Federal Court of Appeal | Cour d'appel fédérale

Date: 20221104

Docket: A-405-15

Citation: 2022 FCA 189

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

MRS. CAROL A. NICOL,
Widow of Flying Officer ROBERT DONALD NICOL

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Matter decided based on the written record without the appearance of parties.

Judgment delivered at Ottawa, Ontario, on November 4, 2022.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] On July 2, 1954, Robert Donald Nicol, a twenty-year-old flying officer (F.O.) in the Royal Canadian Air Force (the RCAF) serving in Germany, was involved in a tragic car accident. He was seriously injured and, as a consequence of the physical limitations arising therefrom, he was honourably discharged from the RCAF in 1957.

[2] Between 1958 and 1978, F.O. Nicol made several unsuccessful attempts to obtain a disability pension pursuant to the *Pension Act*, R.S.C. 1985, c. P-6 (*Pension Act*). In 2003, he died of pancreatic cancer.

[3] There is no doubt that this man served his country honourably. F.O. Nicol has and deserves our respect. These reasons, online permanently, will serve as due recognition of his considerable public service.

[4] What is before us in this appeal is a more limited question than what was before other bodies that have dealt with his applications for a disability pension.

[5] This is an appeal brought by F.O. Nicol's surviving spouse, Mrs. Nicol, from a decision of the Federal Court (2015 FC 785) dismissing her application for judicial review of a September 3, 2014 decision of the Veterans Review and Appeal Board (the VRAB) not to reconsider a decision of the Pension Review Board (PRB) issued in 1978.

[6] Although the VRAB was created in 1995, pursuant to section 111 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18 (the *VRAB Act*) (all relevant legislative provisions are reproduced in Annex A to these reasons), the VRAB has the power to reconsider decisions of specific predecessor bodies such as the PRB. It can do so on its own motion if it determines that there was an error of fact or in the interpretation of the law, or, as was the case here, on application if new evidence is presented to it.

[7] This right to apply for a reconsideration of a decision of a predecessor body is more limited than when the decision at issue is one made by the VRAB. Pursuant to subsection 32(1) of the *VRAB Act*, a person such as Mrs. Nicol could apply for reconsideration of a prior decision of the VRAB on the basis of an error of fact or of law, or on the basis of new evidence.

[8] Here, Mrs. Nicol used the standard form applicable to all reconsideration requests (those made pursuant to sections 32 or 111) and relied on a new document described as "3(F) Wing Historical Narrative". Although she notes that it covers the period between June 1 and November 30, 1954, only the portion covering July 1 to July 5, 1954 is included in the evidentiary record (see Appeal Book, Tab 4, exhibit H, pages 171 and 172). In her application dated October 3, 2013, she writes that this new evidence goes to the argument that her husband was attending a squadron picnic and suggests that his injuries arose out of or were directly connected to his peacetime military service as he was attending such an event when the accident occurred. Mrs. Nicol also filled out the section of the form relating to reconsideration on the basis of an error of fact, which she specified as "the failure of the Appeal Panel to properly apply the facts to the legislation". Under the section relating to reconsideration on the basis of an error of law, she simply wrote "See Error of Fact".

[9] In the three-page submissions made on her behalf by the Pensions Advocate, the main argument was that the mention of the picnic and accident found in the Historical Narrative for July 1 & 2 "was tantamount to accepting that the whole activity was service related". Three prior administrative decisions were relied upon: the 2005 rehearing decision of the VRAB in *Frye* (Decision No. 100000973288) (*Frye*), the 1972 PRB decision in *Glover* (Decision 2B-16320)

and the 1975 decision of the Canadian Pension Commission in *Bingham* (P-17112, ZP-137) (see Appeal Book, Tab 4, exhibit G-1, pages 103 to 105). Finally, relying on F.O. Nicol's prior declarations, it was argued that the veteran was "in a duty situation being required to attend the Squadron Picnic". There are no details in the file about what more, if anything, was said when the VRAB convened on July 15, 2014. A copy of the Federal Court decision quashing the initial decision of the VRAB in *Frye* was in the record before the VRAB.

[10] The VRAB decision was brief. It noted that when a request is based on new evidence pursuant to section 111, it had to apply the test set out in *Mackay v. Canada (Attorney General)*, (1997), 129 F.T.R. 286 (T.D.) to determine if the evidence presented was indeed new evidence. This preliminary question (or first stage) determines if the VRAB can actually proceed to reconsider the previous decision. It held that the Historical Narrative put forth as the only new evidence justifying the application for reconsideration did not meet the fourth criterion of the test — that is, if the evidence presented is believed, it must reasonably, when taken with other evidence, be expected to affect the result. It also noted that there was no error of fact.

[11] As mentioned, Mrs. Nicol had described the error in her application as a failure "to properly apply the facts to the legislation". I note that, rather than a specific error of fact or an extricable question of law, this is really a question of mixed fact and law, in essence, a reweighing of the evidence. Under section 32 of the *VRAB Act*, even on its own motion, the VRAB could not reconsider the decision before it without first identifying an error of fact or in the interpretation of the law.

[12] In the Federal Court, Mrs. Nicol sought judicial review of the VRAB's 2014 decision. She was unsuccessful in the Federal Court, and has appealed to this Court.

[13] Mrs. Nicol represented herself before the Federal Court and before this Court. Therefore, it is imperative to explain exactly what the role of this Court in this appeal is. Our role is limited by many decisions that bind us; the Supreme Court has said that this Court is not allowed to make new findings of fact based on its own appreciation of the evidentiary record. The Supreme Court also tells us that on appeal of a decision of a reviewing Court (here the Federal Court), we are to answer only two questions: whether the Federal Court chose the appropriate standard of review, and whether the Federal Court applied it properly (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 (*Agraira*) reconfirmed in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras 11-12).

[14] The "standard of review" defines the extent to which a Court can interfere in respect of a decision of an administrative body, like the VRAB, to whom Parliament chose to give the primary task of deciding matters such as whether to reconsider a prior decision or not. This means that if, as here, the standard of review is "reasonableness", this Court is not allowed to second-guess the VRAB. We have to give the VRAB some leeway—what the law calls "deference"—when it applies the rules to the facts and reaches a conclusion.

[15] This Court cannot redo what the VRAB or PRB did. It cannot decide whether they reached the right result. We are not allowed to go through the evidence and reach our own

conclusion about F.O. Nicol's eligibility for a disability pension: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 83 (*Vavilov*).

[16] Thus, when we leave a decision of the VRAB in place, it doesn't mean we disbelieve the person claiming benefits or we don't care about the person's feelings, bad condition or painful suffering. It is just that the law limits our ability to set aside decisions such as this—and we have to apply the law to the facts of a case, no matter how sympathetic, no matter how heart-rending, whether we like it or not.

[17] Before going further with my analysis, I ought to mention that this appeal is somewhat unusual because more than seven years have elapsed since the Notice of Appeal was filed. This calls for some explanation.

[18] The appellant obtained a stay of this appeal on March 16, 2016, in order to enable her to request a further reconsideration from the VRAB based on new evidence that she had not been granted leave to file in this appeal. The appellant did not advise this Court when she received the resulting new VRAB decision dated July 25, 2018. By January 2019, this Court became aware that the VRAB had ruled, and so this Court gave her two months to seek legal advice as to whether to pursue her appeal or seek other remedies. Then, two hearing dates were fixed and later adjourned in March and September 2020. In July 2021, the appellant advised the Court that she had retained counsel to contest another decision of the VRAB issued on June 29, 2021, concerning yet another request by her for reconsideration. The Federal Court ultimately

dismissed this application (2022 FC 245). The appellant has not filed a Notice of Appeal from that decision of the Federal Court, and the time to do so has expired.

[19] Because of various health issues, the appellant requested another last-minute adjournment the day before the hearing in this appeal. A hearing was held by video conference on September 7, 2022 to discuss her request and what should be done to ensure the prompt determination of this appeal. At the end of the hearing, the appellant agreed that her appeal should be decided without an oral hearing on the basis of the written record before the Court, including the parties' memoranda of fact and law. This does not include, however, any reference to some new evidence that Mrs. Nicol included in her memorandum of fact and law despite being denied leave to do so.

[20] In deciding this appeal, obviously, I must start with the decision under reconsideration. I must also consider the history of the file and the evidentiary record before the VRAB and the PRB (*Vavilov* at para. 94). Most of the previous proceedings (there were more since 2015) are described in the Federal Court decision under review. I need not relist them. I turn now to a discussion of the evidentiary record that was before the VRAB. I will also refer to the most relevant portions of the PRB's 1978 Decision.

I. Evidentiary Record

[21] Most of the facts are not in dispute, and I will only briefly summarize them. F.O. Nicol was a veteran of the RCAF who served from July 20, 1952, to December 24, 1957 (see Appeal Book, Tab 4, exhibit G-1, page 46). He was stationed in Germany at the time of the accident that resulted in the injuries and his ensuing disability. On July 1, 1954, F.O. Nicol attended a picnic

for the dependants of servicemen to celebrate the Canadian National Holiday, Dominion Day. Although travelling arrangements were organized by the RCAF for other ranks, particularly the members living in family quarters, the officers attending this picnic were expected to make their own arrangements for travel, in privately owned vehicles, to and from the picnic, which was held near Pirmasens, Germany, approximately 30 miles from the military base. F.O. Nicol, like several other officers who attended the picnic, including his commanding officer, drove to the picnic in one of five or more cars available. F.O. Nicol went to the picnic with F.O. Alexander (see Appeal Book, Tab 4, exhibit G-1, page 131) but as noted by the Federal Court there is no evidence as to who else, if anybody, travelled to the picnic in that same vehicle. F.O. Alexander stated that he arrived at the picnic at around 3 p.m.

[22] F.O. Nicol left the picnic at about 6 or 7 p.m. with two other colleagues (F.O. Waldorf and F.O. Johnson) in the car owned and driven by F.O. Alexander (see Appeal Book, Tab 4, exhibit G-1, page 129). This group stopped at a Gasthouse in Pirmasens for some snacks, and then proceeded to a casino in Pirmasens to see a show and have a few drinks. The group (minus F.O. Johnson) (see Appeal Book, Tab 4, exhibit G-1, page 129) left the casino sometime between 11:30 p.m. and midnight (see Appeal Book, Tab 4, exhibit G-1, pages 129 and 131) and headed back to Zweibrücken, Germany, where the military base was located. The accident occurred that evening at about 12:15 a.m.

[23] The three officers involved in the accident, including F.O. Nicol, were found by other motorists passing by (unrelated to F.O. Nicol's station), and taken to a civilian hospital in Pirmasens. Later that night, after the RCAF were notified, they were transferred to the US

military hospital in Landstuhl. F.O. Nicol suffered the most serious injuries; they were diagnosed as likely to cause permanent disability (see Appeal Book, Tab 4, exhibit G-1, page 124).

[24] A Board of Inquiry was convened to investigate and make findings and recommendations regarding the accident. F.O. Nicol, who was still at the hospital, was interviewed, as were the other two officers involved in the accident, and the other witnesses who helped them after the accident. All three officers involved in the accident said they were not on duty at the time of the accident. In an RCAF report on the accident dated July 8, 1954, the Commanding Officer of the 3(F) Wing stated (at paragraph 5 of his declaration) that F.O. Nicol was not injured while on duty or while involved in "a game or other form of physical recreation approved by proper air force authority", and that he was on "pass with pay" at the relevant time (see Appeal Book, Tab 4, exhibit G-1, page 125). The Board of Inquiry report indicates that F.O. Alexander "fell asleep at the wheel of the vehicle, due to general physical exhaustion aided by previous consumption of alcoholic beverages" (see Appeal Book, Tab 4, exhibit G-1, page 157). It appears from the statements taken that he was driving at 70-80 m.p.h.

[25] After his discharge, F.O. Nicol applied for a disability pension. Among other things, he stated that he made his declaration during the Board of Inquiry while he was quite sick and under sedation. He added that, in his view, he was on duty 24/7 at the time of the accident because he was serving in occupied territories in Germany. He also said that attendance at the picnic was compulsory for all officers (see Appeal Book, Tab 4, exhibit G-1, pages 61 and 62). In his testimony before the Canadian Pension Commission in 1960, F.O. Nicol stated that he and other officers had visited one or two other places before starting the trip home. In his view, "he was

free to leave the entertainment [after the picnic concluded in the late afternoon] at any time, and then go where he liked" (see Appeal Book, Tab 4, exhibit G-1, page 69). At that time, he also said that he was unable to recall many particulars connected with the accident itself.

[26] Fourteen years later, F.O. Nicol filed a statutory declaration dated November 1, 1974. He stated that he was on duty at the time of the accident, either by reason of his status as a member of an occupying force in Germany, or under the circumstances leading up to the accident itself. He again noted that RCAF transport was made available for other ranks and their family to go to the picnic, but officers were either "instructed or expected" to make their own arrangements for travel. In the said declaration, he added that they departed the picnic site at about 7 or 8 p.m. (rather than the 6 or 7 p.m. mentioned earlier), after most of the other unit personnel had left for the station. In paragraph 5 of his declaration, there is no express mention of the stop at the casino *per se*; he simply stated that a group, including the Squadron Leader, stopped at several Gasthouses for food and refreshments before ultimately returning to the base. Finally, after describing the accident, he wrote that he "understands" that the Squadron Leader was in a privately owned vehicle immediately following F.O. Alexander's car (see Appeal Book, Tab 4, exhibit G-1, page 62). Although this last statement is not based on personal recollection, it appeared to have had some significance for F.O. Nicol.

[27] But there is no indication what F.O. Nicol is referring to when F.O. Alexander's car left for or from the picnic, or when it left the casino. There is no evidence that anyone from the military base, including the Squadron Leader, stopped at the scene of the accident or witnessed it, as one would expect if they were immediately following each other when F.O. Alexander's

car left the casino. There is no evidence as to who else from the military base went to the casino. Nor is there evidence of when and with whom F.O. Johnson left the casino.

II. Analysis

[28] As mentioned, the Supreme Court of Canada in *Agraira* made it clear that our task is simply to verify if the Federal Court chose the appropriate standard of review and applied it properly.

[29] The Federal Court applied the standard of reasonableness to review the VRAB decision, following the then-governing authority: *Dunsmuir v. New Brunswick* 2008 SCC 9 at para. 57. Today, *Vavilov* is the governing authority. It also mandates the standard of reasonableness (at paras. 23-32).

[30] Thus, the only question that remains is whether the Federal Court applied the reasonableness standard properly. To determine this question, our Court focuses on the administrative decision (*Agraira* at para. 46) to determine whether it is acceptable and defensible in light of the constraints acting upon the administrative decision-maker and whether a reasoned explanation for the outcome can be discerned. This does not mean that we ignore the decision of the Federal Court, in this case a very thorough one that concluded that the VRAB decision was reasonable (*Bank of Montreal v. Canada (Attorney General)*, 2021 FCA 189 at para. 4).

[31] According to the appellant, the Historical Narrative (reproduced in the FC Decision at para. 14), which describes the picnic as a “stn picnic” (a station picnic), should have had a

definitive impact on the conclusion reached by the PRB in 1978, because it confirms that the picnic was a social event organized by the RCAF, and thus that F.O. Nicol was on duty. However, this Historical Narrative is noteworthy in what it does not confirm. It does not confirm F.O. Nicol's allegation that his attendance was compulsory and thus he was on duty. In fact, as noted by the Federal Court, the statement in the Historical Narrative that "attendance was good even though considerable rain was falling" appears to underscore that attendance was not compulsory. At best, it indicates that many went to celebrate the national holiday despite the far from ideal conditions because it was organized by the RCAF to raise the morale of all in the stressful period of the Cold War. I cannot agree with Mrs. Nicol's view that this evidence confirms that officers would only go in bad weather if it was compulsory to do so. It also does not confirm her view that the only people who could opt out of the event were families, wives and children.

[32] I also note that further in this document, the entry for July 3 states that "only 50% of the stn on duty" that day (see Appeal Book, Tab 4, exhibit H, page 172). This, like the 3(F) Wing Commanding Officer's accident report and the statements of the other two officers involved, appears to contradict the appellant's position that F.O. Nicol, like everybody at the station, was on duty 24/7 while serving in Germany, even in peacetime, because they were serving in occupied territories. F.O. Nicol may well have considered himself on duty 24/7. But that does not mean that, for the purpose of determining his legal entitlement to a disability pension, he was actually on duty.

[33] But more importantly, even after accepting that the picnic was organized for the dependants of the servicemen and that transportation was provided by the RCAF for other ranks living in the family quarters, the PRB refused the Pensions Advocate's submission because, considering all the circumstances, including the timing of the accident and the fact that F.O. Nicol felt he was free to go with his colleagues to a casino for a show and some drinks, F.O. Nicol's injuries fell outside of the scope of subsections 12(2) and 12(3) of the *Pension Act*, R.S.C. 1970, c. P-7, as amended by R.S.C. 1970, c. 22 (2d. Supp.) (now subsections 21(2) and (3)) of the current *Pension Act).*

[34] The issue here is not, as put by Mrs. Nicol, whether it was abnormal or unusual for young officers to go to a casino and have some drinks when they felt free to do so. As well, the question is not whether her husband committed a fault. The PRB spoke only in terms of legal entitlement under the legislation that then applied.

[35] This is seen from the following passages in its reasons (see Appeal Book, Tab 4, exhibit G-1, page 97):

> In order for the appellant to be entitled to a pension for his conditions, it is necessary to establish that the incurrence or aggravation of the conditions arose out of or was directly connected with his Regular Force period of service. The Board is required to draw from all the circumstances of the case and from all the evidence, every reasonable inference in favour of the appellant, and is also required to accept as fact any credible uncontradicted evidence submitted to it by the appellant and, in weighing the evidence, to resolve any doubt in the appellant's favour.

[36] This passage indicates that the PRB was alert and alive to its obligation to apply the evidentiary principles that are now set out in section 39 of the *VRAB Act* (previously section 85

of the *Pension Act*, 1970 as amended). Section 39 of the *VRAB Act* enunciates the principle that the evidence presented should be liberally construed in favour of the applicant.

[37] After summarizing the representations of the Pensions Advocate as to the evidence presented, the PRB added (see Appeal Book, Tab 4, exhibit G-1, pages 98 and 99):

> This Board has carefully reviewed the documentation with respect to this claim and observes that the evidence contained in the Board of Inquiry of July 5, 1954, is substantially more significant than outlined by the pensions advocate.
>
> […]
>
> The pensions advocate submitted that it was clearly to be presumed that the picnic event was properly authorized since transportation had been layed on for other ranks and their dependants and it was apparent the appellant had an obligation to attend, then the provisions of subsection 12(3) should apply and since the disabilities were incurred in connection with this affair it should be deemed they arose out of or were directly connected with Regular Force service as provided by this subsection. This Board, on the basis of this evidence, finds that there were no restrictions placed on the appellant or his companions to return directly to their base and that after the picnic they were free to act on their own and chose to proceed on another adventure entirely on their own. In this matter, circumstances are clearly distinguishable from those in the GLOVER case.
>
> The question that subsection 12(3) would have applied had the injuries occurred during the picnic or had occurred had the appellant returned directly to his base, is academic since these circumstances did not apply in this case. This Board finds that the injuries suffered by the appellant, while obviously incurred during Regular Force service, occurred in an auto accident at a time and under circumstances when he was not engaged in any military function and the resultant disabilities did not arise out of nor were they directly connected with Regular Force service.

[38] I note that the PRB used the words military "function", function being the word used by the Pensions Advocate representing Mrs. Nicol to describe the fact that the picnic was a unit function, *i.e.*, an event sponsored by the RCAF. Thus, in arriving at its ultimate conclusion, the

PRB did not just focus on whether F.O. Nicol was on duty or not when he attended the picnic. The Historical Narrative did not add any new element as the PRB had already accepted that this was a so-called station event. Thus, it was reasonable for the VRAB to dismiss the application because this evidence only confirmed what the PRB had already considered as a fact among the various relevant circumstances that it was entitled to consider. This evidence could not have affected the outcome.

[39] The PRB took into account the then applicable legislative provision now found in subsection 21(3) of the *Pension Act*. Also, even on its own motion, the VRAB is not entitled to reconsider the decision of a predecessor body in the absence of an error of fact or an error in the interpretation of the law. There was no basis for finding one here.

[40] The approach adopted by the PRB in this case was in line with the one approved by the Federal Court in *Fournier v. Attorney General of Canada*, 2005 FC 453 at paragraph 35, which our Court fully endorsed (2006 FCA 19). The VRAB (and its predecessors) can consider several relevant factors, none of which is determinative (see the FC decision at para 29). This includes whether one was on duty or not. It also includes the degree of control exercised by the military over the applicant when the accident occurred.

[41] I realize that I am going into more details and issues than is required by *Vavilov* in a reasonableness review. But, I feel the need to reassure Mrs. Nicol that I have carefully reviewed the file and considered her concerns.

[42] Mrs. Nicol says that the PRB should have accepted her husband's statement that he was on duty 24/7, and thus that everything he did at all times arose out of his military service. As mentioned earlier, there was contrary evidence before the PRB in that respect. The PRB did not have to accept the veteran's statement under section 39 of the *VRAB Act*. This was not an uncontradicted statement. Mrs. Nicol also suggests that the other officers' evidence that they were not on duty at the relevant time, should have been construed as meaning simply that "they were not flying jets at the time". If this were how a F.O. usually understood the word "duty", there would have been no need for F.O. Nicol to retract the statement he made during the Inquiry in 1954. It would also make little sense for him to say that he, like all the other officers at the military base, was on duty 24/7 because they were in occupied territories.

[43] As to the appellant's concern with the use of the words "grey zone" (FC Decision at para. 36), it appears that she may have misunderstood the Federal Court's comment. It does not mean that there was any doubt in the mind of the Federal Court or of the administrative decision makers that should be resolved in favour of the appellant pursuant to section 39 of the *VRAB Act*. Rather, the "grey zone" refers to the balancing of the various relevant circumstances, which included the timing and the unique circumstances leading up to this accident, and which did not all point to a single outcome in determining whether there was a sufficient nexus with the military service.

[44] This expression was used by the Federal Court in *Fournier* citing Evans J. in *McTague v. Canada*, [2000] 1 FC 647, a seminal case referred to many times over the years. This balancing

is required by the legislation and at the very core of the jurisdiction of the VRAB and its predecessor bodies.

[45] Mrs. Nicol asks us to give directions to the VRAB similar to those issued by the Federal Court (2004 FC 986) in *Frye*, *i.e.*, that in the redetermination of the application, a pension be granted. As mentioned, the case law has evolved since the *Frye* decision. In *Vavilov*, the Supreme Court has emphasized that under reasonableness review, it is for the administrative decision maker to make the decision, not a reviewing court such as us. Even if I admitted the new evidence under the *Mackay* test, and I were able to conclude that the VRAB has made a reviewable error, I would not be able to grant the pension or direct the VRAB to do so. Under this legislative scheme, only the VRAB can normally do that after proceeding to a reconsideration of the 1978 decision (second stage under s. 111 of the *VRAB Act*).

[46] This brings me to Mrs. Nicol's last concern regarding the VRAB's failure to refer to the three cases raised in the Pensions Advocate's written submissions. I note first that each case before the VRAB must be decided on its own unique facts, and the VRAB (or the PRB) is not bound by precedents dealing with what Mrs. Nicol considers similar factual situations. In any event, all these cases are distinguishable on their facts.

III. Conclusion

[47] In light of the foregoing, I propose to dismiss the appeal without costs.

[48] Although the appellant, Mrs. Nicol, now into her eighties, is unsuccessful in her appeal, I salute her courage in bringing this appeal and all the proceedings leading up to it. I sincerely hope that Mrs. Nicol can now enjoy her remaining years knowing that, truly, she has done everything in her power to honour her late husband's memory.

"Johanne Gauthier"
J.A.

"I agree
David Stratas J.A."

"I agree
J.B. Laskin J.A."

APPENDIX

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

…

Construction

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.

…

Reconsideration of decisions

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.

…

Rules of evidence

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

[…]

Principe général

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.

[…]

Nouvel examen

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.

[…]

Règles régissant la preuve

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 applicant or appellant has established a case.

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

…

[…]

Reconsideration of decisions of predecessor bodies

111. The Veterans Review and Appeal Board may, on its own motion, reconsider any decision of the Veterans Appeal Board, the Pension Review Board, the War Veterans Allowance Board, or an Assessment Board or an Entitlement Board as defined in section 79 of the *Pension Act*, 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, in the case of any decision of the Veterans Appeal Board, the Pension Review Board or the War Veterans Allowance Board, do so on application if new evidence is presented to it.

Demande de réexamen

111. Le Tribunal des anciens combattants (révision et appel) est habilité à réexaminer toute décision du Tribunal d'appel des anciens combattants, du Conseil de révision des pensions, de la Commission des allocations aux anciens combattants ou d'un comité d'évaluation ou d'examen, au sens de l'article 79 de la *Loi sur les pensions*, et soit à la confirmer, soit à l'annuler ou à la modifier comme s'il avait lui-même rendu la décision en cause s'il constate que les conclusions sur les faits ou l'interprétation du droit étaient erronées; s'agissant d'une décision du Tribunal d'appel, du Conseil ou de la Commission, il peut aussi le faire sur demande si de nouveaux éléments de preuve lui sont présentés.

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

…

Service in militia or reserve army and in peace time

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

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

…

Presumption

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

(a) any physical training or any sports activity in which the member was participating that was authorized or organized by a military authority, or performed in the interests of the service although not authorized or organized by a military authority;

[…]

Milice active non permanente ou armée de réserve en temps de paix

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

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

[…]

Présomption

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

a) d'exercices d'éducation physique ou d'une activité sportive auxquels le membre des forces participait, lorsqu'ils étaient autorisés ou organisés par une autorité militaire, ou exécutés dans l'intérêt du service quoique

non autorisés ni organisés par une autorité militaire;

(b) any activity incidental to or directly connected with an activity described in paragraph (a), including the transportation of the member by any means between the place the member normally performed duties and the place of that activity;

b) d'une activité accessoire ou se rattachant directement à une activité visée à l'alinéa a), y compris le transport du membre des forces par quelque moyen que ce soit entre le lieu où il exerçait normalement ses fonctions et le lieu de cette activité;

(c) the transportation of the member, in the course of duties, in a military vessel, vehicle or aircraft or by any means of transportation authorized by a military authority, or any act done or action taken by the member or any other person that was incidental to or directly connected with that transportation;

c) soit du transport du membre des forces, à l'occasion de ses fonctions, dans un bâtiment, véhicule ou aéronef militaire ou par quelque autre moyen de transport autorisé par une autorité militaire, soit d'un acte fait ou d'une mesure prise par le membre des forces ou une autre personne lorsque cet acte ou cette mesure était accessoire ou se rattachait directement à ce transport;

(d) the transportation of the member while on authorized leave by any means authorized by a military authority, other than public transportation, between the place the member normally performed duties and the place at which the member was to take leave or a place at which public transportation was available;

d) du transport du membre des forces au cours d'une permission par quelque moyen autorisé par une autorité militaire, autre qu'un moyen de transport public, entre le lieu où il exerçait normalement ses fonctions et soit le lieu où il devait passer son congé, soit un lieu où un moyen de transport public était disponible;

(e) service in an area in which the prevalence of the disease contracted by the member, or that aggravated an existing disease or injury of the member, constituted a health hazard to persons in that area;

e) du service dans une zone où la fréquence des cas de la maladie contractée par le membre des forces ou qui a aggravé une maladie ou blessure dont souffrait déjà le membre des forces, constituait un risque pour la santé des personnes se trouvant dans cette zone;

(f) any military operation, training or administration, either as a result of a specific order or established

f) d'une opération, d'un entraînement ou d'une activité administrative militaires, soit par

military custom or practice, whether or not failure to perform the act that resulted in the disease or injury or aggravation thereof would have resulted in disciplinary action against the member; and

suite d’un ordre précis, soit par suite d’usages ou pratiques militaires établis, que l’omission d’accomplir l’acte qui a entraîné la maladie ou la blessure ou son aggravation eût entraîné ou non des mesures disciplinaires contre le membre des forces;

(g) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof.

g) de l’exercice, par le membre des forces, de fonctions qui ont exposé celui-ci à des risques découlant de l’environnement qui auraient raisonnablement pu causer la maladie ou la blessure ou son aggravation.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-405-15

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE YVES DE MONTIGNY DATED JUNE 24, 2015, NO. T-2054-14

STYLE OF CAUSE:	MRS. CAROL A. NICOL, Widow of Flying Officer ROBERT DONALD NICOL v. ATTORNEY GENERAL OF CANADA
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	STRATAS J.A. LASKIN J.A.
DATED:	NOVEMBER 4, 2022

WRITTEN SUBMISSIONS:

Carol A. Nicol	FOR THE APPELLANT
Hanna Davis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT