**Date: 20080528**

**Docket: T-1502-07**

**Citation: 2008 FC 682**

**Ottawa, Ontario, May 28, 2008**

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

**BETWEEN:**

**PIERRE DUGRÉ**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Introduction

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, against a decision of the Veterans Review and Appeal Board (the Board) dated May 23, 2007. In this decision, the Board refused an application to reconsider an appeal decision on pension entitlement dated September 17, 2003, in accordance with subsection 32(1) of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the Act).

II. Factual background

[2] The applicant served in the Canadian Armed Forces (the Forces) between 1987 and 2006.

[3] In 2006, the Forces discharged the applicant for medical reasons as the result of a permanent disability making him unsuitable by the Forces' universality of service standards. The applicant's physical unsuitability was attributed to lumbar problems after he suffered a fall on July 21, 1988.

[4] On October 27, 2000, the applicant applied for pension for spondylolysis L5 and spondylolisthesis L5-S1, the result of an L1 lumbar vertebral fracture, aggravated when he served in the regular forces in accordance with subsections 21(1),(2) and (5) of the *Pension Act*, R.S.C. 1985, c. P-6, which he claimed were entirely the result of his fall on July 21, 1988, when he fell from a height of 4 to 6 feet directly onto his back during a physical activity session.

[5] On November 16, 2001, the Minister of Veterans Affairs granted full pension entitlement to the applicant for the L1 lumbar fracture for his service in the regular forces.

[6] In another decision dated September 9, 2002, the Minister of Veterans Affairs refused the applicant's pension application for spondylolysis L5 and spondylolisthesis L5-S1. He determined that the conditions claimed by the applicant were not caused by the pensionable condition of the L1 lumbar vertebral fracture and were not aggravated when he served in the regular forces.

[7] The applicant appealed the decision dated September 9, 2002, before the Review Board.

[8] On April 7, 2003, the Board set aside the Minister's decision, granting him pension benefits for spondylolysis L5 and spondylolisthesis L5-S1 in the proportion of two fifths for the part of the

disability or the aggravation thereof which resulted from or were connected to serving in the regular forces. In its decision, the Board pointed out that it was withholding a proportion of three fifths because the conditions were endogenous.

[9] The applicant appealed the decision dated April 7, 2003, before the Appeal Board on the grounds that he should have received full and complete pension and not a partial pension of two fifths. In its decision dated September 17, 2003, the Appeal Board awarded for the spondylolysis L5 and the spondylolisthesis L5-S1 three fifths of the pension for the portion of the disability or aggravation consecutive to or related to the service in the regular forces and confirmed the Minister's positive decision.

[10] On May 18, 2007, the applicant filed, under section 32 of the Act, an application for reconsideration of the decision by the Appeal Board dated September 17, 2003. Before the Review Board, the applicant submitted that he was not seeking any indemnification for the spondylolysis L5, but that his request was for the spondylolisthesis L5-S1, for which he was seeking full pension entitlement.

[11] In a decision dated May 23, 2007, the Board's review panel refused the application for reconsideration of the decision of the Appeal Board dated September 17, 2003.

[12] The applicant filed this application for judicial review on August 15, 2007, against the decision made by the Board on May 23, 2007.

## III. Impugned decision

[13] In its decision dated May 23, 2007, the Board refused the application for reconsideration for the following reasons:

> (a) The Board did not detect any error of law or fact and made its decision on the basis of the evidence before it;
>
> (b) Dr. Fecteau's report, dated September 24, 2004, did not add any fact that could change the opinion given by the Board on February 23, 2001, since Dr. Fecteau's second opinion complemented what had already been discussed;
>
> (c) The Board was of the opinion that withholding the pension entitlement of two fifths was medically documented;
>
> (d) The applicant's conditions were endogenous;
>
> (e) Even if the medical opinions suggested that there was a possibility that the conditions were entirely related to the applicant's military service, the documentary evidence in the record did not corroborate these allegations.

## IV. Issue

[14] The only issue is whether the Board erred in its assessment of the evidence by refusing to grant full pension entitlement under subsection 21(1) of the *Pension Act*.

## V. Standard of review

[15] In *Dunsmuir v. Nouveau Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there should only be two standards of review, the standard of correctness and the standard of reasonableness. The Court stated that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law (see *Dunsmuir* at paragraph 50). When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning

process. It will rather undertake its own analysis of the question and decide whether or not the tribunal's decision is correct.

[16] The Supreme Court also instructs that in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir* at paragraph 47).

[17] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law (see *Dunsmuir* at paragraph 54). The appropriate deference to be given to a tribunal will be determined in consideration of the following factors: the existence of a privative clause; whether the decision-maker has special expertise in a discrete and special administrative regime; and the nature of the issue (see *Dunsmuir* at paragraph 55).

[18] In *McTague v. Canada (Attorney General)*, [1999] F.C.J. No. 1559 (Lexis), Justice John Evans applied the pragmatic and functional approach to determine the appropriate standard of review to apply to the Board's decisions. He determined that the appropriate standard of review in the case of decisions by the Veterans Review and Appeal Board is that of reasonableness *simpliciter*, except when the issue involves the Board's assessment or interpretation of inconsistent evidence and the conclusions that it drew from it regarding whether the applicant's disability was in fact caused or aggravated by the military service. In the latter case, the appropriate standard of review is that of patent unreasonableness (*Bradley v. Canada (Attorney General)*, 2001 FCT 793, [2001] F.C.J. No. 1152 (Lexis), at paragraphs 16 and 17). See also *Wannamaker v. Canada*

*(Attorney General)*, 2007 FCA 126, [2007] F.C.J. No. 466 (Lexis), at paragraph 12; and *Thériault v. Canada (Attorney General)*, 2006 FC 1070, [2006] F.C.J. No. 1354 (Lexis), at paragraphs 22 and 23.

[19] In this matter, there are provisions in the Act providing for a series of administrative appeals against the refusal of a pension application. In this case, the review panel has a certain expertise in regard to issues related to pension entitlement and the question is essentially one of mixed law and facts. Accordingly, some deference is contemplated. For these reasons, I am of the opinion that the appropriate standard of review is that of reasonableness.

## VI. Analysis

[20] The applicant states that the Board erred in withholding two fifths of the pension on the ground that his personal condition was such that his spinal column was more at risk. The applicant alleges that the Board had no medical basis for making such a determination. He points out that, paradoxically, the Board recognizes in its decision that the medical opinions appear to indicate that there is a possibility that the conditions are entirely related to military service. The applicant also points out that the Board erred in determining that Dr. Fecteau's opinion merely complements the evidence and that in its decision, it admits that the medical reports seem to indicate that there is a possibility that the applicant's conditions are entirely related to military service. However, the Board determined that the evidence does not corroborate these allegations. Indeed, the applicant points out that the Board ignored the following factors that were in his favour:

(a) His excellent physical condition when he enlisted with the Canadian Armed Forces;

(b) No visits to physicians for lumbar problems before the fall on July 21, 1988;

(c) His fall on July 21, 1988, was documented at the time by a statement of an eyewitness;

(d) The existence of back trauma, namely a fracture, spondylolysis and spondylolisthesis;

(e) The fall on July 21, 1988, caused the first onset of the applicant's back pain;

(f) The pain continued throughout his career in Canada as well as on missions abroad ("special duty area"); and

(g) The applicant's condition was aggravated over the years because the Canadian Armed Forces did not provide him with the appropriate care or reassign him to new duties to protect his back from any physical deterioration.

Finally, the applicant alleges that the Board disregarded section 39 of the Act by refusing to draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant. The applicant points out that the Board ought to have accepted the new medical evidence because it reported plausible and uncontradicted facts. According to the applicant, the Board acted contrary to section 32 of the Act in refusing to reconsider the application so as to favour the achievement of the Act's objectives.

[21] The respondent contends that the proportion of three fifths of the applicant's pension entitlement is consistent with the requirements of subsection 21(2.1) of the *Pension Act*. Further, the medical expertise clearly indicates that the applicant's conditions are congenital and that he had these conditions when he enlisted. The respondent also contends that the medical expert reports establish that the applicant's fall was not the only cause of his conditions. In the respondent's opinion, the Board complied with the requirements of section 39 of the Act by taking into account

the two new medical reports. The respondent maintains that the pension entitlement guidelines for spondylolisthesis and spondylolysis state that most spondylolytic problems and cases of spondylolisthesis are congenital. It is alleged that the medical reports of Dr. Fecteau and Dr. Montminy do not add anything more in regard to the information already filed in the record.

[22] Subsection 21(9) of the Act provides that there is a presumption regarding the applicant's medical condition at the time of the enlistment. More specifically, when a disability or disabling condition is not obvious at the time of enlistment, there is a presumption that the applicant's medical condition is the condition that was found on the enlistment medical examination. In this case, the unrefuted evidence, specifically Dr. Montminy's medical report dated April 20, 2005, indicates that [TRANSLATION] "when [the applicant] enlisted in the Armed Forces, he already had spondylolisthesis with spondylolysis. However, this spondylolisthesis had always been asymptomatic and it is absolutely impossible in spondylolisthesis of this degree to identify it at the physical examination when the patient is asymptomatic" [emphasis added]. Given that it is not at all disputed that the applicant had asymptomatic spondylolisthesis when he enlisted, the presumption of subsection 21(9) applies.

[23] Notwithstanding the existence of this presumption, it should be noted that the acknowledged condition does not necessarily cause a disability. On this point, we must rely on the medical evidence establishing that the applicant was healthy and that he had no obvious symptoms when he enlisted. Indeed, Dr. Montminy is of the opinion that [TRANSLATION] "it is likely that [the applicant] could have pursued his career as an infantryman without any restriction unless another accident

were to bring on spondylolisthesis." In this case, following the fall on July 21, 1988, the applicant not only fractured an L1 vertebra resulting in a fracture of 15%, but he also brought on L5-S1 spondylolisthesis which before had been entirely dormant. Indeed, according to the testimony of Private Gagnon, an eyewitness to the fall in question, the applicant fell at least five feet directly onto his lower back and his spine. The uncontradicted evidence establishes that but for this trauma, the applicant's spondylolisthesis would probably not have become symptomatic. Also according to Dr. Fecteau's report, since the fall the applicant [TRANSLATION] "has functional limitations and if ever he were to have to perform demanding physical activities, we could expect to see the lumbar pain resurface with the protective spasms usually associated with it." In other words, the applicant's condition caused him a significant disability.

[24] The respondent's argument is essentially based on the thin skull rule which is founded on the principle that the wrongdoer is responsible for the damages incurred by the applicant, even if these are unforeseeably serious because of a predisposition. This doctrine also provides that the respondent need not put the applicant in a position better than his original situation. In fact, the respondent is responsible for the prejudice caused, but it need not indemnify the applicant for the debilitating effects attributable to the pre-existing condition which the applicant would have suffered anyway. In other words, the wrongdoers must take their victims as they are and they are therefore liable even if the prejudice suffered by the applicant is more significant than it would have been if the victim were not afflicted with spondylolysis (*Athey v. Leonati*, [1996] 3 S.C.R. 458 at paragraphs 34 and 35). In this case, the respondent maintains that the conditions suffered by the applicant are not entirely the result of his fall on July 21, 1988, but that his pre-existing condition,

i.e. asymptomatic spondylolisthesis, also contributed. The respondent also maintains that the conditions ailing the applicant are [TRANSLATION] "also the result of his personal condition recognized by the physicians and by the applicant himself." Therefore, also in the opinion of the respondent, under subsection 21(2.1) of the Act, it was not unreasonable for the Board to withhold two fifths of the pension. I cannot accept this argument. The evidence in the record clearly indicates that before the fall on July 21, 1988, the applicant was in good health despite the asymptomatic spondylolisthesis. No evidence in this case indicates that the debilitating effects suffered by the applicant are attributable to the pre-existing condition.

[25] As noted above, Dr. Montminy is of the opinion that but for his fall, the applicant could have pursued his infantry career without any limitations. The evidence does not support the claim that the debilitating effects were caused by the applicant's pre-existing condition. To the contrary, the evidence is clear that it was very well the fall on July 21, 1988, that brought on the spondylolisthesis. Consulting the "Entitlement Eligibility Guidelines for Spondylolisthesis and Spondylolysis" (the Guidelines), "severe trauma to the vertebral spine" is listed among the causes and/or aggravation leading to spondylolisthesis. These same Guidelines define this type of trauma as follows:

> <u>Severe trauma to the lumbar spine means a major, high impact, direct injury to the lumbar spine which produces immediate lumbar pain</u> and precludes unaided ambulation for a period of at least 2 weeks, and is associated with other fractures and/or significant soft tissue injuries.
>
> Examples:
> <u>A fall from a significant height directly onto the back;</u>
> A major motor vehicle accident;

> A blow across the back by a heavy, high momentum object, e.g. a falling tree.
>
> [Emphasis added.]

This is the same kind of trauma suffered by the applicant on July 21, 1988.

[26] The evidence establishes that that anyone who suffers “[a] fall from a significant height directly onto the back” would probably experience the same symptoms as the applicant. In such circumstances, the applicant’s pre-existing is of no consequence. The evidence does not therefore support the Board’s finding to the effect that the applicant’s pre-existing condition in these circumstances would have an impact on his disability. Accordingly, the Board erred in determining that the applicant, suffering from spondylolisthesis, would be entitled to only three fifths of the total degree of disability because of his predisposition.

[27] Finally, the applicant submits that the Board refused to draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant. First, bear in mind that the special provisions under section 39 of the Act require the Board to draw every reasonable inference in favour of the applicant, to accept any uncontradicted evidence that it considers to be credible in the circumstances and to resolve in favour of the applicant any doubt, in the weighing of evidence, as to whether the applicant has established a case. The applicant also benefits from section 3 of the Act, which provides that the powers, duties or functions of 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.

[28] In this case, the documentary evidence, *inter alia* Dr. Montminy's report, was uncontradicted evidence supporting the applicant's claims. In my opinion, the Board did not make the necessary inferences from Dr. Montminy's report and narrowly interpreted the evidence by selecting certain passages while disregarding others which favoured the interpretation submitted by the applicant. The Board's interpretation of this evidence was not consistent with the provisions of sections 3 and 39 of the Act. The inferences most favourable to the applicant were not accepted. This amounts to a reviewable error. It should be noted that the Board is at liberty to impugn and reject any report but must do so by relying on medical evidence responding to the points raised in the impugned report and in accordance with the specific provisions of section 39 of the Act. In this case, the applicant filed credible evidence of the connection between the fall and the appearance of symptomatic spondylolisthesis.

## VII. Conclusion

[29] Considering all of the evidence and for the reasons discussed above, I am of the opinion that in finding as it did, the Board's decision was unreasonable, which justifies the intervention of this Court. The application for judicial review will therefore be allowed.

[30] The matter will be referred to the Board for reconsideration by a differently constituted review panel in accordance with these reasons.

**JUDGMENT**

**THE COURT ORDERS AND DIRECTS that**

1. the application for judicial review be allowed.

2. The matter be referred to the Board for reconsideration by a differently constituted review panel, in accordance with these reasons.

3. The costs of this application be awarded to the applicant.

"Edmond P. Blanchard"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

**Appendix**

*Veterans Review and Appeal Board Act*, S.C. 1995, c. 18:

**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.

**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 s'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.

**32.** (1) Notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.

(2) The Board may exercise the powers of an appeal panel under subsection (1) if the members of the appeal panel have ceased to hold office as members.

(3) Sections 28 and 31 apply, with such modifications as the circumstances require, with respect to an application made under subsection (1).

**32.** (1) Par dérogation à l'article 31, le comité d'appel peut, de son propre chef, réexaminer une décision rendue en vertu du paragraphe 29(1) ou du présent article et soit la confirmer, soit l'annuler ou la modifier s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; il peut aussi le faire sur demande si l'auteur de la demande allègue que les conclusions sur les faits ou l'interprétation du droit étaient erronées ou si de nouveaux éléments de preuve lui sont présentés.

(2) Le Tribunal, dans les cas où les membres du comité ont cessé d'exercer leur charge, peut exercer les fonctions du comité visées au paragraphe (1).

(3) Les articles 28 et 31 régissent, avec les adaptations de circonstance, les demandes adressées au Tribunal dans le cadre du paragraphe (1).

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

**39.** Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles

(*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.

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.

*Pension Act*, R.S.C. 1985, c. P-6:

**21.** (1) In respect of service rendered during World War I, service rendered during World War II other than in the non-permanent active militia or the reserve army, service in the Korean War, service as a member of the special force, and special duty service,

( *a*) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during 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;

( *b*) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that was attributable to or was incurred during such military

**21.** (1) Pour le service accompli pendant la Première Guerre mondiale ou la Seconde Guerre mondiale, sauf dans la milice active non permanente ou dans l'armée de réserve, le service accompli pendant la guerre de Corée, le service accompli à titre de membre du contingent spécial et le service spécial :

*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 — survenue au cours du service militaire ou attribuable à celui-ci;

*b*) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou

service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

son aggravation — survenue au cours du service militaire ou attribuable à celui-ci;

( *c*) no deduction shall be made from the degree of actual disability of a member of the forces who has rendered service in a theatre of actual war, service in the Korean War or special duty service on account of a disability or disabling condition that existed in the member before the member's period of service in World War I or World War II, service in the Korean War or special duty service, as the case may be, except

(i) to the extent that the member is receiving a pension for that disability or disabling condition, or

(ii) to the extent that that disability or disabling condition was obvious or was recorded on medical examination prior to enlistment;

*c*) l'invalidité ou l'affection entraînant incapacité dont était atteint le membre des forces qui a accompli du service sur un théâtre réel de guerre, du service pendant la guerre de Corée ou du service spécial, et qui est antérieure au service accompli pendant la Première ou la Seconde Guerre mondiale, au service accompli pendant la guerre de Corée ou au service spécial n'autorise aucune déduction sur le degré d'invalidité véritable, sauf dans la mesure où il reçoit une pension à cet égard ou si l'invalidité ou l'affection était évidente ou a été consignée lors d'un examen médical avant l'enrôlement;

( *d*) an applicant shall not be denied a pension in respect of disability resulting from injury or disease or aggravation thereof incurred during military service or in respect of the death of a member of the forces resulting from that injury or disease or the aggravation thereof solely on the grounds that no substantial disability or disabling condition is considered to have existed at the time of discharge of that member;

*d*) un demandeur ne peut être privé d'une pension à l'égard d'une invalidité qui résulte d'une blessure ou maladie ou de son aggravation contractée au cours du service militaire, ou à l'égard du décès d'un membre des forces causé par cette blessure ou maladie ou son aggravation, uniquement du fait que nulle invalidité importante ou affection entraînant une importante incapacité n'est réputée avoir existé au moment de la libération de ce membre des forces;

( *e*) where a member of the forces who has seen service during World War I or World War II is, on retirement or discharge from that service, passed directly to the Department for treatment, a pension shall be paid to or in respect of the member for disability or death incurred by the member during treatment;

*e*) lorsqu'un membre des forces qui a fait du service pendant la Première ou la Seconde Guerre mondiale est, lors de sa retraite ou de sa libération de ce service, transféré directement au ministère pour un traitement, il est payé à ce membre, ou à son égard, une pension pour invalidité contractée ou décès survenu au cours de ce traitement;

(*f*) no pension shall be paid for disability or death incurred by a member of the forces,

(i) while on leave of absence without pay,

(ii) during a period of absence without leave for which the pay of the member was stopped, or

(iii) when the member of the forces has, during leave of absence with pay, undertaken an occupation that is unconnected with military service,

unless the disability or death was attributable to that military service;

(*g*) where

(i) a pension for disability has been awarded to a member of the forces in respect of service in a theatre of actual war, service in the Korean War or special duty service, and

(ii) the member's degree of actual disability in respect of any of that service subsequently changes,

the pension shall, regardless of the cause of the change, be increased, decreased or discontinued, as the case requires, to reflect the new degree of actual disability in respect of that service, except that, if a member is receiving a pension in respect of more than one type of service referred to in subparagraph (i), the total pension payable by virtue of this subsection may not exceed the amount of pension for the total actual disability arising from all the service

*f*) aucune pension n'est payée à l'égard de l'invalidité contractée ou du décès survenu d'un membre des forces :

(i) soit lorsqu'il est en congé sans solde,

(ii) soit pendant une période d'absence sans permission pour laquelle sa solde a été suspendue,

(iii) soit lorsque ce membre des forces, durant un congé avec solde, a exercé un métier ou une profession qui n'a aucun rapport avec le service militaire,

à moins que son invalidité ou son décès ne soit attribuable à son service militaire;

*g*) la pension pour invalidité accordée au membre des forces au titre du service sur un théâtre réel de guerre, du service effectué pendant la guerre de Corée ou du service spécial est, en cas de changement du degré d'invalidité véritable lié à un de ces services, rajustée ou discontinuée en fonction du nouveau degré d'invalidité véritable sans qu'il soit tenu compte de la cause du changement; toutefois, si le membre des forces reçoit une pension pour plus d'un de ces services, le total de la pension à payer en application du présent paragraphe ne peut être supérieur au montant de la pension pour toute l'invalidité véritable découlant de l'ensemble de ces services;

referred to in that subparagraph;

( *h*) where a member of the forces is in receipt of an additional pension under paragraph ( *a*), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member commencing during that period, until the date that it so commences; and

( *i*) where, in respect of a survivor who was living with the member of the forces at the time of the member's death,

(i) the pension payable under paragraph ( *b*)

is less than

(ii) the aggregate of the basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph ( *a*), subsection (5) or section 36 at the time of the member's death,

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph ( *b*) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)( *a*)(i) shall be read as "from the first day of the month

*h*) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa *a*), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

*i*) lorsque, à l'égard d'un survivant qui vivait avec le membre des forces au moment du décès de ce dernier :

(i) la pension payable en application de l'alinéa *b*)

est inférieure à :

(ii) la somme de la pension de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa *a*), du paragraphe (5) ou de l'article 36,

une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant au lieu de la pension visée à l'alinéa *b*) pendant une période de un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 (sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)*a*) doit s'interpréter comme signifiant « s'il est

following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès ») et, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II.

(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;

( *b*) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall be awarded in respect of the member in accordance with the rates set out in Schedule II;

( *c*) where a member of the forces is in receipt of an additional pension under paragraph ( *a*), subsection (5) or section 36 in respect of a spouse or common-law partner who is living with the member and the spouse or common-law partner dies, except where an award is payable under subsection 34(8), the additional pension in respect of the spouse or common-law partner shall continue to be paid for a period of one year from the end of the month in which the spouse or common-law partner died or, if an additional pension in respect of another spouse or common-law partner is awarded to the member

(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;

*b*) des pensions sont accordées à l'égard des membres des forces, conformément aux taux prévus à l'annexe II, en cas de décès causé par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

*c*) sauf si une compensation est payable aux termes du paragraphe 34(8), la pension supplémentaire que reçoit un membre des forces en application de l'alinéa *a*), du paragraphe (5) ou de l'article 36 continue d'être versée pendant l'année qui suit la fin du mois du décès de l'époux ou du conjoint de fait avec qui il cohabitait alors ou, le cas échéant, jusqu'au versement de la pension supplémentaire accordée pendant cette année à l'égard d'un autre époux ou conjoint de fait;

commencing during that period, until the date that it so commences; and

( *d*) where, in respect of a survivor who was living with the member of the forces at the time of that member's death,

(i) the pension payable under paragraph ( *b*)

is less than

(ii) the aggregate of the basic pension and the additional pension for a spouse or common-law partner payable to the member under paragraph ( *a*), subsection (5) or section 36 at the time of the member's death,

a pension equal to the amount described in subparagraph (ii) shall be paid to the survivor in lieu of the pension payable under paragraph ( *b*) for a period of one year commencing on the effective date of award as provided in section 56 (except that the words "from the day following the date of death" in subparagraph 56(1)( *a*)(i) shall be read as "from the first day of the month following the month of the member's death"), and thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule

*d*) d'une part, une pension égale à la somme visée au sous-alinéa (ii) est payée au survivant qui vivait avec le membre des forces au moment du décès au lieu de la pension visée à l'alinéa *b*) pendant une période d'un an à compter de la date depuis laquelle une pension est payable aux termes de l'article 56 — sauf que pour l'application du présent alinéa, la mention « si elle est postérieure, la date du lendemain du décès » à l'alinéa 56(1)*a*) doit s'interpréter comme signifiant « s'il est postérieur, le premier jour du mois suivant celui au cours duquel est survenu le décès » — d'autre part, après cette année, la pension payée au survivant l'est conformément aux taux prévus à l'annexe II, lorsque, à l'égard de celui-ci, le premier des montants suivants est inférieur au second :

(i) la pension payable en application de l'alinéa *b*),

(ii) la somme de la pension de base et de la pension supplémentaire pour un époux ou conjoint de fait qui, à son décès, est payable au membre en application de l'alinéa *a*), du paragraphe (5) ou de l'article 36.

…

**[…]**

(5) In addition to any pension awarded under subsection (1) or (2), a member of the forces who

( *a*) is eligible for a pension under paragraph (1)( *a*) or (2)( *a*) or this subsection in respect of an injury or disease or an aggravation thereof, or has suffered an injury or disease or an aggravation

(5) En plus de toute pension accordée au titre des paragraphes (1) ou (2), une pension est accordée conformément aux taux indiqués à l'annexe I pour les pensions de base ou supplémentaires, sur demande, à un membre des forces, relativement au degré d'invalidité supplémentaire qui résulte de son état, dans le cas où :

*a*) d'une part, il est admissible à une

thereof that would be pensionable under that provision if it had resulted in a disability, and

( *b*) is suffering an additional disability that is in whole or in part a consequence of the injury or disease or the aggravation referred to in paragraph ( *a*)

shall, on application, be awarded a pension in accordance with the rates for basic and additional pension set out in Schedule I in respect of that part of the additional disability that is a consequence of that injury or disease or aggravation thereof.

pension au titre des alinéas (1)*a*) ou (2)*a*) ou du présent paragraphe, ou a subi une blessure ou une maladie — ou une aggravation de celle-ci — qui aurait donné droit à une pension à ce titre si elle avait entraîné une invalidité;

*b*) d'autre part, il est frappé d'une invalidité supplémentaire résultant, en tout ou en partie, de la blessure, maladie ou aggravation qui donne ou aurait donné droit à la pension.

**35.** (1) Subject to section 21, the amount of pensions for disabilities shall, except as provided in subsection (3), be determined in accordance with the assessment of the extent of the disability resulting from injury or disease or the aggravation thereof, as the case may be, of the applicant or pensioner.

(1.1) Despite anything in this Act, if the extent of disability of a member of the forces, in respect of the aggregate of all of the member's disability assessments, exceeds 100%, no pension shall be paid in respect of any percentage points exceeding 100%.

(1.2) Any disability assessments under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* shall be taken into account for the purpose of determining whether the extent of disability exceeds 100%.

(2) The assessment of the extent of a disability shall be based on the instructions and a table of disabilities to be made by the Minister for the guidance of persons making those assessments.

**35.** (1) Sous réserve de l'article 21, le montant des pensions pour invalidité est, sous réserve du paragraphe (3), calculé en fonction de l'estimation du degré d'invalidité résultant de la blessure ou de la maladie ou de leur aggravation, selon le cas, du demandeur ou du pensionné.

(1.1) Aucune pension n'est accordée pour toute partie du total des degrés d'invalidité estimés à l'égard du membre des forces excédant cent pour cent.

(1.2) Dans le calcul du total des degrés d'invalidité, il est tenu compte de tout degré d'invalidité estimé au titre de la *Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes*.

(2) Les estimations du degré d'invalidité sont basées sur les instructions du ministre et sur une table des invalidités qu'il établit pour aider quiconque les effectue.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1502-07 |
| **STYLE OF CAUSE:** | PIERRE DUGRÉ v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Québec, Quebec |
| **DATE OF HEARING:** | April 22, 2008 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Blanchard J. |
| **DATE OF REASONS:** | May 28, 2008 |

**APPEARANCES:**

| | |
|---|---|
| François Dugré<br>1056 Maires-Gauthier<br>Québec, Quebec | FOR THE APPLICANT |
| Chantal Labonté<br>Montréal, Quebec | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| François Dugré<br>Québec, Quebec | FOR THE APPLICANT |
| John H. Sims, QC<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |