Federal Court Cour fédérale

Date: 20191017

Docket: T-2073-18

Citation: 2019 FC 1303

Ottawa, Ontario, October 17, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

STEPHEN J. LAMARCHE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of a decision by an Advisory Officer at the Government of Canada Pension Centre of Public Services and Procurement Canada [the Pension Centre], adopting a particular interpretation of the *Reserve Force Pension Plan Regulations*, SOR/2007-32 [the Regulations], made under the *Canadian Forces Superannuation Act*, RSC,

1985, c C-17 [the Act], and a resulting position on the calculation of the Applicant's pension benefits entitlement [the Decision].

[2] As explained in more detail below, this application is dismissed, because I find the Decision to be reasonable.

II. **Background**

[3] The Canadian Armed Forces include a regular force and a reserve force. The regular force consists of officers and non-commissioned members who are enrolled for continuing, full-time military service. The reserve force consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service, when not on active service. The two forces benefit from different pension plans. The Regular Force Pension Plan, administered under Part I of the Act, has been in place since 1959, while the Reserve Force Pension Plan [the Pension Plan] was created by March 1, 2007 amendments, adding Part I.1 to the Act. Details surrounding the Pension Plan are found in the Regulations, including the calculation of contributions and benefits.

[4] As explained in the affidavit of Linda LeBlanc, a Senior Advisory Officer, Advisory Services, at the Pension Centre, filed by the Respondent in this application, the Pension Plan has been administered by the Pension Centre since July 4, 2016, having previously been administered by the Department of National Defence.

[5] The Applicant, Stephen J. Lamarche, is a retired reserve force member. Mr. Lamarche joined the Canadian Naval Reserve on July 4, 1973. On April 26, 2016, at the age of 60, he retired with over 42 years of service. On January 1, 2012, he attained the rank of Chief Petty Officer 1st Class, which he advises is the highest available rank for a non-commissioned reserve force member.

[6] Presumably because the Pension Plan did not exist prior to 2007, the Regulations permit what is colloquially called a "buyback" of years of service predating March 1, 2007. As will be canvassed with more precision in the Analysis portion of these Reasons, a participant can elect to treat past earnings as pensionable earnings under the Pension Plan and make a payment into the Pension Plan for that purpose. Mr. Lamarche made such an election on February 9, 2010, although the election was effective as of August 1, 2007. As a result of his election, he paid $41,011.09 into the Pension Plan.

[7] As will also be explained in greater detail below, benefits under the Pension Plan are calculated taking into account a maximum of 35 years of pensionable service by the participant. That point appears to be common ground between the parties for purposes of this application. However, the parties' positions diverge on which 35-year period should be taken into account when a participant like Mr. Lamarche has over 35 years of service.

[8] Records disclosed by the Respondent indicate that, on June 1, 2010, Mr. Lamarche spoke with a representative of what the Respondent describes as the Prior Pensionable Information

Centre to inquire about this point. The response he received was that "[i]n calculating pension we take the best years." The Respondent acknowledges that this advice was incorrect.

[9] Mr. Lamarche retired on April 26, 2016. In December 2016, he received a Pension Benefit Estimates Statement, which set out his gross pensionable earnings and calculated his monthly benefits prior to age 65 as $685.45 and monthly benefits as of age 65 as $514.09. However, on April 26, 2017, one year after his retirement, Mr. Lamarche received his first pension benefit deposit in the amount of $442.06, which was $243.39 less than the estimate he received in December 2016.

[10] Mr. Lamarche telephoned the Pension Centre in May 2017 to inquire about the discrepancy. He spoke with Samir Baaghil, whom the Respondent describes as a Pension Expert with the Pension Centre. Mr. Baaghil advised Mr. Lamarche that the December 2016 estimate was incorrect, as it mistakenly included earnings received by Mr. Lamarche after he completed 35 years of service. Mr. Baaghil advised Mr. Lamarche that only his first 35 years of earnings should be used in the pension calculation, such that Mr. Lamarche's final 7+ years of earnings were not included.

[11] Following further inquiries, in May 2017, Mr. Lamarche spoke with David Symes, Advisory Officer at the Pension Centre. Mr. Symes communicated the same position as had been expressed by Mr. Baaghil, that only a member's first 35 years of service were to be taken into account in calculating pension benefits under the Pension Plan. Although not particularly relevant to the issues in this application for judicial review, I note that, by letter dated May 17,

2017, Mr. Symes also provided Mr. Lamarche with information about the method to seek revocation of his buyback election. Mr. Lamarche did not pursue that possibility. However, he requested a written copy of Mr. Symes' decision as to the calculation of his benefits, which Mr. Symes subsequently sent to Mr. Lamarche in a letter dated June 5, 2017. That letter represents the Decision challenged by Mr. Lamarche in this application for judicial review.

[12] Among other points, Mr. Symes' letter relies on s 11(3) of the Regulations, which provides as follows:

Most recent earnings	**Gains visés par le choix**
(3) A past earnings election is for all of the past earnings. However, there shall be counted as pensionable earnings, starting with the most recent, only those that would result in a maximum of 35 years of pensionable service to the credit of the participant.	**(3)** Le choix visant les gains antérieurs porte sur la totalité de ces gains; toutefois, ne sont comptés comme gains ouvrant droit à pension, à commencer par les plus récents, que ceux qui permettent de porter le nombre d'années de service ouvrant droit à pension du participant à un maximum de trente-cinq.

[13] As interpreted by Mr. Symes, s 11(3) provides that, when an election is made to count past earnings as pensionable earnings, one counts those past earnings backwards from the date of election to a maximum of 35 years. Mr. Symes calculated that Mr. Lamarche had 32 years and 353 days of pensionable service to his credit from the beginning of his service in 1973 until March 1, 2007. Mr. Symes' calculation added another 157 days accrued between March 1 and August 1, 2007, the effective date of Mr. Lamarche's election. Under Mr. Symes' calculation, Mr. Lamarche continued to accrue pensionable service after the election date but only until he reached the 35-year maximum on March 12, 2009.

[14] This interpretation of s 11(3) of the Regulations and its effect upon the calculation of Mr. Lamarche's pension benefits represent the substantive issue to be considered by the Court in this judicial review.

[15] Concerned that his pension benefits were being improperly calculated, Mr. Lamarche made additional inquiries, including sending a letter dated July 7, 2017, to the Minister of National Defence [the Minister]. Mr. Lamarche received a response dated February 15, 2018, from Isabelle Daoust, Defence Corporate Secretary. Ms. Daoust stated that she was replying on the Minister's behalf.

[16] Ms. Daoust maintained the position, in reliance on s 11(3), that Mr. Lamarche's pension benefits were properly calculated based on his past earnings, starting with the most recent from the date of his election (to the maximum 35 years of pensionable service, which Mr. Lamarche's past earnings had not reached), plus his subsequent earnings until the 35 year maximum was reached.

[17] The interpretation of s 11(3) for which Mr. Lamarche advocates in this application for judicial review is that, when the section refers to "staring with the most recent", it means the most recent earnings as of the date of retirement, not the most recent earnings as of the date of the election. Were this interpretation adopted, it would effectively replace the first 7+ years of Mr. Lamarche's past earnings with the last 7+ years of earnings immediately before his retirement. During his last 7+ years, Mr. Lamarche rose two ranks and seven pay grades. He

estimates that calculating his pension benefits in accordance with his proposed interpretation would therefore increase those benefits by approximately $200.00 monthly.

III. **Issues**

[18] This application for judicial review raises two issues for determination by the Court:

A. What is the applicable standard of review?

B. Applying the applicable standard of review, is there a reviewable error by the Pension Centre in its interpretation and application of s 11(3) of the Regulations to calculate the Applicant's pension benefits?

IV. **Analysis**

A. *Preliminary Matter*

[19] I note from reviewing Mr. Lamarche's affidavit that he states he was advised in 2018 that he was entitled, under s 93(1) of the Act, to make a request to the Minister within 90 days to reconsider the decision with which he was dissatisfied. Mr. Lamarche's affidavit expresses his position that he had invoked this right by submitting his letter to the Minister on July 7, 2017, which was within 90 days of receiving Mr. Symes' Decision.

[20] While neither party raised this issue in this application, the identification of s 93(1) in the enabling legislation requires the Court to consider whether it should undertake this judicial review in the context of an available alternative remedy.

[21] In *Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 40-45, the Supreme Court of Canada identified that one of the discretionary grounds for refusing to undertake judicial review is where there is an adequate alternative remedy and described considerations relevant to the exercise of such discretion.

[22] In *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] at para 30, the Federal Court of Appeal explained that the normal rule is that parties can proceed to the court system only after all adequate remedial resources in the administrative process have been exhausted. Among the objectives underlying this rule are preventing fragmentation of the administrative process and piecemeal and premature court proceedings, as well as ensuring that the administrative decision-maker's findings being considered by the reviewing court are suffused with the benefit of expertise, legitimate policy judgments, and valuable regulatory experience (see *CB Powell* at para 32).

[23] In my view, taking into account the aforementioned principles, the appropriate exercise of my discretion is to decide this application for judicial review on its merits. I agree with the statement in Mr. Lamarche's affidavit (although it was not made with this particular issue in mind) that his July 7, 2017 letter to the Minister represented a timely invocation of his right under s 93(1) to request the Minister's reconsideration of the Decision. Ms. Daoust's February 15, 2018 letter expressly states that she is replying on behalf of the Minister and therefore represents a decision under s 93. Therefore, Mr. Lamarche exhausted the administrative remedial process before applying to this Court for judicial review.

[24] I appreciate that the decision that Mr. Lamarche challenges in this application is the Decision by Mr. Symes, not the subsequent decision conveyed by Ms. Daoust. However, on the facts of this particular case, it would be excessively formalistic to dismiss Mr. Lamarche's application and require him to challenge instead the decision conveyed in Ms. Daoust's letter. I see no material difference in the reasoning underlying the two decisions. As such, the record before the Court has the benefit of available administrative expertise, policy judgments, and regulatory experience to suffuse that reasoning, and there is no concern about fragmentation of the administrative process or premature recourse to the Court.

B. *What is the applicable standard of review?*

[25] The Respondent takes the position that, even to the extent that the Applicant's arguments raise a pure question of law surrounding the Decision's interpretation of the Regulations, such an issue is reviewable on a standard of reasonableness. In the Respondent's submission, this case involves a decision of a specialized tribunal, interpreting and applying its enabling statute, such that there is a presumption that the standard of reasonableness applies, and there is no question of law of central importance to the legal system outside the tribunal's expertise that would rebut this presumption (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30, 34 & 39).

[26] While Mr. Lamarche made no particular submissions on the identification of the standard of review, I do not understand him to have taken issue with the Respondent's position that the applicable standard is reasonableness. Regardless, I agree with the Respondent's submissions on this issue and apply that standard in my review of the Decision.

C. *Applying the applicable standard of review, is there a reviewable error by the Pension Centre in its interpretation and application of s 11(3) of the Regulations to calculate the Applicant's pension benefits?*

[27] Before turning to consideration of the reasonableness of the Decision, it is helpful to review some of the principal provisions of the Regulations relevant to the issue before the Court, including identifying the particular provisions that give rise to the dispute between the parties. The sections of the Regulations upon which I rely in in these Reasons are set out in full in Appendix "A" below.

[28] Starting with the provision that actually sets the amount of a member's pension, s 41 provides that the amount of an annuity to which a member may become entitled is an amount equal to 1.5% of the greater of the member's total pensionable earnings and the total updated pensionable earnings.

[29] Updated pensionable earnings are calculated under s 37(2), employing a formula by which a member's pensionable earnings for a particular calendar year in the past are updated from wage levels applicable in that calendar year to reflect more recent wage levels. Neither the calculation nor impact of updated pensionable earnings upon a member's annuity is particularly material to the issue of statutory interpretation presently before the Court.

[30] Turning therefore to pensionable earnings, s 10 provides as follows:

Pensionable earnings	**Gains ouvrant droit à pension**
10 (1) There shall be counted	**10 (1)** Sont comptés comme

as pensionable earnings

(a) the earnings in respect of which the participant is required to make the contribution to the Fund set out in paragraph 6(1)(a); and

(b) subject to subsections 11(3), 26(1) and 32(1), the earnings in respect of which the participant makes an election to count as pensionable earnings.

gains ouvrant droit à pension :

a) les gains à l'égard desquels le participant est tenu de verser à la caisse la cotisation prévue à l'alinéa 6(1)a);

b) sous réserve des paragraphes 11(3), 26(1) et 32(1), les gains qu'il choisit de compter ainsi.

Not pensionable earnings

(2) There shall not be counted as pensionable earnings those earnings in respect of which

(a) the participant has opted, under section 8, not to contribute;

(b) the member was entitled to a return of contributions, within the meaning of section 38;

(c) the payment of a transfer value has been effected in accordance with section 61; or

(d) an amount is charged to the Fund and credited to the Canadian Forces Pension Fund under section 83.

Gains n'ouvrant pas droit à pension

(2) Ne sont pas comptés comme gains ouvrant droit à pension les gains à l'égard desquels, selon le cas :

a) le participant a opté, en vertu de l'article 8, pour ne pas verser de cotisations;

b) le membre avait droit à un remboursement de cotisations au sens de l'article 38;

c) il y a eu versement d'une valeur de transfert conformément à l'article 61;

d) une somme est portée au débit de la caisse et au crédit de la Caisse de retraite des Forces canadiennes en vertu de l'article 83.

[31] The circumstances prescribed s 10(2), where earnings shall not be counted as pensionable earnings, do not apply to Mr. Lamarche and are not particularly relevant to the issue before the Court. Section 10(1)(a) and (b) set out the two types of earnings that count as pensionable earnings. The first type, under s 10(1)(a), is earnings in respect of which the participant is required to make the contribution to the pension fund set out in s 6(1)(a). The full text of s 6(1) states:

Rate of contributions	**Taux de cotisation**
6 (1) The contribution of a participant to the Fund shall be	**6 (1)** La cotisation du participant à la caisse est, selon le cas :
(a) the following percentage of the participant's earnings:	**a)** du pourcentage ci-après de ses gains :
(i) 4.3 per cent in respect of 2007,	**(i)** 4,3 % à l'égard de 2007,
(ii) 4.6 per cent in respect of 2008,	**(ii)** 4,6 % à l'égard de 2008,
(iii) 4.9 per cent in respect of 2009, and	**(iii)** 4,9 % à l'égard de 2009,
(iv) 5.2 per cent in respect of 2010 and each subsequent year; or	**(iv)** 5,2 % à l'égard de 2010 et des années suivantes;
(b) 1 per cent of the participant's earnings, if the participant has to their credit 35 years of pensionable service.	**b)** de 1 % de ses gains, s'il compte à son crédit trente-cinq années de service ouvrant droit à pension.

[32] Section 6(1)(a) prescribes different percentages of a participant's earnings which must be paid as a contribution to the pension fund for each year starting with 2007. However, ss 6(1)(a)

and (b) must be read together, because s 6(1)(b) imposes a limitation on 6(1)(a). Once a participant reaches 35 years of pensionable service, their required contribution reduces to 1% of the participant's earnings, regardless and instead of the percentages prescribed by s. 6(1)(a).

[33] Therefore, the first type of pensionable includes only those earnings on which contributions are paid under s 6(1)(a) for the first 35 years of pensionable service. The concept of pensionable service is addressed later in this analysis.

[34] The second type of earnings which qualifies as pensionable earnings, under s 10(1)(b), is earnings in respect of which a participant makes an election to count those earnings as pensionable earnings. This brings us to s 11, which applies to such elections:

Election	**Choix**
11 (1) A participant is entitled to make an election, once only in respect of each type of earnings in each period during which the participant is a participant, to count past earnings and transfer value earnings as pensionable earnings.	**11 (1)** Le participant a le droit de choisir, une fois seulement à l'égard de chaque type de gains pendant toute période durant laquelle il est participant, de compter les gains antérieurs et les gains pris en compte pour une valeur de transfert comme gains ouvrant droit à pension.
Past earnings	**Gains antérieurs**
(2) Past earnings are the earnings, up to the product calculated under paragraph 6(2)(a), in respect of	**(2)** Les gains antérieurs correspondent, à concurrence du produit visé à l'alinéa 6(2)a), aux gains afférents à l'ensemble des périodes suivantes :
(a) any period in the reserve force, including any	**a)** toute période dans la force de réserve, même

period before March 1, 2007, during which the participant was not a participant except any period

antérieure au 1er mars 2007, durant laquelle le participant n'était pas participant, à l'exception de celle :

(i) that the participant is counting as pensionable service for the purposes of, or in respect of which the payment of a transfer value or a commuted value has been effected under, *the Public Service Superannuation Act* or the *Royal Canadian Mounted Police Superannuation Act*, or

(i) qu'il compte comme service ouvrant droit à pension ou à l'égard de laquelle il y a eu versement d'une valeur de transfert ou d'une valeur escomptée aux termes de la *Loi sur la pension de la fonction publique* ou de la *Loi sur la pension de retraite de la Gendarmerie royale du Canada,*

(ii) in respect of which the payment of a transfer value has been effected in accordance with section 61;

(ii) à l'égard de laquelle il y a eu versement d'une valeur de transfert conformément à l'article 61;

(b) any period in the reserve force in respect of which the participant was entitled to a return of contributions within the meaning of section 38; and

b) toute période dans la force de réserve à l'égard de laquelle il a eu droit à un remboursement de cotisations au sens de l'article 38;

(c) any period in the regular force in respect of which the participant was entitled to a cash termination allowance or a return of contributions.

c) toute période dans la force régulière à l'égard de laquelle il a eu droit à une allocation de cessation en espèces ou à un remboursement de contributions.

Most recent earnings

Gains visés par le choix

(3) A past earnings election is for all of the past earnings. However, there shall be

(3) Le choix visant les gains antérieurs porte sur la totalité de ces gains; toutefois, ne sont

counted as pensionable earnings, starting with the most recent, only those that would result in a maximum of 35 years of pensionable service to the credit of the participant.	comptés comme gains ouvrant droit à pension, à commencer par les plus récents, que ceux qui permettent de porter le nombre d'années de service ouvrant droit à pension du participant à un maximum de trente-cinq.
Transfer value earnings	**Gains pris en compte pour une valeur de transfert**
(4) Transfer value earnings are those earnings in respect of which the payment of the last transfer value was effected in accordance with section 61.	**(4)** Les gains pris en compte pour une valeur de transfert correspondent aux gains à l'égard desquels il y a eu versement de la dernière valeur de transfert conformément à l'article 61.

[35] Section 11(1) provides for elections in relation to both transfer value earnings and past earnings, entitling a participant to count such earnings as pensionable earnings. Applied to Mr. Lamarche's circumstances, only past earnings are relevant.

[36] The effect of s 11(2)(a) is that (subject to a maximum prescribed by s 6(2)(a) which is not relevant to Mr. Lamarche) past earnings are the earnings in respect of any period in the reserve force, including any period before March 1, 2007, during which the participant was not a participant. That is, eliminating detail that is not relevant to the present analysis, past earnings represents pre-March 1, 2007 earnings.

[37] Section 10(1)(b) is subject to ss 11(3), 26(1) and 32(1). Section 32(1) relates to transfer value earnings and therefore is not relevant to this analysis. Section 26(1) provides a formula governing how past earnings are to be counted as pensionable earnings. Section 11(3) is the

subsection upon which Mr. Lamarche's arguments in this application focus. It provides that, when a past earnings election is made, it must be for *all* past earnings, a point which is not controversial between the parties. It also provides that there shall be counted as pensionable earnings, starting with the most recent, only those that would result in a maximum of 35 years of pensionable service to the credit of the participant. It is the meaning of the language "starting with the most recent" in s 11(3) upon which the parties' disagreement principally turns. I will return to that disagreement shortly.

[38] Like s 6(1), s 11(3) employs the concept of pensionable service. This takes us to s 34 of the Act:

Counting pensionable service	**Service ouvrant droit à pension**
34 (1) There shall be counted as pensionable service	**34 (1)** Est comptée comme service ouvrant droit à pension:
(a) any period during which a member is a participant;	**a)** toute période durant laquelle le membre est participant;
(b) despite subsection (2), any period during which the participant has been deemed to have earnings in respect of which the participant has opted not to pay contributions under section 8; and	**b)** malgré le paragraphe (2), toute période durant laquelle le participant est réputé avoir touché des gains à l'égard desquels il a opté, en vertu de l'article 8, pour ne pas verser de cotisations;
(c) any period that relates to earnings in respect of which an election was made under subsection 11(1).	**c)** toute période qui se rattache à des gains qui ont fait l'objet d'un choix aux termes du paragraphe 11(1).

Not counted as pensionable service	Service n'ouvrant pas droit à pension
(2) There shall not be counted as pensionable service any period that relates to earnings that are not counted as pensionable earnings.	**(2)** N'est pas comptée comme service ouvrant droit à pension toute période qui se rattache à des gains qui ne sont pas comptés comme gains ouvrant droit à pension.

[39] Disregarding s 34(1)(b), which is irrelevant to the present issue, the two periods counted as pensionable service are as follows:

A. any period during which a member is a participant (s 34(1)(a)); and

B. any period that relates to earnings in respect of which a s 11(1) election was made (s 34(1)(c)).

Therefore, in broad strokes, when a member makes a s 11(1) election, the effect of s 34(1)(a) and (c) is to count as pensionable service all the member's service both before and after March 1, 2007.

[40] However, s 34(2) provides this important qualification: "[t]here shall not be counted as pensionable service any period that relates to earnings that are not counted as pensionable earnings". This returns us to s 10(1) and the two different types of pensionable earnings identified in s 10(1)(a) and (b). Under s 10(1)(a), the member's earnings are treated as pensionable earnings, because the s 6(1)(a) contributions are paid in respect of such earnings, only up to the point that the participant has to their credit 35 years of pensionable service. Under s 10(1)(b), the reference to s 11(3) achieves the same effect, i.e. that past earnings are counted as

pensionable earnings only up to the point that the participant has 35 years of pensionable service to their credit.

[41] Returning to the principal disagreement between the parties, the key question is this: if a reserve force member such as Mr. Lamarche has over 35 years of service, which type of earnings is truncated to respect the 35-year maximum? Is it the s 10(1)(b) pre-March 1, 2007 earnings or the s 10(1)(a) post-March 1, 2007 earnings? Both parties take the position that the answer turns on the interpretation of the words "starting with the most recent" in s 11(3).

[42] The Respondent's position, as reflected in the Decision under review, is that these words should be read in reference to the date of the s 11(1) election. One counts pre-March 1, 2007 earnings as pensionable earnings backwards from the date of the election until reaching the maximum of 35 years of pensionable service. In a case like Mr. Lamarche's, the count includes the entirety of the member's past earnings because the 35-year maximum is yet reached. There remains room for earnings after March 1, 2007, to be counted as pensionable earnings. Earnings would continue being counted until the 35 year maximum is reached, after which the member's earnings no longer fall under s 6(1)(a) and therefore s 10(1)(a).

[43] Mr. Lamarche's position is that the words "starting with the most recent" in s 11(3) must be read in reference to the time of the member's retirement. Therefore, he says, the counting prescribed by s 11(3) stops only once the total of all post-March 1, 2007 earnings and the latest of the pre-March 1, 2007 earnings reach the 35-year maximum.

[44] There does not appear to be any disagreement between the parties on applicable principles of statutory interpretation. The words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, the object of the statute, and the intention of Parliament. Put otherwise, the interpretation of a statutory provision must be conducted according to a textual, contextual, and purposive analysis to find meaning that is harmonious with the statute as a whole (see *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10).

[45] Mr. Lamarche also relies on s 12 of the *Interpretation Act*, RSC 1985, c I-21, which provides that every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[46] Mr. Lamarche advances several arguments to support his position that the interpretation of the Regulations reflected in the Decision under review is not reasonable. Analysing the wording of s 11(3) itself, he notes that the section falls under the heading “Most recent earnings”. He submits that when the section refers to those earnings that are to be counted, starting with the most recent, this is a reference not to the most recent past earnings but rather to the most recent earnings of any type, including the earnings immediately before the date of retirement.

[47] I find this interpretation strained. Notwithstanding its heading, when the second sentence of s 11(3) states that there shall be counted “only those that would result in a maximum of 35 years of pensionable service”, the word “those” reads as a reference to something in the preceding wording of the section. In my view, the natural interpretation of the language is that

"those" refers to "past earnings" which is the subject of the first sentence of s 11(3). More importantly, recognizing that the Court is conducting a reasonableness analysis, such interpretation, which appears to be the interpretation at least implicit in the Decision, is within the range of acceptable outcomes.

[48] Mr. Lamarche also notes that the second sentence in s 11(3) commences with the word "However". He submits that this demonstrates that the second sentence is intended to contrast with or contradict something said in the first sentence. While I agree with that submission, I do not find it supports the position that the earnings to be counted under the second sentence must be other than past earnings. It is at least an equally available interpretation that the use of the word "However" relates to the fact that the first sentence provides that a past earnings election is for all the past earnings, while the second sentence provides that not all of the past earnings are necessarily to be counted as pensionable earnings. Again, Mr. Lamarche's argument does not support a conclusion that the interpretation of s 11(3) in the Decision is unreasonable.

[49] Mr. Lamarche also relies upon s 57 of the Regulations which provides as follows:

Pensionable earnings to pensioner's credit	**Gains ouvrant droit à pension au crédit du pensionné**
57 The calculation of the accrued pension benefits shall be based on the pensionable earnings to the pensioner's credit on the day after the day on which they cease to be a participant and for which they have paid or ought to have paid before the date of the option.	**57** Le calcul des prestations de pension acquises est fondé sur les gains ouvrant droit à pension qui figurent au crédit du pensionné le lendemain du jour où il cesse d'être participant et pour lesquels il a payé ou aurait dû payer, jusqu'à la veille de la date d'exercice du droit d'option.

[50] Mr. Lamarche observes that s 57 refers to pensionable earnings to the pensioner's credit on the day after the day they cease to be a participant. He argues that this supports his position that earnings up to the date of retirement should be accounted for in the calculation of pension benefits. I note that s 57 relates to the calculation of accrued pension benefits. These are used for calculating the transfer value, a payment that the pensioner may opt to receive in lieu of a deferred annuity, and are not directly applicable to the operation of s 11(3). Moreover, the reference to pensionable earnings to the pensioner's credit as of the date of retirement does not necessarily mean that such credit was accruing up to the date of retirement. I find that s 57 provides little support for Mr. Lamarche's position.

[51] In defence of the Decision's reasonableness, the Respondent refers to sections 26(2) and 35 of the Regulations. These provide, respectively, that past earnings and pensionable service shall come to the participant's credit on the date of the election. While the Decision does not expressly reference these sections, its reasoning does include the point that a member's past service is credited to the member as pensionable service once an election has been made.

[52] In my view, the effect of these sections provides strong support for the reasonableness of the Decision. If past earnings and pensionable service are to be credited on the date of the election, then the amounts of such earnings and service must be capable of quantification at that date. This supports the conclusion that s 11(3) directs the accounting of past earnings, starting with the most recent past earnings as of the date of the election, as the Respondent argues. If one were to adopt Mr. Lamarche's interpretation, and count earnings backwards from the date of retirement, the quantum of past earnings and pensionable service to take into account from the

pre-March 1, 2007 period would be unknown and thus impossible to calculate until the date of retirement. That is, such quantum would not be known at the date of election to inform the operation of sections 26(2) and 35.

[53] Mr. Lamarche further submits that there are four principal federal public service pension plans in Canada: the public service superannuation plan, the plan applicable to the RCMP, the Canadian Armed Forces regular force pension plan administered under Part I of the Act, and the Pension Plan for the reserve force that is the subject of this application. He submits that each of the other three plans clearly states that pension benefit calculations employ a formula based on the member's best five years of earnings. He argues this represents a precedent that supports his interpretation of the Pension Plan.

[54] While Mr. Lamarche has not supported his submission with statutory references for the legislation governing the other plans, for purposes of assessing his argument, I accept that his submission is accurate. However, this argument—based on legislation that is inapplicable to the Pension Plan—does not undermine the reasonableness of the Decision based on the interpretation of the particular Regulations that govern the Pension Plan.

[55] Similarly, Mr. Lamarche refers the Court to the *Pension Benefits Standards Act*, RSC 1985, c 32. He acknowledges that this statute applies to private pension plans falling within federal jurisdiction and therefore does not apply to the Pension Plan under consideration in this application. However, he refers the Court to s 16(5), which states as follows:

Employment after pensionable age	**Emploi après l'âge admissible**
16 (5) Where a pension plan provides generally that a member's period of employment or the member's salary during that period, or both, affect the member's pension benefit, it shall provide that, where a member continues employment after attaining pensionable age and is not receiving a pension benefit in respect of employment with the current employer, the member's period of employment after pensionable age or the member's salary during that period, or both, as the case may be, shall be taken into account in calculating the member's pension benefit, subject to any term of the pension plan	16 (5) Un régime de pension qui prévoit, d'une façon générale, que la période d'emploi d'un participant ou sa rémunération durant cette période, ou les deux, influent sur ses prestations de pension doit également prévoir l'application de ces facteurs relativement à la période postérieure à l'âge admissible, pour le calcul de ses prestations de pension, s'il continue à travailler après l'âge admissible sans recevoir de prestations de pension, relativement à l'emploi qu'il occupe auprès de l'employeur actuel, sous réserve des dispositions du régime fixant :
(a) fixing a maximum number of years of employment that can be taken into account under the plan for purposes of determining the pension benefit; or	**a)** le nombre maximal d'années d'emploi dont il peut être tenu compte pour la détermination des prestations de pension;
(b) fixing a maximum amount of the pension benefit.	**b)** le montant maximal des prestations de pension.

[56] Mr. Lamarche argues that this provision supports his interpretation of the Regulations, as it ensures that a Pension Plan member who continues to work after attaining pensionable age also continues to receive further credit towards his or her pension benefits.

[57] I am not certain that that this provision would assist Mr. Lamarche, even if it had some application to the Pension Plan, as the provision states that the principle upon which he relies is subject to any term of the pension plan fixing a maximum number of years of employment that can be taken into account under that plan for purposes of determining the pension benefit. More importantly, as with the terms of the legislation governing the three other federal public service pension plans upon which Mr. Lamarche has relied, this provision is inapplicable to the Pension Plan and therefore does not undermine the reasonableness of the Decision based on the interpretation of the particular Regulations that govern the Pension Plan.

V. **Conclusion**

[58] I have taken into account the principles of statutory interpretation upon which the parties rely, including the requirement to give the Regulations such fair, large, and liberal construction as best ensures the attainment of its objects. Applying those principles, I have considered the arguments advanced by Mr. Lamarche in support of his proposed interpretation. Despite his very capable advocacy, I find no basis to conclude that the Decision is outside the range of possible, acceptable outcomes, based on the applicable facts and law. The Decision is therefore reasonable, and this application for judicial review must be dismissed.

[59] While the Respondent's Memorandum of Fact and Law takes the position that this application should be dismissed with costs, the Respondent did not advance this position at the hearing of the application. These Regulations do not appear to have been the subject of previous judicial interpretation. I also note that the record of this application demonstrates that the Pension

Centre struggled in the past to provide Mr. Lamarche with accurate and consistent information surrounding the operation of the Pension Plan and the benefits he would derive therefrom.

[60] Taking these factors into account, notwithstanding that the Respondent prevailed in this application, I exercise my discretion not to award costs against Mr. Lamarche on this occasion.

JUDGMENT IN T-2073-18

THIS COURT'S JUDGMENT is that that this application for judicial review is dismissed, with no award of costs.

"Richard F. Southcott"
Judge

APPENDIX A

Rate of contributions

6 (1) The contribution of a participant to the Fund shall be

(a) the following percentage of the participant's earnings:

(i) 4.3 per cent in respect of 2007,

(ii) 4.6 per cent in respect of 2008,

(iii) 4.9 per cent in respect of 2009, and

(iv) 5.2 per cent in respect of 2010 and each subsequent year; or

(b) 1 per cent of the participant's earnings, if the participant has to their credit 35 years of pensionable service.

Taux de cotisation

6 (1) La cotisation du participant à la caisse est, selon le cas :

a) du pourcentage ci-après de ses gains :

(i) 4,3 % à l'égard de 2007,

(ii) 4,6 % à l'égard de 2008,

(iii) 4,9 % à l'égard de 2009,

(iv) 5,2 % à l'égard de 2010 et des années suivantes;

b) de 1 % de ses gains, s'il compte à son crédit trente-cinq années de service ouvrant droit à pension.

Pensionable earnings

10 (1) There shall be counted as pensionable earnings

(a) the earnings in respect of which the participant is required to make the contribution to the Fund set out in paragraph 6(1)(a); and

(b) subject to subsections 11(3), 26(1) and 32(1), the earnings in respect of which the participant makes an election to count as pensionable earnings.

Gains ouvrant droit à pension

10 (1) Sont comptés comme gains ouvrant droit à pension :

a) les gains à l'égard desquels le participant est tenu de verser à la caisse la cotisation prévue à l'alinéa 6(1)a);

b) sous réserve des paragraphes 11(3), 26(1) et 32(1), les gains qu'il choisit de compter ainsi.

Not pensionable earnings

Gains n'ouvrant pas droit à pension

Election

Choix

Date of crediting

26 (2) The past earnings shall come to the participant's credit on the date of the election.

Moment de l'imputation

26 (2) Ils sont portés à son crédit à la date du choix.

Counting pensionable service

34 (1) There shall be counted as pensionable service

(a) any period during which a member is a participant;

(b) despite subsection (2), any period during which the participant has been deemed to have earnings in respect of which the participant has opted not to pay contributions under section 8; and

(c) any period that relates to earnings in respect of which an election was made under subsection 11(1).

Service ouvrant droit à pension

34 (1) Est comptée comme service ouvrant droit à pension :

a) toute période durant laquelle le membre est participant;

b) malgré le paragraphe (2), toute période durant laquelle le participant est réputé avoir touché des gains à l'égard desquels il a opté, en vertu de l'article 8, pour ne pas verser de cotisations;

c) toute période qui se rattache à des gains qui ont fait l'objet d'un choix aux termes du paragraphe 11(1).

Not counted as pensionable service

(2) There shall not be counted as pensionable service any period that relates to earnings that are not counted as pensionable earnings.

Service n'ouvrant pas droit à pension

(2) N'est pas comptée comme service ouvrant droit à pension toute période qui se rattache à des gains qui ne sont pas comptés comme gains ouvrant droit à pension.

Date of crediting

35 The pensionable service shall come to the participant's credit on the date of the election.

Imputation du service ouvrant droit à pension

35 Le service ouvrant droit à pension est porté au crédit du participant à la date du choix.

Updated pensionable earnings

37 (2) The updated pensionable earnings, for a calendar year, are the lesser of

(a) an amount determined by the formula

$$\mathbf{A \times B}$$

where

A is the participant's pensionable earnings for that

Gains rajustés ouvrant droit à pension

37 (2) Les gains rajustés ouvrant droit à pension correspondent, pour une année civile, à la moins élevée des valeurs suivantes :

a) le résultat de la formule suivante:

$$\mathbf{A \times B}$$

où :

A représente les gains ouvrant droit à pension du participant de

year, and

B is the result of the following formula, rounded to the nearest fourth decimal point:

C/D

where

C is the average of the wage measures for five years consisting of the year the member most recently ceased to be a participant and the most recent years during which the member was a participant and, if necessary, the years preceding all of those years, and

D is the wage measure for that calendar year, and

(b) the product calculated under paragraph 6(2)(a) for the year the member most recently ceased to be a participant.

cette année,

B le résultat de la formule ci-après, arrondi au dix-millième près :

C/D

où :

C représente la moyenne du salaire de référence des cinq années comprenant l’année pendant laquelle le membre a cessé d’être participant la dernière fois et les années les plus récentes durant lesquelles il a été participant ainsi que, s’il le faut, les années qui les précèdent toutes,

D le salaire de référence de cette année civile;

b) le produit visé à l’alinéa 6(2)a) pour l’année pendant laquelle le membre a cessé d’être participant la dernière fois.

Amount of annuity

41 The amount of an annuity to which a member may become entitled is an amount equal to 1.5 per cent of the greater of the member’s total pensionable earnings and total updated pensionable earnings.

Montant de la pension

41 Le montant de la pension annuelle à laquelle le membre peut acquérir le droit correspond à 1,5 % du total de ses gains ouvrant droit à pension ou, s’il est plus élevé, du total de ses gains rajustés ouvrant droit à pension.

Pensionable earnings to pensioner’s credit

57 The calculation of the accrued pension benefits shall be based on the pensionable earnings to the pensioner’s credit on the day after the day on which they cease to be a participant and for which they have paid or ought to have paid before the date of the option.

Gains ouvrant droit à pension au crédit du pensionné

57 Le calcul des prestations de pension acquises est fondé sur les gains ouvrant droit à pension qui figurent au crédit du pensionné le lendemain du jour où il cesse d’être participant et pour lesquels il a payé ou aurait dû payer, jusqu’à la veille de la date d’exercice du droit d’option.

FEDERAL COURT

SOLICITORS OF RECORD

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