

T-511-96

BETWEEN:

ALEXANDER EWING

Applicant

- and -

**VETERANS REVIEW and APPEAL BOARD CANADA
and THE ATTORNEY GENERAL OF CANADA**

Respondents.

REASONS FOR ORDER

GIBSON J.:

These reasons arise out of an application for judicial review of a decision of the Veterans Review and Appeal Board (the "Board") in which the Board determined the applicant not to be entitled to be awarded a pension under subsection 21(2) of the *Pension Act*,¹ because the disability suffered by him did not arise out of and was not directly connected with military service in peace time. The Board's decision is dated the 27th of October, 1995 and was communicated to the applicant under cover of a letter dated the 2nd of February, 1996.

The applicant served as a military policeman with the Royal Canadian Air Force from the 1st of March, 1960 until the 7th of June, 1966. During the month of November, 1965, he was serving in West Germany. In addition to his regular duties with the military police, the applicant was involved with public relations activities in relation to the

¹R.S. c. P-7, as amended

Canadian Air Force hockey team. His public relations function was facilitated by the fact that he spoke German. This may have been a factor taken into account when his "boss" in the military police requested that he take on the public relations function which was "voluntary" in nature. The public relation function involved, among other things, fundraising among German businesses to support the Canadian Air Force hockey team.

On the evening of the 29th of November, 1965, the applicant was invited by a West German neighbour of his to accompany the neighbour on a drive in the neighbour's new car. The applicant agreed. They were involved in an automobile accident which resulted in the death of the neighbour and of others. The applicant was very seriously injured. A Board of Inquiry was convened to determine whether the applicant's injuries were sustained in the performance of his duties. The Board of Inquiry found that he was not on duty at the time of the accident.

On the 5th of May, 1993, the applicant made a claim for a pension, under the *Pension Act*, on the basis of disabilities resulting from the injuries incurred by him in the car accident and alleging that those injuries arose out of or were directly connected with "military service in peace time." The Canadian Pension Commission rejected his application on the 9th of February, 1994. It concluded:

There is no evidence which would tend to establish that the injury was incurred at a point in time when the Applicant was actually engaged in the performance of a duty and therefore his injuries are not attributable to Military service as such. To the contrary, the Board of Inquiry clearly establishes that the Applicant was not on duty at the time of the accident.

The applicant appealed the decision of the Canadian Pension Commission to the Entitlement Board.² The Entitlement Board rejected the applicant's

²The Entitlement Board was established by provisions of the *Pension Act* that were repealed by S.C. 1995, c. 18.

appeal. It concluded:

Nevertheless, as the Military Board of Enquiry [sic] subsequently found, "Corporal Ewing was not on duty at the time of the accident." Our Board also cannot in any way connect this accident which occurred off duty with his Military duties.

The applicant further appealed the decision of the Entitlement Board to the Veterans Review and Appeal Board. The substance of the Board's decision is in the following terms:

The Board has carefully reviewed the evidence in light of the Advocate's submission and has considered and put weight on the testimony of the Appellant [here the applicant], but unfortunately cannot agree with the argument that the Appellant was on duty at the time of his accident.

There is a Report on Injuries dated November 29, 1965 which indicates that a Board of Inquiry will determine the duty status issue. This inquiry... discusses the said accident and finds "Corporal Ewing was not on duty at the time of the accident." Pension entitlement can only be granted if the claimed conditions arose out of or were directly connected with military service in peacetime.

This Board has only one option where there is a finding that the Appellant was not on duty at the time of the incident, and that is Pension entitlement cannot be granted. The decision of the Entitlement Board of November 15th, 1994, is affirmed.

The most relevant provisions of the *Pension Act* for the purposes of this application are the following:

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

...

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

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenues invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

...

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 causé par une blessure ou maladie - ou son

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 1;

...

(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of

...

(f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and

...

aggravation - consécutive ou rattachée directement au service militaire;

...

(3) Pour l'application du paragraphe (2), une blessure ou maladie - ou son aggravation - est réputée, sauf preuve contraire, être consécutive ou rattachée directement au service militaire visé par ce paragraphe si elle est survenue au cours:

...

(f) d'une opération, d'un entraînement ou d'une activité administrative militaires, soit par suite d'un ordre précis, soit par suite d'usages ou pratiques militaires établis, que l'omission d'accomplir l'acte qui a entraîné la maladie ou la blessure ou son aggravation eût entraîné ou non des mesures disciplinaires contre le membre des forces;

...

The most relevant provisions of the ***Veterans Review and Appeal Board Act***³ are the following:

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

...

31. A decision of the majority of members of an appeal panel is a decision of the Board and is final and binding.

3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent d'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

...

31. La décision de la majorité des membres du comité d'appel vaut décision du Tribunal; elle est définitive et exécutoire;

...

³S. C. 1995, c. 18

...

39. In all proceedings under this Act, the Board shall

(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;

(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and

(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.

39. Le Tribunal applique, à l'égard du demandeur ou de l'appellant, les règles suivantes en matière de preuve

(a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;

(b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;

(c) il tranche, en sa faveur toute incertitude quant au bien-fondé de la demande.

I conclude that the Board, in the portion of its reasons for decision cited above, cited the proper test to determine whether the applicant is entitled to be awarded a pension under paragraph 21(2)(a) of the Act but then went on to ignore that test and determined against the applicant on the basis that he was not "on duty" at the time of the accident that resulted in his injuries. Whether or not he was on duty is simply not the test. The test is whether or not the applicant's injuries leading to disability "...arose out of or [were] directly connected with ...military service [in peace time]". Further, the Board appear not to have considered paragraph 21(3)(f) of the **Pension Act**, whether the injuries arose out of training or administration as a result of a specific order or "...established military custom or practice...". Given its error regarding the appropriate test and paragraph 23(1)(f), the Board never got to the point of taking into account the interpretive obligations imposed on it by section 2 of the **Pension Act** and sections 3 and 39 of the **Veterans Review and Appeal Board Act**.

The question remains, was the error of the Board such as to provide a basis for remedy on this application for judicial review notwithstanding the privative words of section 31 of the *Veterans Review and*

Appeal Board Act to the effect that a decision such as that here under review "... is final and binding."

In *Ross v. New Brunswick School District No. 15*,⁴ Mr. Justice LaForest, writing for the Court, stated at page 848:

However, there are privative clauses and privative clauses, and the extent to which the legislature intends to afford protection from review is a function of the language of the clause, the nature of the legislation and the expertise of the tribunal in question.

In *Ballingall v. Canada (Minister of Veterans Affairs)*,⁵ Mr. Justice Denault, on an application for judicial review of a decision of the Veterans Appeal Board, the predecessor to the Board in this matter, cited with approval the following passage from *Alberta Wheat Pool v. Jacula*⁶:

...the current state of the law is that in the face of a privative clause, the jurisdiction of the court to review the decision of a federal board or tribunal is restricted to errors that the tribunal or board has committed that go to its jurisdiction or decisions that are so patently unreasonable that their construction cannot be rationally supported by the relevant legislation. In my opinion, that is the scope of the judicial review that I am entitled to conduct in this case.

The foregoing quotation would appear to apply in the case of the strongest of privative clauses.⁷ Here, against Mr. Justice LaForest's assertion that there are "privative clauses and privative clauses", I find that I am faced with a relatively weak privative clause.

I find that the error of the Board in adopting the wrong test to determine the applicant's entitlement to a pension is a jurisdictional error. The Board simply refused or neglected to enter upon an examination

⁴[1996] 1 S.C.R. 826

⁵(1994), 76 F.T.R. 44 (F.C.T.D.)

⁶(1992), 58 F.T.R. 277 (F.C.T.D.)

⁷See *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18 at 23, 35 and 40-41.

of the question as to whether or not the applicant's disability resulted from injuries that arose out of or were directly connected with his military service in peace time, taking into account paragraph 21(3)(f) of the ***Pension Act***. In so refusing, it failed to consider the evidence before it and the relevant provisions of law in accordance with the interpretive obligations imposed on it by section 2 of the ***Pension Act*** and sections 3 and 39 of the ***Veterans Review and Appeal Board Act***.

Based on the foregoing, I conclude that this application for judicial review should be allowed, that the decision of the Board should be set aside and that the applicant's application for a pension should be referred back to the Board for rehearing and redetermination by a differently constituted panel.

The decision of the Board under review before me was apparently that of a panel of three Board members. Only one Board member signed the decision. Whether or not this factor goes to the heart of the decision or is a mere administrative oversight was briefly argued before me. In light of my decision on the substance of this application, I find it unnecessary to deal with this question.

Judge

Ottawa, Ontario
October 15, 1997