverage was extended to service-attributable injuries, the issue for determination is whether the CDS chose adequate language to achieve that result. After all, CF members were not privy to the CDS's rationale for changes to the SISIP Policy nor were they consulted.

[37] As a general rule, parol evidence is not admissible to establish the subjective intent of one party to an insurance contract. The only basis for introducing parol evidence is to show an underwriting purpose for a disputed term. This point was made in *Abdulrahim v Manufacturers Life Insurance Co* (2003), 65 OR (3d) 543, [2003] OJ no 2592 (QL) (Sup Ct J):

> 67 Parol evidence relating to the surrounding circumstances of a contract may be admissible in certain cases (for example, to explain commercial purpose). Evidence as to subjective contractual intention, however, including draft letters or other expressions of intention made in the course of negotiations (Indian Molybdenum, supra at 503) and intentions in drafting or implementing an agreement (Eli Lilly, supra at para. 59) is inadmissible. In Transcanada Pipelines, Lane J. wrote at para. 12:
>
> > Direct evidence from a party as to his intention in the use of particular language is not an admissible part of the context. This is particularly so where, as here, the party did not communicate the relevant intention at the time to the opposite party.
>
> 68 Manulife has had complete control over the wording of this contract, and it could have used more specific wording in constructing the exclusion clause if it wished to limit the benefits payable to the insured in these circumstances. The interpretive principles articulated by the Supreme Court relating to insurance contracts apply. In this regard, in Eli Lilly, supra, Iacobucci J. only delved into the question of whether a party could call extrinsic evidence in after specifically noting (at para. 53) that contra proferentum and other interpretive principles did not apply, because

> the claim was being brought by a third party. In the case before me, these principles apply and compel me to find in favour of the plaintiff.
>
> [Emphasis added]

[38] I accept that Mr. Bouchard's affidavit touches on an underwriting concern about the avoidance of stacking income benefits. While this is admissible evidence, it is based on a mischaracterization of the nature of the benefits payable to disabled CF members under the *Pension Act*. They are not an indemnity for lost income. Rather, they represent compensation for impairments to the activities in daily living including loss of function and for reductions in the quality of life. In the result, Mr. Bouchard's principal underwriting justification for deducting *Pension Act* benefits from a member's SISIP LTD income (ie. to avoid an excess recovery of lost income) is untenable. There is nothing untoward or objectionable about a disabled CF member receiving a *Pension Act* disability award in addition to an LTD benefit to compensate for lost income. It is also not accurate for Mr. Bouchard to say that the Defendant's offset of benefits under Article 24(a)(iv) of the SISIP Policy represents a typical approach to the integration of benefits under an LTD policy. The common law does not permit an LTD insurer to subrogate against an insured's non-indemnity entitlements and LTD insurers generally respect that distinction in their policies: see *Gibson v Sun Life Assurance Co of Canada* (1984), 45 OR (2d) 326, 6 DLR (4th) 746 (H Ct J); *Maritime Life Assurance Co v Mullenix* (1986), 76 NSR (2d) 118, [1986] NSJ no 479 (QL) (SC (TD)). Where an insurer attempts to achieve a windfall by pursuing the recovery of something different in kind from what they have paid to the insured, they are frequently unsuccessful: see *Bannon v McNeely* (1998), 38 OR (3d) 659 at paras 49-50, 159 DLR (4th) 223 (CA).

[39] I also do not recognize saving money as a legitimate underwriting concern. It is always in the interest of the underwriter to save money in responding to claims and that advantage is primarily, if not completely, obtained at the expense of the insured. Such an argument cannot be used to assist an insurer or to interpret disputed policy language.

[40] Having determined that the Class is not contractually disadvantaged in the manner suggested by the Defendant, it is important to recognize the principles that apply to the interpretation of insurance contracts and, in particular, contracts of adhesion.

[41] In *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21, [2006] 1 SCR 744, the Supreme Court of Canada discussed the special interpretive rules that apply to insurance contracts. In doing so, the Court was cognizant of the unequal bargaining power that exists when the insurance agreement is formed. The following passages from the decision are instructive:

> 27 Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies. These principles were recently reviewed by this Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24. They apply only where there is an ambiguity in the terms of the policy.
>
> 28 First, the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly. This is done in two ways: (1) through the application of the *contra proferentem* rule; (2) through the broad interpretation of coverage provisions and the narrow interpretation of

> exclusions. These rules require that ambiguities be construed against the drafter. . . .
>
> 29 Second, the courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them. In essence, "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract" (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, pp. 901-902; *Non-Marine Underwriters*, at para.71).
>
> 30 Finally, the context of the particular risk must also be taken into account. . . .

[42] The idea that the Court should look for meaning on the basis of the reasonable expectations of the parties is not new. It goes back at least as far as the decision in *Consolidated Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co,* [1980] 1 SCR 888, [1979] SCJ no 133 (QL), where Justice Willard Estey held that literal meaning should give way to an interpretation that promotes a fair and sensible commercial result. A construction that enables either of the parties to achieve an unintended windfall at the expense of the other is usually to be avoided. It seems to me that this is another way of saying that context takes precedence over strict literalism in the interpretation of contracts of insurance. In the face of an ambiguity, however, the doctrine of *contra proferentem* applies and the reasonable expectation of the insured is always favoured.

[43] It is, therefore, left to the Court to determine what was intended by the phrase "the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments . . .)". The task is not to interpret any particular word or phrase in isolation but, rather, in the context of the complete agreement and the surrounding circumstances.

The search for meaning is performed by looking objectively for a common intention and one that achieves a fair and sensible commercial outcome for the parties.

The Plaintiff's Argument

[44] The Plaintiff's principal argument for challenging the legality of the Defendant's offset of the *Pension Act* benefit from the monthly SISIP benefit is that the former is not a "monthly income benefit" as that phrase is used in Article 24(a)(iv) of the SISIP Policy. According to the Plaintiff, the word "income" has interpretive significance as a qualifier to the words that precede and follow it. "Income" signifies an intent to deduct only monthly *Pension Act* benefits that can be characterized as indemnities for lost income. That interpretation gives meaning to the word that is consistent with its normal grammatical use and conforms with the income replacement character of the SISIP benefit and the three other offsets described in Article 24. It also conforms to the common law approach which denies rights of offset or subrogation to an LTD insurer with respect to an insured's non-indemnity entitlements.

[45] According to the Plaintiff, if the parties intended to deduct the monthly *Pension Act* disability benefit from the SISIP LTD benefit, there would be no need to use the word "income" at all. It would have been sufficient to say "the total monthly benefits payable to the member under the Pension Act". This approach is employed in Article 64 of the SISIP Policy where the monthly dismemberment benefit is "reduced by <u>any monthly benefits</u> payable pursuant to . . . [t]he Pension Act . . .": see SISIP Policy, Part III(A), art 64 [emphasis added]. The Plaintiff contends that the addition of the qualifying term "income" in Article 24(a)(iv) indicates a different intent.

[46] In short, the Plaintiff says that the monthly *Pension Act* disability benefit that the Defendant has deducted from his SISIP LTD benefit and from other members of the Class is not payable with respect to lost income and, therefore, does not qualify as an offset under Article 24(a)(iv).

[47] The Plaintiff invokes the authority of *Stitzinger v Imperial Life Assurance Co of Canada* (1998), 39 OR (3d) 566, 60 OTC 161 (Ct J (Gen Div)), which considered an LTD benefit integration provision providing for the offset of "total monthly income from all sources". The insured recovered damages in an action against a tortfeasor, including damages for lost earning capacity, that were payable periodically from an annuity. The insurer sought to deduct the annuity benefits from its LTD obligation. In holding against the insurer, the Court characterized the award of damages as compensation for the loss of personal ability and not a form of income replacement. The fact that the damages were payable periodically did "not change their legal character" and the payments were "not income within the meaning and intention" of the policy. The Court went on to note that, at common law, the insurer's right to subrogate against its insured's collateral recoveries only arose once the insured's losses had been fully satisfied and not before. According to the Plaintiff, this principle is violated by the SISIP offset because a disabled CF member is left substantially under-compensated upon release. To the same effect is the decision in *Elliott and Attorney-General of Ontario*, [1973] 2 OR 534 at para 6, [1973] OJ no 1934 (QL) (CA), where the Court held that compensation for pain and suffering did "not bear the character of income as that word is ordinarily understood": see also *Doucet v New Brunswick*, 2004 NBQB 398, 283 NBR (2d) 51.

The Defendant's Argument

[48] The Defendant argues that Article 24 of the SISIP Policy must have been inserted for some underwriting purpose and that, as it is written, it can only refer to one thing – the deduction of the *Pension Act* disability benefits, including dependent benefits, from the SISIP LTD payment. According to the Defendant, there are no other extant benefits available to CF members or their dependents under the *Pension Act* that could be deducted.

[49] The Defendant also contends that the word "income" has a broader meaning than the one the Plaintiff advances. It refers to the expansive definition of "income" in the *Income Tax Act*, RSC 1985, c 1 (5th Supp), and in matrimonial cases concerned with spousal and child support. These examples suggest that the word can include money coming from a diversity of sources including disability pension benefits. The same point is made concerning the word "revenu" as it is used in the French text of Article 24 of the SISIP Policy.

[50] The Defendant also relies on the phrase "monthly income benefit" in Articles 23 and 24 in connection with the SISIP benefit and the offsets for superannuation, Canada and Quebec Pension Plans and other employment income. According to this view, Article 24(a)(iv) represents a consistent use of the word "income" in connection with the SISIP benefit and all of the applicable deductions. A similar point is made about the *Pension Act* which prohibits the assignment or commutation of an award except to the extent of a holdback from a retroactive award to reimburse a provincial welfare authority. This is said to be a recognition of the integration of *Pension Act* awards with provincial welfare schemes. The Defendant argues that the same is true of the

Departmental offsets that are recognized under section 32(2) of the *Pension Act* and intended to prevent the stacking of federal benefits.

[51] The Defendant further relies on an agreement signed by the Plaintiff and other members of the Class as a condition of receiving SISIP benefits (the reimbursement agreement). Under that agreement, a disabled plan member agrees to reimburse the insurer for amounts recovered from third-party sources "including the Canada Pension Plan, Quebec Pension Plan, Canadian Forces Superannuation Act, Government Employer Compensation Act (GECA), Worker's Compensation Act, Automobile Insurance and the Pension Act": Affidavit of André Bouchard, Exhibit "D" at p 40. The Defendant says that this agreement confirms the intent under the SISIP Policy to deduct *Pension Act* disability benefits from LTD income.

> *Discussion of Issue No. 1: Are the Pension Payments Made Pursuant to Section 21 of the Pension Act, "total monthly income benefits" as That Term is Described in Article 24(a)(iv) of Part III(B) of SISIP Policy 901102?*

[52] The Defendant contends that Article 24(a)(iv) must include *Pension Act* disability benefits because there is no other extant benefit that would be caught by the provision. The Plaintiff answers that insurance policies frequently contain generic exclusions or coverage limitations that have no application to a particular insured or to a particular claim. The Plaintiff adds that the *Pension Act* could be amended at any time to create an income replacement benefit that would be deductible from the SISIP LTD benefit and thereby give some practical effect to Article 24(a)(iv).

[53] What happened, of course, is that the Defendant did amend the *Pension Act* to replace the monthly *Pension Act* disability benefit with a one-time lump-sum award that is not now deductible

from the SISIP LTD income stream. This amendment renders Article 24(a)(iv) of the SISIP Policy meaningless for future claims so that its only arguable remaining significance is with respect to claims which predate the *Pension Act* amendment. It seems to me that this legislative history adds some strength to the Plaintiff's argument that there is nothing inherently problematic about a contractual provision that limits coverage that has no immediate significance or practical effect. This is, after all, not a statutory provision where the presumption against tautology might apply. For a contract of insurance – and particularly group insurance – one could well expect to find limiting provisions or exclusions that have no present application to a particular claim or claims.

[54] The Defendant's remaining arguments are not compelling. The fact that the *Income Tax Act* and spousal and child support guidelines incorporate expansive definitions of income is hardly surprising given the different purposes they serve. The authorities cited by the Plaintiff are stronger comparators because they are concerned with principles of compensation for injury and related claims for offset (or subrogation) of collateral source recoveries. Furthermore, it was open to the CDS to include an expansive definition of "income" in the SISIP Policy but he elected not to do so. The fact that the French word "revenu" is sometimes used to include pension income is similarly not surprising inasmuch as many pensions are forms of income replacement or substitution. The question remains as to whether the word "revenu" includes a disability benefit that bears no relationship to an income loss. I can identify nothing in the French text of Article 24 that assists the Defendant on this issue.

[55] The Defendant's argument that the *Pension Act* describes a disability pension as a "benefit" also fails to answer the interpretive issue arising from Article 24. The essential problem remains

that the *Pension Act* does not describe a disability pension as an "income benefit" and clearly it is not.

[56] The fact that Articles 23 and 24 respectively describe the SISIP benefit and the offsets for superannuation, Canada and Quebec Pension Plan benefits and employment income as "monthly income benefits" does not assist the Defendant either because the SISIP benefits and all of the other offsets identified in Article 24 are forms of income replacement or income substitution that fit comfortably within the term "monthly income benefits". This distinction does not detract from the Plaintiff's interpretation but actually supports it.

[57] The Defendant's argument that sections 30 and 32 of the *Pension Act* confirm an intent to integrate disability pensions with the SISIP LTD benefits fails for much the same reason. The fact that the *Pension Act* recognizes and limits certain benefit overlaps does not mean that Article 24 of the SISIP Policy accomplishes the same result. There is no question that the CDS is fully capable of creating a lawful offset of benefits by statute or by contract notwithstanding the harshness of the result. But when he does so by contract, clear language must be used to express that intent.

[58] The Defendant also invokes the reimbursement agreement signed by Class members which states that CF members' LTD benefits will be set off by other sources of income including *Pension Act* benefits. However, I give this document no weight as a guide to interpreting Article 24 of the SISIP Policy. It is an after-the-fact document that does not alter the SISIP Policy and, according to Mr. Bouchard's affidavit at paragraph 40, CF members are required to sign it as a condition of receiving benefits. I would add that this agreement purports to include sources of income that are

nowhere referenced in the SISIP Policy (ie. Workers Compensation, automobile insurance) as appropriate offsets and, therefore, appears to include recoveries that cannot be contractually justified under the SISIP Policy. If anything, this document reflects a profound misunderstanding by the Defendant about what is contractually appropriate to demand from an insured in terms of third-party benefit offsets or recoveries.

[59] I have no doubt that the CDS could have drafted a provision that clearly authorized the deduction of a CF member's *Pension Act* pension benefit from the SISIP LTD benefit. There is, after all, no limit on what the parties to a contract may stipulate. However, the CDS drafted Article 24 of the SISIP Policy by incorporating the limiting term "income" with respect to the offset of *Pension Act* benefits. The CDS did not include that limiting term in a number of other offset provisions in the SISIP Policy or in the *War Veterans Allowance Act*, RSC 1985, c W-3. And more recently, a reduction to the earnings loss benefits payable under the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50, was claimed for "disability pension benefits payable under the *Pension Act*": see s 22(a). This provision very clearly captures the *Pension Act* disability benefit and the different approach in Article 24 indicates a different intent.

[60] It seems to me that the term "income" cannot be ignored. The word is entirely unnecessary if the intention was to provide for the deduction of *Pension Act* disability benefits. In common parlance, an "income benefit" is not a benefit in the nature of a *Pension Act* disability award and, at common law, the distinction is rigorously enforced by preventing an insurer from limiting its liability in the way that the CDS has done against members of the Class. In fact, the common law

rationale behind the insurer's right to subrogate against the insured's collateral recoveries is to prevent double recovery. The right to subrogate is not recognized where the effect is to leave the insured under-compensated. This point is expressed by the Ontario Court of Appeal in the following passage from *Bannon v McNeely*, above, at paras 48-49:

> 48 In Jang, supra, Lambert J.A. for the British Columbia Court of Appeal, concluded that:
>
> The theory underlying s. 24 of the Insurance (Motor Vehicle) Act is that there should not be double compensation for the same loss. But that does not mean that all of the benefits paid under Pt. 7 must be deducted one way or another from some item of damages, or from the total award of damages. *It is only where the benefit corresponds with the particular heading of claim for damages that the benefit is to be deducted, and then only from the award for that particular head of damages.* The requirement that the benefit match the claim is implicit in the legislative scheme as it was described in Baart v. Kumar, supra, and is explicit in s. 24(2), which matches "a claim for damages" with "benefits respecting the claim." I do not think that the claim there referred to is the whole claim; rather, it is a claim to a particular heading of loss matched by a particular heading of benefits. There was no match in this case between the benefits paid to Mrs. Jang for homemaker disability and the claim made by Mrs. Jang for general damages for pain, suffering and loss of amenities of life. [Emphasis added]
>
> 49 Notwithstanding the far-reaching proposition I have quoted from O'Donnell and most of the trial level decisions referred to above, my opinion with respect to the deductibility of no-fault benefits is more in accord with the approach taken by the British Columbia Court of Appeal in Jang, supra. I believe that, where possible, any no-fault benefit deducted from a tort award under s. 267(1)(a) must be deducted from a head of damage or type of loss akin to that for which the no-fault benefits were intended to compensate. In other words, and employing the comparison of Morden J. in Cox, supra, if at all possible, apples should be deducted from apples, and oranges from oranges. It follows further from this conclusion that if the no-fault deduction exceeds the amount awarded under the specific head of damages to which the no-fault benefits can be attributed, then there cannot be resort to another portion of the tort judgment for the balance. The particular plaintiff must account for no-fault benefits to which he or she is entitled, but where as in the case on appeal, the plaintiffs' case consisted of evidence directed

> towards a tort judgment for a net award, the no-fault benefits have been accounted for under appropriate damage headings.
>
> [Emphasis added]

[61] The Defendant's interpretation of Article 24(a)(iv) of the SISIP Policy is inconsistent with the above approach and results in the substantial under-compensation of disabled CF members following their release. The Defendant's interpretation of Article 24(a)(iv) also creates particular hardship for those who are the most in need of their *Pension Act* benefits because of disabling injuries.

[62] Viewed contextually and with the reasonable expectations of the parties in mind, what was the common intent behind the use of the word "income" to qualify the word "benefit"? Would anyone examining the SISIP Policy reasonably expect that a *Pension Act* disability benefit that bears no relationship to lost future income would, in the event of a disabling injury, be deducted from a CF member's SISIP income replacement benefit? Of perhaps greater significance is whether a CF member who suffers a catastrophic combat injury at a level approaching 100% disability would expect to effectively receive nothing more than 75% of his CF income and to be treated the same as a CF member with a disability of lesser functional significance arising outside of his military service.

[63] It seems to me that to ask these questions is to answer them. Giving effect to the SISIP offset of *Pension Act* disability benefits wholly deprives disabled veterans of an important financial award intended to compensate for disabling injuries suffered in the service of Canadians. The SISIP offset effectively defeats the Parliamentary intent that is inherent in the *Pension Act* which is to

provide modest financial solace to disabled CF members for their non-financial losses. The approach adopted by the Defendant does not lead to a fair or sensible commercial result and defeats the reasonable expectation of CF members. CF members looking at the SISIP Policy and, in particular Article 24, would expect that they were obtaining a meaningful and not illusory LTD benefit payable over and above their *Pension Act* disability entitlement for the loss of personal amenities. This view is enhanced by the fact that disabled CF members who continue with their active service are entitled to be paid and to keep their *Pension Act* disability benefits and by the fact that they lose their right of action against the Crown to pursue claims to damages (including income losses) if a *Pension Act* benefit is payable: see *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 9. The practical consequence of the claimed offset is to substantially reduce or to extinguish the LTD coverage promised to members of the Class by the SISIP Policy with particularly harsh effect on the most seriously disabled CF members who have been released from active service. That is an outcome that could not reasonably have been intended and I reject it unreservedly.

[64] Even if I am wrong in the interpretation I have placed on Article 24(a)(iv), the issue must be resolved against the Defendant on the basis of the principle of *contra proferentem*. Where a policy of insurance contains exceptions and limitations to coverage, it is incumbent on the drafter to use language that clearly expresses the extent and scope of those limiting provisions: see *Indemnity Insurance Co of North America v Excel Cleaning Service*, [1954] SCR 169 at para 35, 1954 CarswellOnt 132 (WL Can). Here, the offset Canada has applied represents a substantial limitation to a CF member's LTD coverage: a limitation that effectively deprives the most seriously disabled CF members from recovering much, if anything, for their income losses. Because the CDS did not make it "perfectly clear" that he could deduct a member's *Pension Act* disability pension from the

SISIP LTD benefit, any ambiguity stands to be resolved in favour of the Plaintiff and the other members of the Class: see *Canada Life v Donohue*, above, at para 14.

[65] Having determined that the Defendant's offset of *Pension Act* disability benefits from LTD income payable under the SISIP Policy is not contractually justified, it is unnecessary to consider the second issue raised by the parties. A further case-management meeting with counsel will be convened to discuss the implications of this decision for the continuation of the proceeding.

ORDER

THIS COURT ORDERS that the Defendant's offset of *Pension Act* disability benefits from the SISIP LTD income payable to the Plaintiff and to the other members of the Class is in breach of Article 24(a)(iv) of the SISIP policy.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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