

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20161019**

**Docket: A-403-15**

**Citation: 2016 FCA 253**

**CORAM: BOIVIN J.A.  
RENNIE J.A.  
GLEASON J.A.**

**BETWEEN:**

**ROBERT JAMES THOMSON**

**Appellant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

Heard at Ottawa, Ontario, on May 10, 2016.

Judgment delivered at Ottawa, Ontario, on October 19, 2016.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**BOIVIN J.A.  
RENNIE J.A.**

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] The circumstances giving rise to this appeal are nothing short of tragic. The appellant was a civilian employee of the Department of National Defence. In October 1991, he was required in the course of his duties to fly onboard a Canadian Forces Hercules airplane, which crashed over the Northwest Territories. The appellant suffered severe injuries that left him a paraplegic and an

amputee as a result of the frostbite he incurred while waiting over 30 hours to be rescued. He also developed post-traumatic stress disorder following the plane crash.

[2] The appellant elected to receive compensation for his injuries under the *Flying Accidents Compensation Regulations*, C.R.C., c. 10 [*FAC Regulations*] as opposed to the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 [*GECA*]. He and his dependents were awarded pensions under the *FAC Regulations* based on the appellant's 100% incapacity. The appellant subsequently applied to the Department of Veterans Affairs for the additional benefits of a clothing allowance, an attendant allowance and an exceptional incapacity allowance. His applications were denied as the Department determined that there was no entitlement to these additional allowances under the *FAC Regulations*. Had the appellant been a member of the Canadian Armed Forces, these additional allowances would have been available to him under the *Pension Act*, R.S.C. 1985, c. P-6. Thus, the military personnel sitting alongside the appellant and flying the Hercules would have been entitled to these allowances if they had sustained injuries similar to those suffered by the appellant.

[3] The appellant appealed the denials, first to the Entitlement Review Panel of the Veterans Review and Appeal Board [the VRAB] and then to the Entitlement Appeal Panel of the VRAB [the Appeal Panel]. In all instances, his appeals were denied. He then sought judicial review of the August 2014 decision of the Appeal Panel denying his entitlement to an exceptional incapacity allowance. In that decision the Appeal Panel held that the relevant provisions in the *FAC Regulations* did not provide the appellant the entitlement he sought and rejected his assertion that his equality rights under section 15 of the *Canadian Charter of Rights and*

*Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the *Charter*] had been contravened through the differential treatment he had been afforded as compared to members of the military.

[4] In a decision dated August 18, 2015, the Federal Court (per Justice Denis Gascon) dismissed the appellant's judicial review application: *Thomson v. Canada (Attorney General)*, 2015 FC 985. The Federal Court held that there was no basis to intervene as the Appeal Panel's interpretation of the relevant provisions in the *FAC Regulations* and the *Pension Act* was reasonable. The Federal Court also applied the reasonableness standard to the review of the Appeal Panel's assessment of the appellant's *Charter* claim and found the assessment to be reasonable as it was in conformity with the applicable case law under section 15 of the *Charter*.

[5] The appellant has appealed the Federal Court's decision to this Court. As sympathetic as I am to the appellant's situation, I am of the view that his appeal must be dismissed because the portion of the Appeal Panel's decision interpreting the *FAC Regulations* and the *Pension Act* is reasonable and there has been no denial of the appellant's *Charter* rights.

I. The Relevant Statutory and Regulatory Provisions

[6] To put the issues in context, it is necessary to begin by reviewing the relevant statutory and regulatory provisions.

[7] The appellant's entitlements are governed by paragraph 3(1)(a) of the *FAC Regulations*, which provides in relevant part:

3(1) [...] where

(a) an employee dies or is injured as a direct result of a non-scheduled flight undertaken by him in the course of his duties,

[...]

compensation is payable for his death or injury in an amount equal to the pension that would have been awarded to or in respect of him in accordance with the rates set out in Schedule A or B to the *Pension Act*, whichever is applicable, as increased by virtue of Part V.1 of that Act, if his death or injury had arisen out of or was directly connected with military service in peace time.

3(1) [...] dans le cas

a) d'un employé qui décède ou est blessé en conséquence directe d'un vol non régulier entrepris par lui dans l'exercice de ses fonctions,

[...]

une indemnité est payable à l'égard de son décès ou de ses blessures, et le montant de l'indemnité est égal à la pension qui aurait été accordée à lui-même ou à son égard, conformément aux taux indiqués aux annexes A ou B de la *Loi sur les pensions*, selon le cas, augmentée en vertu de la Partie V.1 de ladite Loi, si son décès ou ses blessures avaient été causés au cours de son service militaire en temps de paix ou avaient été reliés directement à un tel service.

[8] This paragraph was identically worded at the time of the appellant's accident. Thus, the compensation the appellant is entitled to receive is an amount equal to the pension that would have been awarded to him in accordance with the rates set out in Schedules A or B to the *Pension Act*, as increased by Part V.1 of that Act, as though he had been a member of the military and the injury arose out of or was directly connected with military service during peace time. For the purposes of the appellant's case, the key question related to this definition is determining what is meant by a pension awarded in accordance with the rates set out in the applicable Schedule to the *Pension Act*.

[9] The *Pension Act* has not contained a Schedule A or B since 1985, when, as part of the statutory consolidation, these Schedules were re-named Schedules I and II. Schedule I

(formerly A) sets out the rates of pensions payable to an individual and his or her dependents in the event of the individual's disability, and Schedule II (formerly B) sets out the rate of pension payable to an individual's dependents in the event of the individual's death. Thus, the relevant Schedule in the appellant's case is Schedule I (formerly A). It sets out the amounts of pension payments to be made to an injured employee and his or her dependents, based on the severity of the injury.

[10] Section 3 of the *Pension Act* defines an "award", "pension" and "compensation" but not an "allowance". "Compensation" is defined specifically with reference to monies payable in respect of time spent in, evading or escaping from enemy captivity. The definition provides:

**3 compensation** means compensation payable under this Act on account of time spent by a former prisoner of war in enemy captivity or in evading or escaping from enemy captivity.

**3 indemnité** Indemnité payable en vertu de la présente loi à l'égard des périodes pendant lesquelles un prisonnier de guerre a été en captivité, a tenté d'échapper à la capture ou de fuir.

It has no application to the appellant's circumstances.

[11] The terms "award" and "pension", on the other hand, are defined more broadly in the *Pension Act*. These two terms are defined as follows:

**3 award** means a pension, compensation, an allowance or a bonus payable under this Act.

**3 compensation** Pension, indemnité, allocation ou boni payable en vertu de la présente loi.

**pension** means a pension payable under this Act on account of the death or disability of a member of the forces, including a final payment referred to in Schedule I.

**pension** Pension payable en vertu de la présente loi en raison du décès ou de l'invalidité d'un membre des forces, y compris un paiement définitif visé à l'annexe I.

[12] Part III of the *Pension Act* sets out the rules applicable to the payment of pensions and makes multiple references to Schedules I and II when defining the amount of the pensions payable. The basic pension entitlement for injuries incurred during peace time is set out in paragraph 21(2)(a) of the *Pension Act*, which provides in relevant part as follows:

21 (2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,

(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I [...]

21 (2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :

a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire [...]

[13] Part III of the *Pension Act* also contains provisions establishing entitlements to a clothing allowance and an attendance allowance in section 38, which provides in relevant part:

*38 Attendance allowance*

(1) A member of the forces who has been awarded a pension or compensation or both, is totally disabled, whether by reason of military service or not, and is in need of attendance shall, on application, in addition to the pension or compensation, or pension and compensation, be awarded an attendance allowance at a rate determined by the Minister in accordance with the minimum and

*38 Allocation pour soins*

(1) Il est accordé, sur demande, à un membre des forces à qui une pension, une indemnité ou les deux a été accordée, qui est atteint d'invalidité totale due à son service militaire ou non et qui requiert des soins une allocation pour soins au taux fixé par le ministre en conformité avec les minimums et maximums figurant à l'annexe III.

maximum rates set out in Schedule III.

[...]

*Wear and tear of clothing on account of amputation*

(4) A member of the forces who is in receipt of a pension on account of an amputation of the leg at or above a Symes' amputation is entitled to the allowance set out in Schedule III on account of wear and tear of clothing in respect of each such amputation.

[...]

*Wear and tear on account of other disabilities*

(7) A member of the forces who is in receipt of a pension for a disability other than a disability described in subsection (4) or (5) that causes wear and tear of clothing may be granted an allowance on account of wear and tear of clothing not exceeding the allowance set out in Schedule III.

[...]

*Usure des vêtements : amputation*

(4) Le membre des forces qui reçoit une pension par suite d'une amputation de la jambe au niveau du sillon de Symes ou à un niveau supérieur a droit, pour chacune des amputations, à l'allocation prévue à l'annexe III pour l'usure de ses vêtements.

[...]

*Usure des vêtements : invalidité autre*

(7) Le membre des forces qui reçoit une pension à cause d'une autre invalidité qui occasionne l'usure des vêtements peut toucher pour cette usure une allocation n'excédant pas celle qui est prévue à l'annexe III.

[14] At several points in Part III of the *Pension Act*, “allowances” are distinguished from “pensions” payable under the Act. In addition to the definition of an “award”, set out above, which refers to both pensions and allowances, section 31 describes the two forms of payments as being separate entitlements under the Act. The section provides:



*31 Disposition of pension or allowance*

(1) Any pension or allowance held in trust by the Minister and due to a deceased pensioner at the time of death does not form part of the estate of the deceased pensioner.

*Pensioner's last sickness and burial expenses*

(2) The Minister may direct the payment of any pension or allowance referred to in subsection (1) either to the pensioner's estate or to the survivor or child or children of the pensioner, or to the survivor and child or children, or may direct that it be paid in whole or in part to any person who has maintained, or been maintained by, the pensioner or toward the expenses of the pensioner's last sickness and burial.

*Non-payment of pension or allowance*

(3) If no order for the payment of a pension or an allowance referred to in subsection (1) is made by the Minister, the pension or allowance shall not be paid.

*31 Emploi de la pension ou allocation impayée*

(1) Toute pension ou allocation détenue en fiducie par le ministre au moment du décès du pensionné ne fait pas partie de la succession de celui-ci.

*Paiement des frais de maladie et de funérailles*

(2) Le ministre peut toutefois en ordonner le paiement soit à la succession du pensionné, soit à son survivant ou à son ou ses enfants, soit à son survivant et à son ou ses enfants, ou encore en tout ou en partie, à une personne qui a eu le pensionné à sa charge ou qui a été à la charge du pensionné, ou au titre des frais de dernière maladie et de funérailles.

*Non-paiement*

(3) Si le ministre n'émet aucun ordre pour le paiement de la pension ou allocation visée au paragraphe (1), cette pension ou allocation n'est pas payée.

[15] Similarly, section 41 makes it clear that “awards” made under the Act include more than pensions; the relevant portions of the section state:

*Administration of awards*

41 (1) Where it appears to the Minister that a person to whom an award is payable is

*Administration de la pension*

41 (1) Le ministre peut ordonner que le ministre ou la personne ou l'organisme qu'il choisit administre la compensation payable à l'intéressé au profit de celui-ci ou de la personne à l'égard de laquelle une pension

supplémentaire est payable conformément à l'annexe I, ou au profit des deux à la fois, s'il lui paraît évident que l'intéressé est incapable de gérer ses propres affaires, en raison de son infirmité, de sa maladie ou pour toute autre cause ou ne subvient pas aux besoins de la personne.

(a) by reason of infirmity, illness or other cause, incapable of managing their own affairs, or

(b) not maintaining an individual in respect of whom additional pension is payable in accordance with Schedule I,

the Minister may direct that the award payable to that person be administered for the benefit of that person or any individual in respect of whom additional pension is payable in accordance with Schedule I, or both, by the Department or a person or agency selected by the Minister.

[16] Exceptional allowances are governed by Part IV of the *Pension Act*. Of particular relevance to this appeal is section 72, which provides in relevant part as follows:

*72 Amount of allowance*

(1) In addition to any other allowance, pension or compensation awarded under this Act, a member of the forces shall be awarded an exceptional incapacity allowance at a rate determined by the Minister in accordance with the minimum and maximum rates set out in Schedule III if the member of the forces

(a) is in receipt of

*72 Montant de l'allocation*

(1) A droit à une allocation d'incapacité exceptionnelle au taux fixé par le ministre en conformité avec les minimums et maximums de l'annexe III, en plus de toute autre allocation, pension ou indemnité accordée en vertu de la présente loi, le membre des forces qui, à la fois :

a) reçoit :

(i) a pension in the amount set out in Class 1 of Schedule I, or

(i) soit la pension prévue à la catégorie 1 de l'annexe I,

(ii) a pension in a lesser amount than the amount set out in Class 1 of Schedule I as well as compensation paid under this Act or a disability award paid under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, or both, if the aggregate of the following percentages is equal to or greater than 98%:

(ii) soit, d'une part, une pension moindre et, d'autre part, l'indemnité prévue par la présente loi, l'indemnité d'invalidité prévue par la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes* ou ces deux indemnités, lorsque la somme des pourcentages ci-après est au moins égale à quatre-vingt-dix-huit pour cent :

(A) the extent of the disability in respect of which the pension is paid,

(A) le degré d'invalidité pour lequel la pension lui est versée,

(B) the percentage of basic pension at which basic compensation is paid, and

(B) le pourcentage de la pension de base auquel l'indemnité lui est versée,

(C) the extent of the disability in respect of which the disability award is paid; and

(C) le degré d'invalidité pour lequel l'indemnité d'invalidité lui est versée;

(b) is suffering an exceptional incapacity that is a consequence of or caused in whole or in part by the disability for which the member is receiving a pension or a disability award under that Act.

b) souffre d'une incapacité exceptionnelle qui est la conséquence de l'invalidité pour laquelle il reçoit la pension ou l'indemnité d'invalidité prévue par cette loi ou qui a été totalement ou partiellement causée par celle-ci.

[...]

[...]

*Determination of exceptional incapacity*

*Détermination d'incapacité exceptionnelle*

(2) Without restricting the generality of paragraph (1)(b), in determining whether the incapacity suffered by a member of the forces is exceptional, account shall be taken of the extent to which the disability for which the member is receiving a pension or a disability award under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*

(2) Sans que soit limitée la portée générale de l'alinéa (1)b), pour déterminer si l'incapacité dont est frappé un membre des forces est exceptionnelle, il est tenu compte du degré auquel l'invalidité pour lequel le membre reçoit soit une pension, soit l'indemnité d'invalidité prévue par la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et*

has left the member in a helpless condition or in continuing pain and discomfort, has resulted in loss of enjoyment of life or has shortened the member's life expectancy.

*vétérans des Forces canadiennes* l'a laissé dans un état d'impotence ou dans un état de souffrance et de malaise continus, a entraîné la perte de jouissance de la vie ou a réduit son espérance de vie.

*Treatment, etc., to be considered in determining allowance*

*Traitement, etc. devant être pris en considération en déterminant l'allocation*

(3) In determining the amount of the allowance that is to be awarded to a member of the forces who is suffering an exceptional incapacity, account may be taken of the degree to which the incapacity is lessened by treatment or the use of prostheses.

(3) Pour déterminer le montant de l'allocation qui doit être accordée à un membre des forces qui souffre d'une incapacité exceptionnelle, il peut être tenu compte de la mesure où un traitement ou l'usage de prothèse diminue l'incapacité.

[...]

[...]

[17] Schedule III to the *Pension Act* sets out the minimum and maximum amounts payable as an exceptional incapacity allowance, the amounts payable as a clothing allowance and the minimum and maximum amounts payable as attendance allowances. Thus, the amounts claimed by the appellant are set out in Schedule III and not Schedule I or II of the *Pension Act*.

[18] Finally, Part V.I of the *Pension Act* contains indexing provisions, applicable to all awards made under the Act.

## II. The Applicable Standard of Review

[19] In this appeal, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standard of review and whether it applied that

standard correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559.

[20] Contrary to what the appellant asserts, the reasonableness standard applies to a review of the portions of the Appeal Panel's decision that interpreted and applied the *FAC Regulations* and the *Pension Act*. Both are closely connected to the Appeal Panel's functions, and the Supreme Court of Canada and this Court have established that in such circumstances the reasonableness standard should presumptively apply: *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25 at para. 11, 368 D.L.R. (4<sup>th</sup>) 667; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras. 21-22, [2013] 3 S.C.R. 895; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34, [2011] 3 S.C.R. 654; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54, [2008] 1 S.C.R. 190; *Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200 at para. 79 (CanLII); and *Kandola v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 85 at paras. 40-42, 372 D.L.R. (4<sup>th</sup>) 342.

[21] In my view, there is no basis for rebutting the presumptive application of the reasonableness standard in this case. The authorities from the Federal Court cited by the appellant have been overtaken by the case law of the Supreme Court of Canada and of this Court.

[22] The decision of this Court in *Cole v. Canada (Attorney General)*, 2015 FCA 119, 386 D.L.R. (4<sup>th</sup>) 549 [*Cole*], also cited by the appellant, is distinguishable; the selection of the correctness standard in that case for review of a VRAB decision turned in large part on the

determination that the point in issue was one of general importance outside the expertise of the VRAB. On that basis, the presumptive application of the reasonableness standard was rebutted. The issue in *Cole* concerned the applicable standard of causation; the Court concluded that this determination was a question of general importance as it extends beyond the scope of the *Pension Act* and arises in many other areas of law, including insurance, torts and workers' compensation. The same cannot be said for the issue in the present case, which involves an interpretation of the detailed and specialized entitlement provisions in the *FAC Regulations* and the *Pension Act* that apply to those similarly-situated to the appellant, who could only ever be very few in number.

[23] I therefore conclude that the reasonableness standard applies to review of the portions of the Appeal Panel's decision that interpreted and applied the *FAC Regulations* and the *Pension Act*. However, nothing turns on the selection of this standard as, for the reasons noted below, in addition to being a reasonable interpretation, the Appeal Panel's interpretation of the provisions in issue is also correct.

[24] As for the portions of the Appeal Panel's decision disposing of the appellant's *Charter* claim, I agree with the appellant that the correctness standard applies to the review of this portion of the decision as the case law recognizes that, with the exception of discretionary decisions, the correctness standard applies to reviews of tribunals' adjudications of constitutional issues, including *Charter* claims: *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 35-38, [2012] 1 S.C.R. 395; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at paras. 3-4,

[2015] 1 S.C.R. 613; and *Kamel v. Canada (Attorney General)*, 2013 FCA 103 at para. 17, 448 N.R. 217.

[25] Here the decision is not a discretionary one and, therefore, the correctness standard applies to the review of the portion of the Appeal Panel's decision dealing with the *Charter* claim.

### III. Analysis

[26] Turning, first, to the Appeal Panel's interpretation of the *FAC Regulations* and the *Pension Act*, the appellant advances many of the same arguments before us that he made to the Federal Court in support of his contention that the Appeal Panel's interpretation should be set aside.

[27] He first asserts that the Appeal Panel erred in applying the plain meaning rule to interpret "allowance" and "pension"; he argues that, as the *FAC Regulations* do not define "allowance" or "pension", no plain meaning is possible and accordingly the requested allowance may fall within the scope of "pension" for purposes of the *FAC Regulations*.

[28] He secondly submits that the modern approach to statutory interpretation, as endorsed by the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4<sup>th</sup>) 193, requires that the relevant statutory and regulatory provisions be read in their grammatical and ordinary sense in harmony with the legislative scheme, the object of the legislation and regulations and the intention of Parliament. When this approach is applied, the appellant submits

that the exceptional incapacity allowance should be found to come within the scope of the “pension” or “compensation” to which he is entitled because the provisions, as benefits-conferring regulations, are to be interpreted broadly in favour of an applicant. In addition, the appellant argues that the purpose and history of the relevant provisions indicate a desire to treat civilian victims of accidents on military flights in the same fashion as members of the military who are injured during peace time.

[29] In support of this interpretation the appellant points to a 1974 briefing memo to the Treasury Board, a committee of cabinet and the maker of the *FAC Regulations*. The memo was written in connection with a proposal to extend the *FAC Regulations* to certain civilian aircraft cabin inspectors. In making the recommendation, the memo noted that the *FAC Regulations* provide “compensation [...] equal to that which would be payable under the *Pension Act* if [an entitled individual’s] death or injury were compensable under that Act”. The appellant also points to the fact that Schedule III was added to the *Pension Act* only in 1990 while subsections 38(1), 38(7) and 72(1) were already in the legislation, all to suggest that this supports his claim that the entitlements created by these subsections come within the scope of the “pension” or “compensation” to which he is entitled under paragraph 3(1)(a) of the *FAC Regulations*.

[30] The appellant further submits that the narrow interpretation adopted by the Appeal Panel and endorsed by the Federal Court makes no sense as there is no principled basis to disentitle him from the additional benefits he seeks, especially when the same benefits are extended to many other non-military groups. He points in this regard to members of the merchant marine



(referring to section 21 of the *Pension Act* as well as the inclusive definition of “member of the forces” provided in section 3 of the statute), civilian prisoners of war (referring to Part III.1 of the *Pension Act*) and others afforded benefits under the *Civilian War-related Benefits Act*, R.S.C. 1985, c. C-31.

[31] Finally, the appellant argues that the substantial body of case law under *GECA*, which has been interpreted as affording applicants many of the benefits available under provincial workers’ compensation legislation, is applicable by analogy and supports the relief he seeks.

[32] Despite the appellant’s able arguments, I cannot agree with the interpretation he advances. Simply put, the only possible interpretation of paragraph 3(1)(a) of the *FAC Regulations* is the one adopted by the Appeal Panel, namely, that the appellant is only entitled to a “pension” in accordance with Schedule I or II of the *Pension Act* and that the additional entitlements he seeks are not “pensions” but, rather “allowances”, which are not “pensions” under the *Pension Act*. The above-cited provisions from the *Pension Act* make it clear that pensions and allowances are two different sorts of entitlements under that Act. And, the *FAC Regulations* define the appellant’s entitlement as being equal to the pension that would have been payable to him under Schedule I or II of the *Pension Act*. There is no purposive interpretation that would allow ignoring these clear words in favour of finding that a pension includes the allowances set out in Schedule III of the *Pension Act*.

[33] Contrary to the appellant’s suggestion, the fact that the *FAC Regulations* were not amended to update the naming of Schedules A and B to I and II or the fact that Schedule III was

only added in the 1990 amendments to the *Pension Act* do not give rise to any ambiguity that might assist the appellant. A review of the relevant provisions going back to 1972, when the *FAC Regulations* in their current form were adopted, shows that the entitlement to compensation for someone like the appellant has always been limited to a pension and never included the additional allowances. Moreover, for more than a year before the appellant's accident, these additional allowances were listed in Schedule III of the *Pension Act* and therefore clearly outside the scope of the compensation provided under paragraph 3(1)(a) of the *FAC Regulations*. Thus, contrary to what the appellant asserts, a review of the history of the relevant provisions supports the interpretation of the Appeal Board. (The relevant current and predecessor provisions are listed in the Appendix to these Reasons.)

[34] Finally, the wording in *GECA* is so different from the provisions at issue here that decisions under that Act can have no bearing on the interpretation of the *FAC Regulations* and the *Pension Act*. *GECA* provides in subsection 4(2) that employees covered by the Act are entitled to “compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed”. However, “compensation” is defined broadly in *GECA*:

2 **compensation** includes medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen.

2 **indemnité** Sont compris dans l'indemnité les frais médicaux et hospitaliers ainsi que les prestations, dépenses ou allocations prévues, en matière d'indemnisation des victimes d'accidents du travail et des personnes à charge de celles qui sont décédées, par la législation de la province où l'agent de l'État exerce habituellement ses fonctions.

[35] In light of this broad definition, it is unsurprising that allowances like those sought by the appellant, which now may be available under the provincial laws in at least some jurisdictions, might be available to those covered by *GECA*. However, in light of the different wording used in *GECA*, the case law supporting such a conclusion is inapplicable to the interpretation of paragraph 3(1)(a) of the *FAC Regulations*.

[36] It thus follows that the Appeal Board's interpretation of the *FAC Regulations* and the *Pension Act* and its conclusion that the appellant is entitled to only a pension, but not the additional allowances, is both reasonable and correct.

[37] Turning now to the appellant's *Charter* argument, he submits that he has been differentially treated based on the severity of his disability. He suggests first that civilians with lesser disabilities incurred while flying on non-scheduled flights receive equivalent compensation to members of the military as all receive only pensions, which are identical. Next, he claims that, given his greater degree of disability, his entitlements are different as he receives less than the amounts afforded to similarly-situated members of the military. He thus claims he has been differentially treated in an impermissible manner based on his disability and that this differential treatment violates his equality rights under section 15 of the *Charter*.

[38] With respect, the appellant has miscast the comparison and the basis for the differentiation; he is treated differently not because of the nature of his disability but rather because of the nature of his employment. He is not entitled to receive the additional allowances he seeks because he is not a member of the military or other group to which such entitlements

have been extended. In short, the appellant's non-entitlement is a function of his former employment status, not his disability.

[39] Differential treatment based on the different nature of an individual's employment does not constitute discrimination on the basis of an analogous ground under section 15 of the *Charter: Reference Re: Workers' Compensation Act 1983 (Newfoundland)*, [1989] 1 S.C.R. 922 (CanLII); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at paras. 43-44, 176 D.L.R. (4<sup>th</sup>) 513 [*Delisle*]; and *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 165, [2007] 2 S.C.R. 391 [*BC Health Services*].

[40] In *Delisle*, officers of the Royal Canadian Mounted Police argued that their exclusion from a public service collective bargaining scheme violated their rights under section 15. The Supreme Court of Canada determined that the officers were excluded on the basis of their employment status, and that differential treatment based on such status did not reflect a "type of decision making that [...] leads to discrimination and denial of substantive equality". The Court determined that employment status was not a trait that met the threshold of inherent immutability required to trigger protection under section 15 (*Delisle* at para. 44).

[41] In a similar decision regarding health care workers in British Columbia, the Supreme Court of Canada further explained why distinctions based on employment status do not attract section 15 protection. The Court held that the differential effects of the challenged legislation on different workers related "essentially to the type of work they do, and not to the persons they

are”. In other words, the differential treatment at issue stemmed not from stereotypes about the people holding different jobs, but instead from differences in the jobs themselves (*BC Health Services* at para. 165).

[42] In the present case, the distinction at issue flows solely from the difference in employment status between military personnel and civilian employees. Thus, there has been no violation of the appellant’s *Charter* rights.

#### IV. Conclusion

[43] In light of the foregoing, it follows that I believe that this appeal must be dismissed. Appropriately, the respondent has not sought costs, so I would not make a costs award.

[44] One final point bears mention and repeats something the Federal Court also noted. I agree with the appellant that there does not seem to be any principled reason to justify why he has been treated differently from so many others who are entitled to the benefits he seeks. Indeed, it is probable that the failure to amend the *FAC Regulations* to extend entitlement to allowances is simply an oversight. If that is the case, it is to be hoped that any pleas the appellant might make to have the *FAC Regulations* amended to afford him the benefits he seeks will be favourably received by the Governor in Council.

“Mary J.L. Gleason”

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J.A.

“I agree.  
Richard Boivin, J.A.”

“I agree.  
Donald J. Rennie, J.A.”

## Appendix

This appendix provides a list of amendments to provisions referred to in these Reasons for Judgment between 1972 – when the *FAC Regulations* were enacted in their present form – and the present.

### ***Flying Accidents Compensation Regulations, C.R.C., c. 10***

Between 1972 and the present, there have been no amendments to paragraph 3(1)(a). Other parts of section 3 were amended by:

*Consolidated Regulations of Canada, 1978, Special Issue (Vol. 2), SOR 78-778, s. 1*

### ***Pension Act, R.S.C. 1970, c. P-7 (currently: Pension Act, R.S.C. 1985, c. P-6)***

Between 1972 and the present,

Section 3 (section 2 until R.S.C. 1985) was amended by:

*An Act to amend the Pension Act, R.S.C. 1985, c. 16 (1<sup>st</sup> Supp.), s. 1*

*An Act to establish the Veterans Appeal Board and to amend other Acts in relation thereto, R.S.C. 1985, c. 20 (3<sup>rd</sup> Supp.), s. 21*

*An Act to amend the Pension Act, the War Veterans Allowance Act, to repeal the Compensation for Former Prisoners of War Act and to amend another Act in relation thereto, R.S.C. 1985, c. 37 (3<sup>rd</sup> Supp.), s. 2*

*An Act to amend the Statute Law in relation to War Veterans, R.S.C. 1990, c. 43, s. 3*

*An Act to establish the Veterans Review and Appeal Board, to amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act, R.S.C. 1995, c. 18, s. 46*

*An Act to amend the War Veterans Allowance Act, the Pension Act, the Merchant Navy Veteran and Civilian War-related Benefits Act, the Department of Veterans Affairs Act, the Veterans Review and Appeal Board Act and the Halifax Relief Commission Pension Continuation Act and to amend certain other Acts in consequence thereof, R.S.C. 1999, c. 10, s. 4*

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations, R.S.C. 2000, c. 12, ss. 211, 236(a), 238(a)*

*An Act to Amend the Statute Law in relation to Veterans' Benefits*, R.S.C. 2000, c. 34, ss. 20, 43(a), 94(i)

*An Act to amend the statute law in respect of benefits for veterans and the children of deceased veterans*, R.S.C. 2003, c. 27, s. 7

*An Act to provide services, assistance and compensation to or in respect of Canadian Forces members and veterans and make amendments to certain Acts*, R.S.C. 2005, c. 21, s. 105

Section 21 (section 12 until R.S.C. 1985) was amended by:

*An Act to amend certain statutes to provide equality of status thereunder for male and female persons*, R.S.C. 1974-75-76, c. 66, s. 12

*An Act to Amend the Pension Act, the Compensation for Former Prisoners of War Act, the War Veterans Allowance Act and the Civilian War Pensions and Allowances Act*, R.S.C. 1980-81-82-83, c. 19, s. 2

*An Act to amend the Pension Act*, R.S.C. 1985, c. 16 (1<sup>st</sup> Supp.), s. 2

*An Act to establish the Veterans Appeal Board and to amend other Acts in relation thereto*, R.S.C. 1985, c. 20 (3<sup>rd</sup> Supp.), s. 28

*An Act to amend the Statute Law in relation to War Veterans*, R.S.C. 1990, c. 43, s. 8

*An Act to establish the Veterans Review and Appeal Board, to Amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act*, R.S.C. 1995, c. 18, ss. 75(a), 76(f)

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations*, R.S.C. 2000, c. 12, ss. 212, 236(b), (c)

*An Act to Amend the Statute Law in relation to Veterans' Benefits*, R.S.C. 2000, c. 34, ss. 21, 43(a), (d), (e), (f)

*An Act to amend the Pension Act and the Royal Canadian Mounted Police Superannuation Act*, R.S.C. 2003, c. 12, s. 2

Section 31 (contained within section 23 until R.S.C. 1985) was amended by:

*An Act to Amend the Pension Act, the Compensation for Former Prisoners of War Act, the War Veterans Allowance Act and the Civilian War Pensions and Allowances Act, R.S.C. 1980-81-82-83, c. 19, ss. 8, 9*

*An Act to correct certain anomalies, inconsistencies, archaisms and to deal with other matters of a non-controversial and uncomplicated nature in the Statutes of Canada, R.S.C. 1984, c. 40, s. 79(2)*

*An Act to amend the Children of War Dead (Education Assistance) Act, the Compensation for Former Prisoners of War Act, the Pension Act and the War Veterans Allowances Act, R.S.C. 1985, c. 12 (2<sup>nd</sup> Supp.), s. 6*

*An Act to amend the Statute Law in relation to War Veterans, R.S.C. 1990, c. 43, s. 10*

*An Act to establish the Veterans Review and Appeal Board, to Amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act, R.S.C. 1995, c. 18, s. 52*

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations, R.S.C. 2000, c. 12, s. 238(b)*

Section 38 (section 28 until R.S.C. 1985) was amended by:

*An Act to amend the Pension Act, R.S.C. 1985, c. 16 (1<sup>st</sup> Supp.), s. 6*

*An Act to amend the Statute Law in relation to War Veterans, R.S.C. 1990, c. 43, s. 15*

*An Act to establish the Veterans Review and Appeal Board, to Amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act, R.S.C. 1995, c. 18, ss. 56, 75(1)*

*An Act to amend the War Veterans Allowance Act, the Pension Act, the Merchant Navy Veteran and Civilian War-related Benefits Act, the Department of Veterans Affairs Act, the Veterans Review and Appeal Board Act and the Halifax Relief Commission Pension Continuation Act and to amend certain other Acts in consequence thereof, R.S.C. 1999, c. 10, s. 6*

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations, R.S.C. 2000, c. 12, s. 215*



Section 41 (section 17 until R.S.C. 1985) was amended by:

*An Act to amend the Statute Law in relation to War Veterans*, R.S.C. 1990, c. 43, s. 16

*An Act to establish the Veterans Review and Appeal Board, to Amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act*, R.S.C. 1995, c. 18, ss. 59, 75(j), 115(2)

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations*, R.S.C. 2000, c. 12, s. 216

*An Act to Amend the Statute Law in relation to Veterans' Benefits*, R.S.C. 2000, c. 34, s. 28

Section 72 (section 57 until R.S.C. 1985) was amended by:

*An Act to amend the Pension Act*, R.S.C. 1970, c. 22 (2<sup>nd</sup> Supp.), s. 28

*An Act to amend the Pension Act*, R.S.C. 1985, c. 16 (1<sup>st</sup> Supp.), s. 9

*An Act to amend the Statute Law in relation to War Veterans*, R.S.C. 1990, c. 43, s. 23

*An Act to establish the Veterans Review and Appeal Board, to Amend the Pension Act, to make consequential amendments to other Acts and to repeal the Veterans Appeal Board Act*, R.S.C. 1995, c. 18, ss. 75(2.1), (2.2)

*An Act to amend the War Veterans Allowance Act, the Pension Act, the Merchant Navy Veteran and Civilian War-related Benefits Act, the Department of Veterans Affairs Act, the Veterans Review and Appeal Board Act and the Halifax Relief Commission Pension Continuation Act and to amend certain other Acts in consequence thereof*, R.S.C. 1999, c. 10, s. 16

*An Act to Modernize the Statutes of Canada in relation to Benefits and Obligations*, R.S.C. 2000, c. 12, s. 229

*An Act to Amend the Canadian Forces Members and Veterans Re-establishment and Compensation Act and the Pension Act*, R.S.C. 2011, c. 12, s. 20

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-403-15

**STYLE OF CAUSE:** ROBERT JAMES THOMSON v.  
CANADA (ATTORNEY  
GENERAL)

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 10, 2016

**REASONS FOR JUDGMENT BY:** GLEASON J.A.

**CONCURRED IN BY:** BOIVIN J.A.  
RENNIE J.A.

**DATED:** OCTOBER 19, 2016

**APPEARANCES:**

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