Federal Court  Cour fédérale

Date: 20180501

Docket: T-2238-16

Citation: 2018 FC 464

[ENGLISH TRANSLATION]

Montreal, Quebec, May 1, 2018

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

PIERRE FOURNIER (VETERAN)

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Pierre Fournier, the applicant, is seeking judicial review of the decision rendered by the Entitlement Appeal Panel of the Veterans Review and Appeal Board [the Appeal Panel] denying him entitlement to a disability award under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c 21 [the Act].

[2] Mr. Fournier argues that the Appeal Panel erred in its interpretation of section 45 and subsection 2(1) of the Act by imposing the burden on him of proving that his disability was caused by the negligence of medical staff of the Canadian Armed Forces [the Forces]. He essentially submits that the Supreme Court of Canada's judgment in *Mérineau v The Queen* [1983] 2 SCR 362 [*Mérineau*] and the Pension Review Board's decision in 1978 [Decision I-25] should not be followed and that the disability he suffers from must be recognized as being service-related pursuant to section 45 of the Act, irrespective of any notion of fault, because it consists of a side effect caused by a treatment administered under the authority of the Forces. Mr. Fournier argues in the alternative that the Appeal Panel erred in its application of section 39 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18 [the Appeal Board Act] by finding that he had not discharged his burden of proving that his disability arose out of his military service and by failing to consider all the evidence that was presented.

[3] The Attorney General of Canada [AGC] replies that Mr. Fournier's condition stems from a personal condition that is not caused by or related to his military service. Thus, for his entitlement to an award to be recognized, Mr. Fournier must prove that a professional from the Forces was negligent in administering treatment, which he failed to do. The AGC therefore argues that the Appeal Panel's decision is reasonable.

[4] For the reasons set out below, the Court will allow the application for judicial review.

II. Background

[5] From 1981 to 2014, Pierre Fournier was a member of the Forces. On June 19, 2006, while Mr. Fournier was at the Montreal Heart Institute for a consultation related to pericarditis, Dr. L'Allier, a civilian physician, prescribed him 300 mg of quinine sulfate [quinine] for his "restless legs syndrome."

[6] To comply with military medical procedure, Mr. Fournier presented the prescription received from the civilian physician to Dr. Gaudreau, a military physician, who approved it. The pharmacist to whom Mr. Fournier subsequently presented his prescription expressed some concerns and told him that a G6PD blood test would have to be conducted beforehand. Mr. Fournier went back to Dr. Gaudreau, who told him that the said test was not required (Certified Tribunal Record [CTR], at pages 115–116). Thus, on or around June 20, Mr. Fournier began taking quinine sulfate.

[7] Mr. Fournier states that, starting on June 30, 2006, he started feeling pain in his legs and fatigue, and that from July 1 to 4, 2006, he had consultations at the military hospital. The first mention of a consultation in his military medical file was not until July 4, 2006, but, in any event, Mr. Fournier was subsequently referred to the Centre de santé et de services sociaux [CSSS] de Chicoutimi (applicant's record, at page 24).

[8] According to the applicant's record, on July 5, 2006, Mr. Fournier went to the emergency room of the CSSS de Chicoutimi, where a civilian physician noticed there was purpura on his

legs. On or around July 6, Mr. Fournier returned to the CSSS to consult a physician about his "rash," and the emergency room doctor referred him to Dr. Leclerc, a dermatologist. On July 5 and/or 6, Mr. Fournier consulted Dr. Leclerc, and a skin biopsy was taken for analysis. Finally, on July 6, Mr. Fournier stopped taking quinine (applicant's record, at page 36). On July 14, 2006, the results of a biopsy and Dr. Michel Lessard's diagnosis indicated a histological alteration suggestive of chronic purpura pigmentosa and no evidence of vascular changes.

[9] On July 17, 2006, Dr. Leclerc diagnosed him with drug-induced vasculitis. On a medical examination record dated July 24, 2006, Dr. Lapointe, a military physician, indicated a diagnosis of [TRANSLATION] "severe drug-induced vasculitis" and noted that it could be attributed to quinine, which had been discontinued.

[10] In September 2006, Mr. Fournier submitted an application for disability benefits to the Department of Veterans Affairs [the Department] for his drug-induced vasculitis. A copy of that application is found in the CTR and in the applicant's record. The application consists of a form signed by Mr. Fournier on August 24, 2006, and copies of medical notes confirming the diagnosis of vasculitis made by Dr. Leclerc (civilian physician) on July 17, 2006, and by Dr. Lapointe (military physician) on July 24, 2006.

[11] On May 2, 2007, the Department denied Mr. Fournier's application and concluded that [TRANSLATION] "drug-induced vasculitis (00739) does not give rise to entitlement to a disability award under section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (CFMVRCA), Regular Force service." The Department accepted the

diagnosis of drug-induced vasculitis, but it found that the documentation submitted by Mr. Fournier [TRANSLATION] "provides no information that makes it possible to establish a cause and effect relationship between the claimed condition" and his military duties and concluded that the condition did not arise out of and was not directly connected with his military service.

[12] Mr. Fournier challenged the Department's refusal before the Entitlement Review Panel of the Veterans Review and Appeal Board [the Review Panel]. Mr. Fournier cited the medical negligence of the Forces' medical staff and submitted new evidence, namely a letter from Dr. René Jacques dated November 6, 2013, in which Dr. Jacques indicates that Mr. Fournier's problem is related to quinine and that, based on a reading of the instructions and adverse effects, it [TRANSLATION] "should not be prescribed for restless legs syndrome (as was the case in 2006)." He submits that the test to determine the G6PD level has no connection with hypersensitivity to quinine. To support his application for review, Mr. Fournier also submitted an excerpt from Health Canada's Canadian Adverse Reaction Newsletter on quinine sulfate dated April 2011, a Wikipedia page on quinine, and an excerpt from the quinine monograph dated October 2006.

[13] On or around July 29, 2014, the Review Panel dismissed Mr. Fournier's application and affirmed the Department's decision. With regard to the issue, the Review Panel found that it had to determine whether Mr. Fournier's condition arose out of or was directly connected with his service in the Regular Force.

[14] In the section dealing with the analysis and reasons, the Review Panel cites Decision I-25 and confirms that the burden is on the applicant to support an allegation of negligence or of medical mismanagement. The Review Panel concluded that the condition does not entitle Mr. Fournier to an award because he failed to prove that the treatment provided by the military health professionals in 2006 did not meet the appropriate standard of care or that there had been any medical negligence on their part. Furthermore, the Review Panel did not answer the question he had asked and does not indicate in its analysis or its conclusion whether Mr. Fournier's condition "arose out of or was directly connected with his military service."

[15] Mr. Fournier challenged that decision before the Appeal Panel. At that time, he essentially submitted that the Review Panel had erred (1) in concluding that the Act requires evidence of medical negligence before entitlement to an award could be granted, and (2) in concluding that the evidence filed did not establish any medical negligence. In particular, he argued that the decision in *Hall v Canada (Attorney General)*, 2011 FC 1431 [*Hall*] sets out that it is no longer necessary to prove medical negligence, that Decision I-25 should no longer be followed, and that there was evidence on record confirming that quinine was contraindicated for treating restless legs syndrome.

[16] On November 24, 2016, the Appeal Panel dismissed Mr. Fournier's appeal, affirmed the Review Panel's decision and denied entitlement to an award pursuant to section 45 of the Act. That decision is the subject of this judicial review.

III. The Appeal Panel's decision

[17] The Appeal Panel's decision is divided into six sections, namely (1) Introduction; (2) Preliminary matters; (3) Issue; (4) Evidence and argument; (5) Analysis/reasons and (6) Decision. Sections (3) to (6) are relevant to this decision.

[18] The Appeal Panel states the issue before it as follows: "Should a disability award be granted for the appellant's condition, namely, drug-induced vasculitis?"

[19] In the *Evidence and argument* section, the Appeal Panel reiterates the submissions of Mr. Fournier's advocate, namely (1) the argument that Mr. Fournier should be granted a disability award because his drug-induced vasculitis *arose out of or was directly connected with* his military service within the Regular Force; (2) the uncontested facts; (3) various pieces of evidence, such as Dr. Lapointe's examination record dated July 24, 2006, the opinion of Dr. René Jacques dated November 6, 2013, and Health Canada's newsletter dated April 2011.

[20] The Appeal Panel also reiterates the arguments put forth by Mr. Fournier's advocate that the Review Panel had erred (1) in referring to Decision I-25; (2) in concluding that the Act requires evidence of medical negligence in this case before entitlement to an award could be granted; and (3) in concluding that the evidence filed had not established any medical negligence.

[21] The Appeal Panel notes the advocate's references to this Court's decision in *Hall* and to Mr. Fournier's argument that the said decision confirmed that Decision I-25 is no longer valid, that it is sufficient that a disability arise out of care received from military medical staff for an award to be granted, and that it is therefore no longer necessary for a member of the Forces to prove medical negligence to be entitled to an award. It also notes Mr. Fournier's arguments that the scheme of the Act is a "no-fault" scheme and that the applicant must demonstrate that his condition *arose out of or was directly connected with military service*, which is the case here because Mr. Fournier's condition resulted directly from the treatment he received with the approval of military authorities.

[22] To conclude the *Evidence and argument* section, the Appeal Panel refers to the argument raised by Mr. Fournier's advocate that, in any event, medical negligence was proven, mainly by the contents of Dr. Jacques's letter dated November 6, 2013, and by the Australian document from August 2011.

[23] In the *Analysis/Reasons* section of its decision, the Appeal Panel reiterates the evidentiary rules that it must apply under section 39 of the Appeal Board Act and thus answers the three questions submitted by the applicant's advocate, namely:

1. Does the decision rendered in *Hall* indicate that evidence of medical negligence should no longer be provided? No.
2. Is Interpretation Decision I-25 still applicable? Yes.

3. Does the information in the Appellant's file support entitlement to a disability award? No.

[24] The Appeal Panel postulates that it is Decision I-25 "that adopted the interpretation of the law which makes it possible to provide compensation for disabilities resulting from medical errors, which would not be covered otherwise" (Appeal Panel's decision, page 7, emphasis added).

[25] The Appeal Panel goes on to consider the following three components in particular: (1) How cases of medical negligence are decided; (2) I-25 challenged and subsequently affirmed; and (3) *Hall*.

[26] With respect to the first component, the Appeal Panel addresses Decision I-25 and reiterates that the care provided to members of the Forces, by the medical personnel of the Forces, may sometimes result in disability and that this disability provides entitlement to compensation if it results from negligence or inadequate medical care under the established standard.

[27] With respect to the second component, the Appeal Panel refers to the Supreme Court of Canada's judgment in *Mérineau*. Without specifying the details of that case, the Appeal Panel indicates, *inter alia*, that the Supreme Court concluded "that subsection 21(2) of the *Pension Act* did not entitle military officers to obtain a disability pension when the disability resulted from an error or the negligence of military personnel in the context of care received in a military

establishment" and that "[t]here is certainly a link between the damage for which the appellant is claiming compensation and his status as a serviceman, but I think that link is too tenuous for one to say that the damage is directly connected to his military service." Next, the Appeal Panel reiterates that the Pension Review Board subsequently made Interpretation Decision I-31 to affirm and uphold Decision I-25.

[28] Thus, compensation may be granted to a member of the Forces if the evidence establishes that a disability resulted from medical care which fell short of the standard of care.

[29] In the third component of its analysis, the Appeal Panel considers this Court's decision in *Hall*. According to the Appeal Panel, the Court "does not change the principles established" because the issue of negligence was not raised in that case, and the Appeal Panel dismissed the application for an award because the applicant was not performing his military duties when he received the treatment prescribed by his military physician, which the Court considered to be an error.

[30] The Appeal Panel concludes that, in Mr. Fournier's case, there is no credible evidence that the medical care he received failed to meet the required standard of care.

[31] The Appeal Panel found that the "medication may have caused the Appellant's drug-induced vasculitis, but this fact, in and of itself, does not support the conclusion <u>that this condition arose out of or was directly connected with his military service within the Canadian Forces</u>" (emphasis added).

IV. Positions of the parties

A. *Mr. Fournier's position*

[32] Mr. Fournier has reiterated the facts, submitted his issues and set out his arguments. He is asking the Court to declare invalid or unlawful, or to quash or set aside, the decision made by the Appeal Panel on November 16, 2016, and to refer the matter back for a judgment declaring that his drug-induced vasculitis entitles him to an award under section 45 of the Act.

[33] Mr. Fournier thus submits three arguments: (1) the Appeal Panel's interpretation of the phrases "service-related disease" and "arose out of or was directly connected with service" in section 45 and subsection 2(1) of the Act must be reviewed according to the correctness standard, while the issue of the Appeal Panel's assessment of the evidence must be reviewed according to the reasonableness standard; (2) the Appeal Panel erred in requiring evidence of medical negligence because the Act does not provide for such a requirement; and (3) the Appeal Panel erred in its legal characterization of the evidence.

(1) Standards of review

[34] Mr. Fournier argues that the standard of correctness applies to the interpretation of the phrases "service-related disease" and "arose out of or was directly connected with service" in section 45 and subsection 2(1) of the Act even though this concerns the interpretation, by an administrative body, of a statute that is closely connected to its mandate. In this regard, Mr. Fournier cites *Cole v Canada (Attorney General)*, 2015 FCA 119 [*Cole*], which concerns a

disability pension application for an alleged major depressive disorder under paragraph 21(2)(a) of the *Pension Act*, RSC 1985, c P-6. In that decision, the Federal Court of Appeal (FCA) applied the standard of correctness to review the decision made by Justice de Montigny of the Federal Court, in which he interpreted the wording "arose out of or was directly connected with service" contained in the *Pension Act*.

[35] Furthermore, Mr. Fournier argues that the issue of the assessment of the evidence under section 39 of the Appeal Board Act must be reviewed on the standard of reasonableness.

(2) The Appeal Panel erred in requiring evidence of medical negligence because the Act does not provide for such a requirement

[36] Under this submission, Mr. Fournier considers the following six components: (a) the legislative framework and the principles that apply to its interpretation; (b) the connection between the military service and the disability; (c) *Hall* and the rejection of the negligence test; (d) Decision I-25; (e) *Mérineau*; and (f) the test and its application in this case.

[37] With regard to the first component, Mr. Fournier, after setting out the relevant sections of the legislation, argues that the purpose of the Act is to compensate members of the military or their families in the event of disability or death and that it should be interpreted liberally and generously given that purpose (*Canada (Attorney General) v Frye*, 2005 FCA 264 at paragraphs 14 to 18 [*Frye*]; *Godbout v Pagé*, 2017 SCC 18 at paragraph 38 [*Godbout*]). He emphasizes the fact that the Act contains no requirement to prove any kind of negligence because, in order to obtain compensation, a member of the Forces must simply demonstrate that

his or her disability is “service-related”, namely that it “arose out of or was directly connected with service”. In this respect, he alleges that the test of “arose out of” the military service is less strict than the one of “directly connected with” (*Hall*, at paragraphs 35, 37 and 41).

[38] In connection with the second component, Mr. Fournier’s basic contention is that a disability caused by a disease that arises from treatment provided, prescribed or authorized by the Forces should provide entitlement to an award regardless of any individual’s responsibility, namely because of the health care system imposed on its members by the Forces. This system would constitute the “connection” between the disability and the service that the Act requires.

[39] Mr. Fournier argues that the Appeal Panel erred in law by requiring evidence of negligence on the part of the Forces’ health professionals in order for a disability award to be granted as provided in Decision I-25 because the Act contains no such requirement, which would be at odds with the broad interpretation that is provided therein. He also submits that the Appeal Panel seems to be using the common law “but for” causation test for civil liability, which the FCA rejected for the interpretation of “directly connected with” (*Cole*, at paragraph 56). Thus, he argues to the contrary that there is a sufficient connection between his disability and his service in the Forces because (1) members are required to consult the Forces’ health professionals; and (2) the Forces are involved in the administration of the health care provided to members. Therefore, he argues that he is not required to prove a direct and immediate causal connection because it is sufficient that his disability “arose out of” his military service (*Frye*, at paragraphs 21 and 29).

[40] Mr. Fournier highlights the importance of the Supreme Court of Canada's judgments in *Amos v Insurance Corp. of British Columbia*, [1995] 3 SCR 405 (cited in *Frye*) and *Godbout* to argue that *Mérineau* should no longer apply.

[41] With respect to the third component, Mr. Fournier considers *Hall*, arguing that, in that decision, the Court set aside the requirement of proving the negligence of the Forces' medical staff for an award to be granted (*Hall*, paragraph 48) and that it must be followed.

[42] In connection with the fourth component, Mr. Fournier argues that Decision I-25 is not a binding precedent and that, instead of applying it, the Appeal Panel should have reconsidered its merit against the more recent case law that promotes a liberal and broad interpretation of the connection between the military service and the disability (*Sloane v Canada (Attorney General)*, 2012 FC 567 at paragraph 27). Thus, the requirement to prove medical negligence no longer falls within a range of possible, acceptable outcomes to interpret section 45 of the Act.

[43] With regard to the fifth component, Mr. Fournier argues that *Mérineau* should not be followed because it addresses another subject and leads to the impression that Decision I-25 does not represent an interpretation of the Act, but rather establishes a sort of bonus scheme. Furthermore, according to Mr. Fournier, in *Mérineau*, the Supreme Court apparently addressed only the phrase "directly connected", leaving open the interpretation of the phrase "arose out of", which must not be interpreted narrowly. Mr. Fournier also submits that the Supreme Court of Canada's judgments in *Amos* and *Godbout*, while dealing with the interpretation of different

compensation schemes, should be used to interpret section 45 of the Act, rather than the *Mérineau* judgment.

[44] Lastly, with respect to the sixth component, Mr. Fournier concludes by stating that the requirement for members of the Forces to consult the Forces' health professionals and their obligation to provide members with medical care suffices to prove the connection between the military service and the disability. All effects stemming from the treatment that was provided, prescribed or authorized by the Forces apparently "arose out of" the service.

(3) The Appeal Panel erred in its legal characterization of the evidence

[45] Mr. Fournier argues that the Appeal Panel erred in failing to legally characterize the facts pursuant to the wording of section 39 of the Appeal Board Act and by failing to examine the new evidence he presented.

[46] He submits that the Appeal Panel did not consider the new evidence filed to support the position that, in 2004, the medical community already knew that taking quinine involved risks and was already contraindicated in 2006. He submits that the Panel did not specify the reasons for rejecting that evidence, contrary to the requirements of the case law (*Acreman v Canada (Attorney General)*, 2010 FC 1331 at paragraphs 35 to 37) because it would have necessarily decided in favour of Mr. Fournier on certain material facts.

B. *The Attorney General of Canada's position*

[47] The AGC has also reiterated the facts, submitted his issue and set out his arguments and is asking the Court to dismiss the application with costs.

[48] The AGC addresses the following three components: (1) the applicable standard of review; (2) the applicable legislative scheme; and (3) the application to the facts.

(1) Standard of review

[49] The AGC replies that this is a question of mixed fact and law and that the Court must show deference to an administrative tribunal that is interpreting its home statute or a statute closely connected to its function (Appeal Board Act, at paragraphs 18, 25 and 26).

[50] The AGC also submits that the Appeal Panel's assessment of the evidence is reviewable on the reasonableness standard (*Canada (Attorney General) v Wannamaker*, 2007 FCA 126 at paragraph 12; *Hall*, at paragraph 11; *Cole*, at paragraph 115) and that the Board's expertise in its area of jurisdiction requires deference.

(2) The applicable legislative scheme

[51] The AGC presents this argument in two parts, namely (a) the legislative scheme of an application for a disability award; and (b) the health care system for members of the Regular Force.

[52] In the first part, the AGC sets out the object of the Act and the requirements of section 39 of the abovementioned Appeal Board Act and specifies that the purpose of the liberal compensation scheme is to provide recognition in connection with military service. Thus, to obtain an award, the applicant must prove (i) a disability, and (ii) that this disability is caused by a service-*related* disease, which in this case means that it *arose out of or was directly connected with service*. In this regard, the AGC argues namely that the appearance of a personal condition does not *arise out of* service.

[53] In the second part, the AGC responds to Mr. Fournier's argument that the connection between the disability and the service resides in the fact that the [TRANSLATION] "treatment [was] administered under the authority of the Canadian Forces."

[54] He submits that the structure of the health care system for service members has two objectives: to finance the provision of health care to members and to ensure members' fitness for duty. Thus, it is incorrect to argue that any disability "arose out of" military service because members are obligated to consult a military physician.

(3) Application to the facts

[55] Therefore, the AGC argues that the applicant's restless legs syndrome is not related to his military service and that the applicant experienced side effects (drug-induced vasculitis) because of his hypersensitivity after taking quinine prescribed by a civilian physician. The AGC insists that Mr. Fournier's drug-induced vasculitis is not service-related.

[56] However, even after having argued that Mr. Fournier's condition is neither related to nor arose out of his service, the AGC confirms, at paragraph 44 of his memorandum, that the applicant may seek recognition of his entitlement to an award by demonstrating that a health care professional from the Forces was negligent in administering his treatment.

[57] Thus, in assessing the Appeal Panel's decision, the AGC submits that, after reviewing the record, where it noted in particular the opinion of the attending physician, the Appeal Panel determined that the Forces' health care professionals had not deviated from the standard of care that applied at the time in Canada. According to the respondent, the Appeal Panel correctly determined that the applicant had not proven that his disability arose out of his military service.

[58] The respondent notes that accepting the applicant's argument would give rise to entitlement to an award for any personal condition of the Forces' members on the sole basis that the costs of health care for members are assumed by the Forces and that fitness for duty must be assessed by a military physician.

[59] The respondent concludes that the Appeal Panel did not place an additional burden on the applicant and that it was the applicant's duty to establish a connection between the military service and the disability.

V. Issues

[60] The Court must first determine the appropriate standard of review.

[61] The parties submitted certain issues in their statements. However, as it was discussed with the parties during the hearing, the Court is of the view that the issue is to determine whether or not the Appeal Panel erred in relying on Decision I-25 to examine whether Mr. Fournier is entitled to an award under paragraph 45(1)(a) of the Act even though his disease is *a priori* not related to his service and despite the Supreme Court of Canada's conclusion in *Mérineau*.

[62] To do this, it is necessary to take a closer look at Decision I-25, the position set out by the Supreme Court in *Mérineau*, Decision I-31, and the principle of *stare decisis*.

[63] We will examine these elements more closely.

VI. Standard of review

[64] Although it is usually appropriate to use the standard of reasonableness to review the decision of an administrative tribunal that is interpreting its home statute or a statute closely connected to its function, the FCA has specified that, in a case like this one, and since it involves a distinct legal issue that is likely to be reviewed separately, it is instead necessary to review the Board's decision against the standard of correctness. The FCA determined that "[t]he interpretation of the phrase 'arose out of or was directly connected with' in paragraph 21(2)(a) of the *Pension Act* is a question of law that was in dispute before the Board" and confirmed that the standard of correctness must be applied to the interpretation of those terms (*Cole*, at paragraphs 44–45).

[65] Thus, the Court must assess whether the Appeal Panel correctly determined that Mr. Fournier's drug-induced vasculitis did not arise out of and was not directly connected with the military service on the grounds that he did not prove the level of medical negligence required in Decision I-25.

[66] With regard to the administrative tribunal's assessment of the evidence, I agree with the position of the parties that the standard of reasonableness applies.

VII. Analysis

A. *Legal framework*

[67] Section 45 of the Act provides that a member of the Forces may receive a disability award.

45 (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from	45 (1) Le ministre peut, sur demande, verser une indemnité d'invalidité au militaire ou vétéran qui démontre qu'il souffre d'une invalidité causée :
(a) a service-related injury or disease; or	a) **soit par une blessure ou maladie liée au service**;
(b) a non-service-related injury or disease that was aggravated by service.	b) soit par une blessure ou maladie non liée au service dont l'aggravation est due au service.
	(Nos soulignés)

[68] At the hearing, the parties confirmed that the drug-induced vasculitis does not represent the aggravation of another condition—for example, of the restless legs syndrome—but is rather a distinct and separate disease. It is therefore paragraph 45(1)(a) that applies in this case. Thus, an

award may be granted under that paragraph if the disability the member suffers from is caused by a service-related disease.

[69] The phrase "service-related" is defined in section 2 of the Act:

service-related injury or ***disease*** means an injury or a disease that	**liée au service** Se dit de la blessure ou maladie :
(a) was attributable to or was incurred during special duty service; or	**a)** soit survenue au cours du service spécial ou attribuable à celui-ci;
(b) arose out of or was directly connected with service in the Canadian Forces. (*liée au service*)	**b) soit consécutive ou rattachée directement au service dans les Forces canadiennes.** (service-related injury or disease)
	(Nos soulignés)

[70] The terms of paragraph 45(1)(a) and subsection 2(1) of the Act are similar to those used in the former section 12 of the *Pension Act*, RSC 1970, c P-7, in force in 1978 when Decision I-25 was issued, and in 1983, when the Supreme Court rendered the *Mérineau* judgment, but have since been replaced by section 21 of the *Pension Act*.

[71] Section 12 of the *Pension Act* confirmed that a member of the Forces was entitled to a pension when he or she suffered from a disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service . . . . Subsection 12(2), now repealed, and subsection 21(2) of the *Pension Act* are reproduced in the Appendix.

[72] The case law dealing with those former provisions is therefore still relevant because this case involves interpreting and applying the same terms as those used in paragraph 45(1)(a) of the Act.

[73] The purpose of the Act is clearly set out in section 2.1. Thus, it must be interpreted liberally, which is also confirmed by section 3 of the Appeal Board Act. Furthermore, the Appeal Panel must comply with section 39 of the Appeal Board Act when it examines the evidence and must make the findings that are as favourable as possible for the applicant. These sections are reproduced in the Appendix.

[74] Moreover, members of the Forces are covered by a specific medical plan. A member is not an "insured person" under the *Canada Health Act*, RSC 1985, c C-6 or under the laws governing the provincial health insurance plans. Their health care is instead insured by the Forces, and they are required to consult military health professionals unless the need to consult civilian health professionals has been established (*Queen's Regulations and Orders for the Canadian Forces* (QR&O), Volume I – Administration, Chapter 34: Medical Services, article 34.07). A member of the Forces who has received civilian health care must therefore consult a military health professional upon returning to the base. According to the AGC, the purpose of this system is to ensure that all members of the Forces are fit to carry out their duties.

B. *Decision I-25*

[75] Decision I-25 is inarguably central to this matter, and it is important to examine it.

[76] In that decision from 1978, the Pension Review Board indicates that it is responding to the submission it had received from the Canadian Pension Commission regarding the interpretation of section 12 of the *Pension Act* that was in effect at the time. The submission sought to determine [TRANSLATION] "if disability or death resulting from inadequate medical care, negligence or medical misadventure is pensionable" for members of the Forces and of the Royal Canadian Mounted Police (RCMP). As noted above, section 12, which was in effect at the time, also required that an injury or disease "arose out of" or was "directly connected with" the service to be pensionable.

[77] Thus, the Board first reviews the service in the Forces and in the RCMP and confirms that they each have their own requirements. Having first considered the situation of the members of the Forces, the Board confirms that the Department of National Defence is responsible for providing adequate medical care to all members and that it is its duty to do so.

[78] The Board presents the issue as follows: "if a serviceman is being treated for a service-related disability, any complications are to be considered as part and parcel of the service-related disability . . . . However, <u>if a disability is not service-related</u> but flows from an act of negligence, the disability that results from the act of negligence is a separate entity from the original disability. Therefore, the act of negligence may create a new disability or contribute to the aggravation of the disability under treatment" (Decision I-25, page 2, emphasis added).

[79] The Board goes on to state that entitlement to a pension granted as a result of negligence, inadequate medical care or medical misadventure is related to the disability or to the aspect of the disability that results from the negligence.

[80] From reading Decision I-25, it therefore seems clear that it is possible to apply for disability in a case of medical negligence only if and when the disability is not related to the military service and that this possibility is justified by the duty imposed on the Department of National Defence to provide care to members of the Forces.

[81] Furthermore, the Board confirms that this possibility is not open to members of the RCMP, who do not have the same medical plan.

[82] Thus, a member of the Forces who applies for an award for an injury or a disease related to service is under no obligation to prove that the injury resulted from medical negligence or inadequate medical care even if such negligence exists.

[83] According to Decision I-25, the requirement for medical proof of negligence or of inadequate care applies only when the disease is not related to the member's service in the Forces.

[84] It would therefore be a two-step system, in which the first step is to determine whether or not the disease is service-related. If the disease is service-related, entitlement to an award/pension arises from that fact. If the disease is not service-related, the second step is to

determine whether the Forces' medical staff provided inadequate care, which gives rise to entitlement to an award/pension.

[85] That being said, it is difficult to understand how the Pension Review Board can include this entitlement to an award/pension in the interpretation of subsection 12(2) of the *Pension Act* that was in effect at the time. Section 12 of the *Pension Act*, like the current paragraph 45(1)(a) of the Act, requires that a disease be related (arose out of or was directly connected) to the service to provide entitlement to an award, whereas, according to Decision I-25, the premise that provides entitlement to an award in case of medical negligence first requires that the disease not be related to service.

[86] A reading of Decision I-25 leads us to conclude that the Pension Review Board enhanced the award scheme set out in the Act and provided entitlement to a pension even when the injury, disease or disability is not related to military duties, on the basis of the specific plan for members of the Forces and, furthermore, applicable only to them.

[87] The Honourable Madam Justice Snider seems to have reached the same conclusion at paragraph 20 of *Gannon v Canada (Attorney General)*, 2006 FC 600:

> [19] A veteran of Canada's armed forces—either of reserve or regular service—may qualify for a disability pension where a pre-existing condition has been aggravated during his time in the armed forces. The worsening of such a condition may occur as a result of the member's military duties. <u>In addition, the aggravation may be due to the actions of medical service providers during the time of the military service.</u> (Emphasis added)

[88] Mr. Fournier rightly raises the issue of the legality of such a bonus scheme if it does not arise from section 45 of the Act. However, that issue is not before the Court in this case, and the parties did not have the opportunity to submit arguments in that regard.

C. *Mérineau*

[89] Furthermore, in 1983, the Supreme Court of Canada ruled on the entitlement of a member of the Forces to a disability pension when the disability is not directly connected with the military service but instead arises from an error committed by the Forces' medical staff.

[90] In 1976, Mr. Mérineau was a member of the Forces. After having undergone surgery at a civilian hospital, he was admitted to a Forces' medical establishment to continue his recovery. At that establishment, he received the wrong type of blood during a blood transfusion and suffered serious consequences.

[91] Before applying for a pension under section 12 of the *Pension Act*, Mr. Mérineau brought an action for damages against the Crown.

[92] At trial, and to support the admissibility of his action for damages, Mr. Mérineau argued at the time that he was not entitled to a pension under section 12 of the *Pension Act* [TRANSLATION] "because the act of which he was the victim and the resulting disability were not connected with his military service" (*Mérineau v The Queen* [1981] 1 FC 420 at page 425). The judge at the Federal Court Trial Division rejected that argument and found that the action for damages was inadmissible because Mr. Mérineau was entitled to a pension. The judge states the

following: [TRANSLATION] “it seems clear to me that the acts of which he complains were committed in the course of his military service and that the resulting disability on which his claim is based ‘arose out of or was directly connected with such military service.’”

[93] The Federal Court of Appeal affirmed the trial judge’s decision, stating that [TRANSLATION] “the appellant is entitled to a pension because the aggravation of his disease was directly connected with his military service within the meaning of subsection 12(2) of the *Pension Act*, RSC 1970, c P-7” (*Mérineau v The Queen* [1982] 2 FC 376 [CA]), with Justice Pratte dissenting.

[94] Finally, in 1983, the Supreme Court of Canada adopted the dissenting position of the Federal Court of Appeal and, citing the remarks of Justice Pratte, confirmed that “[t]here is certainly a link between the damage for which the appellant is claiming compensation and his status as a serviceman, but I think that link is too tenuous for one to say that the damage is directly connected to his military service.” It seems evident that the Supreme Court implicitly included the phrase “arose out of” in its analysis, as the trial judge had noted, because it concluded that Mr. Mérineau was not entitled to a pension.

[95] Subsequent to *Mérineau*, the Pension Review Board issued Decision I-31, in which it affirms that Decision I-25 is still applicable. The Pension Review Board set aside the Supreme Court’s conclusion in *Mérineau*, finding in particular that the said decision was made *per incuriam* (Pension Review Board Decision I-31, applicant’s record at page 281).

[96] The Court obviously cannot endorse this statement. Furthermore, the parties have not convinced me that this case corresponds to one of the extraordinary exceptions described by the Supreme Court for departing from the principle of *stare decisis*. The Court is therefore required to apply the *Mérineau* judgment to the facts of the case (*R v Comeau*, 2018 SCC 15 at paragraphs 26 and 31; *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraph 44 and *Carter v Canada (Attorney General)*, 2015 SCC 5 at paragraph 44).

[97] The Supreme Court's judgments in *Amos* and *Godbout*, which are cited by the applicant, respectively address the interpretation of the wording of a private insurer's insurance policy and the wording of Quebec's *Automobile Insurance Act*. However, *Mérineau* deals specifically with the interpretation of the wording of section 12 of the *Pension Act*, which contains the phrase "arose out of or was directly connected with the service", which is carried forward into the current Act. Furthermore, *Mérineau* specifically considers the entitlement of a member of the Forces to a pension in light of the Forces' particular medical system and in a case where medical negligence by its staff members caused the disability.

[98] Thus, despite the applicant's able submissions, the Court cannot agree with the argument that the judgments he presented overturn *Mérineau*. Finally, the other FC and FCA judgments cited by the applicant and the respondent do not specifically address the issue raised in this case.

D. *Discussion*

[99] In 1978, Decision I-25 made it possible for members of the Forces to receive a pension when their disability is not *related* to service, if the disability results from inadequate care

provided by the Forces' medical staff. This possibility is available to members of the Forces in acknowledgement of the particular medical plan under which they are covered.

[100] Paradoxically, Decision I-25 also purports to interpret section 12 of the *Pension Act* despite the fact that the premise granting entitlement to a pension for medical negligence requires that the disability not be service-related, while the Act requires it to be. In that regard, the decision made by the Appeal Panel that is currently under review refers to Decision I-25 and states that the said decision makes it possible "to provide compensation for disabilities resulting from medical errors, which would not be covered otherwise."

[101] In 1983, the Supreme Court of Canada clearly indicated that the Forces' medical plan, which requires its members to be treated by the Forces' medical staff, is not by itself sufficient to connect the disability to the military service.

[102] Decision I-31 confirms the possibility of an award provided in Decision I-25 and rejects the Supreme Court of Canada's decision, which this Court cannot endorse.

[103] Moreover, the position of Mr. Fournier, who asks the Court to eliminate the requirement of proof of inadequate care to provide entitlement to the compensation set out in Decision I-25, appears to be untenable. Indeed, adopting such a position would lead to granting ALL members of the Forces suffering from a disability the entitlement to compensation, even though Parliament restricted entitlement to compensation to the cases that are contemplated by section 45 of the Act.

E. *The Appeal Panel's decision is unintelligible and incorrect*

[104] The Appeal Panel's decision appears to be incorrect because it does not comply with the Supreme Court of Canada's judgment in *Mérineau*.

[105] In addition, the decision is unintelligible. Indeed, the Appeal Panel first determined that Mr. Fournier's disease is not related to his military service to consider the possibility of compensation provided by Decision I-25, namely whether Mr. Fournier proved that his disability resulted from medical negligence committed by the Forces' medical staff.

[106] And, paradoxically, having determined that the evidence did not make it possible to conclude that such medical negligence was in fact committed, the Appeal Panel concluded that Mr. Fournier therefore did not prove that the disease arose out of or was directly connected with the service, and thus that it is not related.

[107] As the Court indicated to the parties during the hearing, it seems unintelligible for the Appeal Panel to (1) determine that the disability is not service-related for the purpose of exercising the option provided by Decision I-25 and subsequently to (2) determine that Mr. Fournier did not prove medical negligence and therefore did not establish that his disability is related to his service.

[108] The Appeal Panel must shed light on the situation. *Inter alia*, it must specify whether the entitlement to compensation set out in Decision I-25 falls (1) within the Act, taking into account *Mérineau*, or (2) outside the Act, such as a bonus.

[109] The Court will therefore refer the case back to the Appeal Panel so that it can review the situation in light of these reasons and enable the parties to submit the additional arguments that are required.

F. *Medical evidence*

[110] The Court need not address this issue because the application is allowed.

JUDGMENT in T-2238-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The case is referred back to the Appeal Panel for reconsideration, taking into account these reasons.
3. Without costs.

"Martine St-Louis"
Judge

Certified true translation
This 11th day of June 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2238-16
STYLE OF CAUSE:	PIERRE FOURNIER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	FEBRUARY 12, 2018
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	MAY 1, 2018

APPEARANCES:

Mark Phillips	FOR THE APPLICANT
Véronique Forest	FOR THE RESPONDENT

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APPENDIX

Veterans Review and Appeal Board Act (SC 1995, c 18), s 3 and 39	***Loi sur le Tribunal des anciens combattants (révision et appel),*** LC 1995, ch 18, art 3 et 39
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.
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 suivantes en matière de preuve :
(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;	a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and	b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;
(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the	c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.

applicant or appellant has established a case.

Canadian Forces Members and Veterans Re-establishment and Compensation Act (SC 2005, c 21), s 2.1

2.1 The purpose of this Act is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.

Loi sur les mesures de réinsertion et d'indemnisation des militaires et vétérans des Forces canadiennes (LC 2005, ch 21), art 2.1

2.1 La présente loi a pour objet de reconnaître et d'honorer l'obligation du peuple canadien et du gouvernement du Canada de rendre un hommage grandement mérité aux militaires et vétérans pour leur dévouement envers le Canada, obligation qui vise notamment la fourniture de services, d'assistance et de mesures d'indemnisation à ceux qui ont été blessés par suite de leur service militaire et à leur époux ou conjoint de fait ainsi qu'au survivant et aux orphelins de ceux qui sont décédés par suite de leur service militaire. Elle s'interprète de façon libérale afin de donner effet à cette obligation reconnue.

Pension Act, (RSC 1970, c P-7), s 12(2) (Repealed)

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, pension shall be awarded to or in respect of members of the forces who have suffered disability, in

Loi sur les pensions, (SRC 1970, ch P-7), para 12(2) (Abrogé)

À 1'égard du service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la seconde guerre mondiale et à 1'égard du service militaire en temps de paix, des pensions sont accordées aux membres ou

accordance with the rates set out in Schedule A, and in respect of members of the forces who have died, in accordance with the rates set out in Schedule B, when the injury or disease or aggravation thereof resulting in disability or death in respect of which the application for pension is made arose out of or was directly connected with such military service.

relativement aux membres des forces qui ont subi une invalidité, d'après les taux indiques à l'annexe A de la présente loi, et relativement aux membres des forces qui sont morts, d'après les taux indiques a 1 annexe B de la présente loi, lorsque la blessure ou maladie ou son aggravation ayant occasionné 1'invalidité ou le décès sur lequels porte la demande de pension, était consécutive ou se rattachait directement à ce service militaire.

Pension Act (RSC, 1985, c P - 6), subs 21(2)

Loi sur les pensions (LRC (1985), ch P-6), para 21(2)

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,

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) 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;

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) where a member of the forces dies as a result of an injury or disease or an aggravation thereof that arose

b) des pensions sont accordées à l'égard des membres des forces, conformément aux taux

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;

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) 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

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;

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

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) the pension payable under paragraph (b) is less than	(i) la pension payable en application de l'alinéa b),
(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	(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.

thereafter a pension shall be paid to the survivor in accordance with the rates set out in Schedule II.

Queen's Regulations and Orders for the Canadian Forces, Volume 1, chapter 34, Medical Services, subs 34.07(1), (2) and (4)	***Ordonnance et règlements royaux applicables aux Forces canadiennes (ORFC)***, Volume 1 – Administration, chapitre 34 : Services de santé, para 34.07(1), (2) et (4)
34.07 – Entitlement to medical care (1) In Canada, medical care authorized in this article shall be provided:	34.07 – Droit aux soins de santé (1) Au Canada, les soins de santé autorisés par le présent article doivent être prodigués :
(a) in a medical facility operated by the Canadian Forces or, where authorized by the commanding officer of an officer or non-commissioned member on the advice of the appropriate senior medical officer, in a medical facility operated by another department of the federal government or a civilian medical facility; and	a) dans une installation médicale exploitée par les Forces canadiennes ou, lorsque le commandant de l'officier ou du militaire du rang l'autorise sur avis du médecin militaire supérieur compétent, dans une installation médicale exploitée par un autre ministère du gouvernement fédéral ou un organisme civil;
(b) by a medical officer of the Canadian Forces or, where authorized by the commanding officer of an officer or non-commissioned member on the advice of the appropriate senior medical officer, by a medical doctor employed by another department of the federal government, a civilian medical doctor or such other health care personnel as may be authorized by the Chief of the Defence Staff.	b) par un médecin des Forces canadiennes ou, lorsque le commandant de l'officier ou du militaire du rang l'autorise sur avis du médecin militaire supérieur compétent, par un médecin qui est au service d'un autre ministère du gouvernement fédéral, un médecin civil ou par d'autres membres d'un service de santé ainsi que l'autorise le chef d'état-major de la défense.

(2) Where emergency medical care is required and the Canadian Forces medical facilities or medical personnel described in paragraph (1) have been determined to be unavailable or where the urgency of the situation precludes such a determination, medical care may be obtained from other sources and the receipt of that care shall be reported to the parent unit by the member concerned as soon as possible.

(2) Lorsque des soins de santé urgents doivent être administrés et qu'il a été établi que les installations médicales des Forces canadiennes ou les médecins mentionnés à l'alinéa (1) ne sont pas accessibles ou lorsque la gravité de la situation est telle qu'il n'est pas possible de faire une telle vérification, on peut obtenir des soins d'autres sources et le militaire qui reçoit les soins doit le signaler le plus tôt possible à son unité d'appartenance.

(4) Subject to paragraphs (5) to (8), medical care shall be provided at public expense to a member of:
(a) the Regular Force;
(b) the Special Force;
(c) the Reserve Force;
(d) a force of a North, Atlantic Treaty Organization State in Canada in connection with his official duties, where reciprocal agreements for the provision of free medical care are provided for by that State; or

(e) any other military force, as directed by the Minister.

(4) Sous réserve des alinéas (5) à (8), les soins de santé sont prodigués aux frais de l'État à un militaire :
a) de la force régulière;
b) de la force spéciale;
c) de la force de réserve;
d) d'une force d'un État Partie au Traité de l'Atlantique Nord qui se trouve au Canada dans le cadre de ses fonctions officielles, lorsque des ententes existent entre les deux pays en ce qui a trait aux soins de santé gratuits prodigués aux frais de l'État;
e) toute autre force militaire ainsi que l'autorise le ministre.