Veterans Review and
Appeal Board Canada

P.O. Box 9900
Charlottetown PE
C1A 8V7

Tribunal des anciens combattants
(révision et appel) Canada

C.P. 9900
Charlottetown (Î.-P.-É.)
C1A 8V7

PROTECTED INFORMATION

VETERANS REVIEW AND APPEAL BOARD

INTERPRETATION DECISION

HEARING DATE: 25 and 26 January 2021

DECISION RELEASED: May 2021

Re: Interpretation of s. 2(1) and s. 45, *Veterans Well-being Act*, and s. 21(2), *Pension Act*, and Interpretation of Chief Pensions Advocate under s. 37(1), *Veterans Review and Appeal Board Act*, and s. 6, *Veterans Review and Appeal Board Regulations*

PANEL MEMBERS: J.A. Bouchard
Christopher J. McNeil
Rose Marie Braden
Patrice Carrière
Constance Robinson

APPEARING: Steven Woodman, Bureau of Pensions Advocates
Lisa Laird, Bureau of Pensions Advocates
Vincent Lambert, Bureau of Pensions Advocates
Susan R. Taylor, Attorney General of Canada
Christopher Rootham, National Police Federation
Nelligan O'Brien Payne, National Police Federation

QUESTION: As the result of preliminary discussions with the Chief Pensions Advocate and interested parties, the questions were expanded to also address Royal Canadian Mounted Police (RCMP) members and RCMP health care services such that the questions presented by the Chief Pensions Advocate at the hearing of 25-26 January 2021 read:

Whether a disability was attributable to service, arose out of service, was directly connected with service and/or is service-related where the disability is the result of:

a. Medical or dental treatment provided or authorized by Canadian Armed Forces (CAF) or RCMP health care services; or
b. A lack of medical or dental treatment provided or authorized by CAF or RCMP health care services;
c. And whether a disability, resulting from medical negligence by or on behalf of the CAF or RCMP, and/or an inability to obtain appropriate treatment, is a disability that is service-related.

EVIDENCE:

Exhibits:

Exhibit I-1	BPA - Affidavit of M. Dauphin
Exhibit I-2	BSJP - Affidavit of M. Dauphin
Exhibit I-3	AGC - Affidavit of C. Garrett-Baird
Exhibit I-4:	AGC - Affidavit of K. Butler
Exhibit I-5:	AGC - Affidavit of Dr. M. Lorenzen

THE INTERPRETATION PANEL DECIDES:

The Interpretation Decision Panel (the Panel) finds that both CAF and RCMP applicants may be eligible for disabilities arising from a service-related treatment injury. In all cases, the claim must be analyzed on a case-by-case basis to determine whether there is a significant relationship to service, without holding applicants to a requirement of establishing negligence.

Signed on 14 May 2021

J. A. Bouchard

Signed on 14 May 2021

Christopher J. McNeil

Signed on 14 May 2021

Rose Marie Braden

Signed on 14 May 2021

Patrice J.J. Carrière

Signed on 14 May 2021

C. E. Robinson

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1. For convenience to readers, an index to the contents of the decision is available at the end of this document.

Authority to Issue Interpretation Decision

2. The Board's authority to issue an Interpretation Decision stems from Section 37 of the *Veterans Review and Appeal Board (VRAB) Act.*
3. On 6 March 2020, the Chief Pensions Advocate submitted questions for an Interpretation Decision regarding CAF members.
4. As the result of preliminary discussions with the Chief Pensions Advocate and interested parties, the questions were expanded to also address RCMP members and RCMP health care services such that the questions presented by the Chief Pensions Advocate at the hearing of 25-26 January 2021 read:

    1. Whether a disability was attributable to service, arose out of service, was directly connected with service, and/or is service-related where the disability is the result of:

        a. medical or dental treatment provided or authorized by CAF health care services; or

        b. a lack of medical or dental treatment provided or authorized by CAF health care services;

2. Whether a disability, resulting from medical negligence by or on behalf of the CAF, and/or an inability to obtain appropriate treatment, is a disability that is service-related.

The Board and its Empowering Legislation

5. In accordance with the *VRAB Act*, the Veterans Review and Appeal Board (the Board) has full and exclusive jurisdiction to hear, determine and deal with all applications for review and appeal that may be made to the Board under the *Pension Act*, the *Veterans Well-being Act (VWBA) - Part 3*, the *War Veterans Allowance Act* and other Acts of Parliament, including duty-related pension applications under the authority of the *Royal Canadian Mounted Police Pension Continuation Act* and the *Royal Canadian Mounted Police Superannuation Act*.

6. In making determinations with respect to entitlement under subsection 21(2)(a), *Pension Act* and subsection 2(1) and Section 45 of the *VWBA,* a key element to be established is whether the illness or injury which gave rise to the claimed disability arose out of or was directly connected with service in either military service (Regular Force or Reserve Force) or RCMP service.

7. Over the years, the determination of what circumstances support a service relationship has been explored in different cases. This Interpretation Panel is not the first to consider whether consequences of medical/dental treatment may have a service relationship. A history of decisions of the Board and its predecessors regarding service relationship claims regarding medical or dental treatment can be found in Appendix A.

Submissions

8. It is in light of the court decisions reviewed in Appendix A, that the Board received the Chief Pensions Advocate’s request for an interpretation decision.

9. In accordance with section 37(2) of the *VRAB Act,* invitations to participate and make written submissions were extended to a number of organizations which are listed in Appendix B.

10. The Attorney General of Canada (AGC), the National Police Federation (NPF), and the Chief Pensions Advocate, as represented by the Bureau of Pensions Advocates (BPA), indicated that they would make written submissions as well as oral presentations. Written submissions were received, along with numerous exhibits. A summary of the submissions can be found in Appendix C.

ANALYSIS/REASONS

11. After considering submissions of the appearing parties, the Panel determined that the issue raised cannot be answered with a simple yes or no response.

12. The Panel has reviewed all submissions and carefully considered the presentations made during the hearing. In making this decision, the Panel has been mindful of the statutory obligations upon it as set out in Section 3 of the *VRAB Act*[1].

13. Similar instruction is also found in Section 2 of the *Pension Act*[2], and Section 2.1 of the *VWBA*.[3]

14. These provisions call for a broad and liberal construction and interpretation of the provisions of these statutes in recognition of what the members of the Forces have done for their country.

Setting aside previous Interpretation Decisions: I-25 and I-31

15. The predecessor bodies to the VRAB considered whether injuries or illnesses from medical or dental treatment fell under the pension scheme. Eventually, in 1978, Interpretation I-25 was issued, concluding:

> This Board finds that a disability or death that results from negligence of, or inadequate medical care provided by, Regular Force service or service-authorized personnel, or from medical misadventure, is pensionable under subsection 12(2) of the *Pension Act*.
>
> This Board further finds that in cases adjudicated under *the RCMP Pension Continuation Act* or *RCMP Superannuation Act*, a disability or death that results from negligence, or inadequate

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[1] **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.

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

[3] **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.

> medical care, or medical misadventure, is not pensionable under the provisions of subsection 12(2) of the *Pension Act.*[4]

16. In 1983, the Supreme Court of Canada, in *Mérineau,* suggested that medical treatment by CAF members was too tenuous a basis for establishing a direct connection to service. Subsequently, another Interpretation Decision, I-31, was issued. I-31 confirmed I-25 on the basis that the predecessor Board believed that the Supreme Court of Canada did not intend *Mérineau* to have general application.

17. Recent decisions of the Federal Court and the Federal Court of Appeal in *Fournier* (2018) and (2019) clearly reject I-31's suggestion that the Supreme Court of Canada in *Mérineau* could be ignored. Furthermore, while the *Fournier* decisions did not reject I-25 outright, the courts did indicate that there were some difficulties with how it was being applied.[5]

18. Given the Court's commentary in *Fournier* (2018) and *Fournier* (2019), the Panel determined that it should set aside Interpretation Decisions I-25 and I-31. Rather than trying to rehabilitate or clarify the earlier Interpretation Decisions, the Panel determined that it is appropriate in the circumstances to return to first principles. The discussion in Appendix A reviews this in greater detail.

Negligence is not necessary for establishing service relationship

19. The parties each had a somewhat different position on the acceptability of the concept of negligence within the Board's legislative scheme. However, all parties agreed that negligence was not required to establish a service relationship.

20. The Panel found that the traditional concept of negligence reflected in I-25 is not appropriate in the legislative schemes under the Board. Negligence involves a finding of fault, and requires the applicant to establish that another party failed to meet a duty of care. These concepts are not mentioned in the Board's empowering legislation. Negligence does not easily fit in a legislative scheme designed to be accessible to applicants and expeditious in determining claims. Making a claim of negligence is typically challenging given:

- The practice of medicine is both an art and a science, with the understanding of what is acceptable treatment and optimal treatment evolving over time;
- Many conditions may have multiple treatment options and experts may not agree on which one is appropriate in the circumstances;

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[4] I-25, *Re Interpretation of Section 12 of the Pension Act* (1978), 8 P.R.B.R.(No. 1) 3., pp. 4, 5

[5] *Fournier c. Canada (Procureur général),* 2018 FC 464, paras 85-86, 96, 108-109

- Many medical treatments carry inherent risks, and decisions are often an issue of balancing potential benefits against potential risks;
- Unsuccessful treatments do not necessarily constitute negligence;
- Proof of negligence may not be proof that the negligence caused or aggravated the condition; and
- Proof of negligence may not be relevant to the fundamental question of relationship to service.

21. A fundamental problem with applying negligence is that it distracts from the central question: Is the claimed disability service-related?

22. Given these reasons, the Panel finds that negligence is not required to establish a service relationship. While a claiming party is not barred from making submissions regarding negligence, it is not essential to establishing a service relationship.

The uniqueness of military health and dental care

23. Having reviewed the submissions of all participating parties, the Panel finds that CAF members, while serving, are subject to a unique system of military and dental health care.

24. CAF members are expressly excluded from the definition of “insured persons” under the *Canada Health Act;* and, the *Constitution Act* places the responsibility for medical care to CAF members on the Federal Government.

25. CAF health and dental care involves a mix of military and civilian health care providers. The balance of the mix shifts and has changed with CAF policies over time. Therefore, the Panel must consider the specific circumstances of health care at the time of the claimed injury.

26. Some aspects of military health care continue to be given by CAF health care providers in CAF facilities.

27. The military culture of not complaining, and concern regarding the potential impact on career progression may tend to deter military members from reporting injuries or conditions of concern while they are still serving.

28. Service often involves postings to different regions, which may interfere with continuity of care.

29. Remote postings may interfere with access to quality care and/or timely care.

30. The military ethos of obeying senior officers, and accepting organizational direction may have an influence on member perception regarding their own

control over their health, and on whether they can or should consent to treatment recommended by a health provider.

31. The Panel observes that the circumstances of service in the RCMP is significantly different from the CAF. RCMP members are not currently excluded from the application of the *Canada Health Act.* The RCMP does not have an extensive cadre of health care providers or health care facilities. Nevertheless, the RCMP culture may also contain elements that deter members from reporting injuries or conditions that may interfere with their career progression. RCMP members are regularly relocated to different regions of the country, which may interfere with continuity of care, and RCMP members may be posted to remote communities where access to health and dental care may be significantly different from what is available in major metropolitan areas. Health care for RCMP members may also be complicated by difficulty tracking medical records across various postings.

Between the guard rails: finding the meaning between *Mérineau* and *Fournier*

32. The Panel finds that it must respect the Supreme Court of Canada decision in *Mérineau.* However, *Mérineau* only addressed whether a claim related to medical treatment could have a direct connection to service; it does not prevent the Panel from considering whether such an injury "arose out of" service.

33. The Panel finds that the Federal Court of Appeal in *Fournier* (2019) clearly indicated that it remains open to the Board to consider whether claims related to medical treatment claims "arose out of" service.[6]

34. Applying the reasoning of the Federal Court of Appeal in *Fournier* (2019), the Panel finds that its response to the questions at issue require a consideration of the "arose out of" test. The Panel must determine if there are factors that can assist applicants in understanding the case to establish when making a claim arising from medical treatment.

Treatment injury

35. To avoid using language that suggests the need for negligence, the Panel uses the phrase "treatment injury". Treatment injury can result from dental or medical care, and includes, but is not limited to the following: incorrect diagnosis, a decision on the treatment to be provided or not provided, a failure to provide

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[6] *Fournier c. Canada (Procureur général),* 2019 CAF 265 *translation* para 35

treatment at all or in a timely manner, obtaining or failing to obtain consent, and equipment failure.

36. Determining if there is a treatment injury takes into account whether there is sufficient evidence of an injury, whether adequate care was available and provided, the extent to which treatment contributed to the claimed disability, whether the claimed outcome is a necessary part of treatment, whether the claimed outcome is an ordinary consequence of treatment at the time the treatment was provided, whether the applicant declined (did not give consent to) recommended treatment, whether the outcome was the result of delayed treatment (such as long waitlists for a procedure), and whether the outcome of treatment was injurious or just not successful.

37. The Board will consider the specific facts of the matter before it, always drawing inferences in favour of applicants where reasonable, and granting applicants the benefit of the doubt, in the weighing of evidence, as to whether they have established their case.

Not every treatment injury is entitled

38. While BPA contended that CAF medical and dental treatment creates a service-relationship factor, it also acknowledged that not all treatment injuries are necessarily entitled. The facts in each case must be subjected to a case-by-case analysis. The Panel refined the issue, accepting that CAF medical and dental treatment may be a relevant factor, and that service relationship must be subjected to a case-by-case analysis.

39. The Panel finds that this approach is in keeping with the Federal Court of Appeal in *Cole.* The Court stipulated that it was Parliament's intention to provide less than "full coverage" pension protection in respect of risks to which members are exposed in peacetime service. More recently, the Federal Court in *Fournier* (2018) rejected an expansive argument:

> [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.

40. The Panel notes the similarities between the arguments put forward by the applicant in *Fournier* in his 2018 submission to the Federal Court, and the BPA

submissions. The Panel finds that the concerns expressed by the Federal Court in *Fournier* similarly apply to the BPA's arguments. However, the Board's legislation requires something more than a mere treatment injury to establish entitlement. It was insufficient in *Mérineau* for a directly connected test, and too tenuous in *Fournier* (2018).

Establishing a relationship to service

41. The BPA submissions asked this Panel to give clarity to applicants by providing guidance.
42. The Federal Court of Appeal in *Cole* declined to offer more definitive parameters of the "significant cause" test, stating:

> [99] The existence of a significant causal connection in the context of an application for a disability pension under paragraph 21(2)(*a*) of the *Pension Act* will be a question of fact. Those with expertise in fact-finding, in my view, will no doubt be able to recognize a significant factor when they see one. Indeed, it may be possible to identify a significant causal connection as simply one that is not insignificant. Moreover, it is not at all clear to me that it will be meaningfully more difficult for fact-finders with expertise to determine the existence of a significant causative factor than it has been for them to determine the existence of the primary causal factor.

43. The Federal Court of Appeal in *Cole* was confident in the Board's ability to "recognize a significant factor when they see one". Indeed, the Federal Court of Appeal's reluctance to offer any more clarity on what is needed to determine whether a factor is "significant" should be taken as a caution against attempting to obtain greater clarity at the expense of fettering the Board's discretion to consider each applicant's case on its own specific and unique facts and context.
44. The Federal Court in *Nicol v. Canada (Attorney General)*[7] reflected on the case-specific nature of the Board's work:

> [29] Each case obviously turns on its own facts, and a number of factors can be considered to determine whether there is a sufficient causal connection between the injuries and the military service. In *Fournier*, Justice Mosley identified the following factors as relevant to that inquiry:

[7] *Nicol v. Canada (Attorney General)*, 2015 FC 785 NB the *Fournier* decision referenced in this quote is from a 2005 decision that is unrelated to the *Fournier* decisions of 2018 and 2019.

> [35] It is clear from the jurisprudence that factors such as the location where the accident occurred, the nature of the activity being carried on by the applicant at the time, the degree of control exercised by the military over the applicant when the accident occurred and whether she was on duty at the time are all relevant to the determination that the Board must make that the injury arose out of or was connected to the applicant's military service. However, it is also clear from the cases that no one factor is determinative.

45. *Nicol* went on to conclude that:

> [36] The facts of this case fall into a grey zone, with some supporting the Applicant's claim while others do not. At the end of the day, a line has to be drawn as to whether a particular situation meets the causal connection required to establish entitlement to a pension. As much as I sympathize with the plight of the Applicant and her deceased husband resulting from the most unfortunate car accident that took place on July 1, 1954, and even if I might have been inclined to come to a different conclusion from that of the VRAB had I been in its position, I am unable to conclude that its conclusion was unreasonable.

The service relationship test

46. Claims for treatment injury require a multi-factor analysis where no one factor automatically outweighs others. The weighing of factors calls for a holistic view of the evidence in the unique and specific circumstances of each case. Possible factors include:

    a. the location of the medical or dental treatment (on CAF or RCMP property, remote postings);
    b. the context of the medical or dental care being sought or provided (routine exams, complaint specific, specialist consult, or emergency care);
    c. who provided the care (CAF medical personnel, other CAF or allied military personnel, civilian personnel under contract to CAF or RCMP, civilian medical personnel or other civilians);
    d. the degree of control exercised by the military or RCMP over the applicant over the course of the medical or dental treatment;
    e. whether service interfered with access to care or continuity of care;
    f. was the claimed condition/disability within the range of expected outcomes; and,

g. the impact/influence of military ethos.

47. The above noted factors are not the only possible factors for consideration; there may be others that should be considered in the particular case before the Panel. The list is not to be applied as an accounting exercise of how many factors support a service relationship and how many do not. Applicants need to show that the service relationship is significant, but it need not be the sole factor, or even the primary causation factor. Each Panel must exercise its deliberative responsibilities to weigh these considerations in light of the requirement to draw from all the circumstances of the case and all evidence presented to it with every reasonable inference in favour of the applicant or appellant; accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and 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.

DECISION

48. The Panel finds that both CAF and RCMP applicants may be eligible for disabilities arising from a service-related treatment injury. In all cases, the claim must be analyzed on a case-by-case basis to determine whether there is a significant relationship to service, without holding applicants to a requirement of establishing negligence.

Appendix A: History of Decisions Regarding Service Relationship of Consequences of Medical/Dental Treatment

49. The Canadian Pension Commission, a predecessor body to the Veterans Review and Appeal Board, awarded pension entitlement under subsection 12(2) (now subsection 21(2)) of the *Pension Act* in some cases where claimed disabilities were caused by inadequate medical care. This practice was confirmed in Interpretation Decision I-25[8] issued by the Pension Review Board in 1978:

> The Board wishes to emphasize that the pensionability that flows from negligence, inadequate medical care or medical misadventure relates to the disability or that part of the disability which results from the act of negligence. This was illustrated in the Fox case (E-338- (1974) 1 PRBR 27). In this case the Board granted an aggravation award for failure to treat the condition caused by the penicillin treatment. In fact, the pensionability was for the contribution made by the omission of remedial treatment.
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> … Medicine is not an exact science and most treatments, particularly surgical intervention, involve an element of risk which varies greatly in each case. The patient is always informed and his consent sought if serious risks are involved. Where treatment is given in an orthodox manner with reasonable care and competence the medical misadventure cannot be said to be entirely unforeseen and is part of the risk involved. P. 3

50. The Board went on to issue the I-25 Decision:

> …The Board has held and still holds that the disability from adverse complications or “medical misadventure” is pensionable if it resulted from inadequate medical care (Houle, E-84, supra), inadequate medical attention (Leblanc, E-1211, 1977) 1 PRBR 75, and Benson, E-65, (1873) 4 PRBR 386), inadequate medical management (Wilson, E-785, (1975) 3 PRBR 352, or omission to take remedial action (Fox, E-338, supra). The mere fact that the treatment is not successful does not bring it within the provisions of subsection 12(2). The common denominator in all pensionable

[8] *Re Interpretation of Section 12 of the Pension Act* (1978), 8 P.R.B.R. (No. 1) 3.

> medical misadventures is the involvement of an element of negligence.
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> …
>
> This Board finds that a disability or death that results from negligence of, or inadequate medical care provided by, Regular Force service or service-authorized personnel, or from medical misadventure, is pensionable under subsection 12(2) of the Pension Act.
>
> This Board further finds that in cases adjudicated under the RCMP Pension Continuation Act or RCMP Superannuation Act, a disability or death that results from negligence, or inadequate medical care, or medical misadventure, is not pensionable under the provisions of subsection 12(2) of the Pension Act.[9]

51. In the early 1980s, a Canadian Armed Forces member, Mérineau, sued the federal government for the damage suffered from a transfusion of the wrong blood type. Under the rules applicable to such proceedings, the government cannot be sued in certain circumstances, such as when an administrative remedy is available. The government asked the Federal Court to dismiss Mérineau's action because a remedy was available under the *Pension Act*. The Federal Court dismissed the claim on this basis. The majority of the Federal Court of Appeal upheld the Federal Court's decision. However, Pratte, J. dissented, commenting that although there was a link between the injury and service, the "link is too tenuous for one to say that the damage is directly connected to his military service". In 1983, the case proceeded to the Supreme Court of Canada. By that time, Mérineau's application for pension under the *Pension Act* had been denied. Beetz J. delivered the oral judgement of the Supreme Court of Canada[10], adopting the Pratte, J. dissent from the Federal Court of Appeal:

> There 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.

52. Soon after the Supreme Court's decision, the Pension Review Board (PRB) was asked to reconsider I-25 in light of the decision in *Mérineau*. The PRB noted that

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[9] I-25, *Re Interpretation of Section 12 of the Pension Act* (1978), 8 P.R.B.R. (No. 1) 3., pp. 4, 5

[10] *Mérineau v. Canada*, [1981] 1 F.C. 420 link to decision; *Mérineau v. Canada*, [1982] 2 F.C. 376 link to decision; *Mérineau v. The Queen*, 1983 CanLII 164 (SCC) http://canlii.ca/t/1xv7t at para. 1

the purpose of the new hearing was to determine whether the Supreme Court's decision in *Mérineau* "effectively over-ruled I-25, whether the Canadian Pension Commission is bound by it, and if so, to what extent." In 1984, the PRB issued Interpretation Decision I-31, which confirmed I-25. In doing so, it found the Supreme Court's decision in *Mérineau* responded to the specific circumstances of the case, and without regard to its significance apart from the immediate issues in the case, and indeed can only be said to have been made *per incuriam.* That being so, the Board is of the opinion that the decision of the Supreme Court of Canada was not intended to over-rule its decision in I-25 and did not do so.[11]

53. Since Decision I-31, Veterans Affairs Canada and the Board (as well as its predecessors) continued to incorporate the concept of negligence into considerations of claimed disabilities resulting from medical or dental treatment that were provided by the Canadian Armed Forces. The Federal Court upheld several Board decisions that employed this approach including: *Balderstone v. Canada (Attorney General)*, 2014 FC 942 http://canlii.ca/t/gdspr; *Sloane v. Canada (Attorney General)*, 2012 FC 567 http://canlii.ca/t/frv1j; *Skouras v. Canada (Attorney General)*, 2006 FC 183 http://canlii.ca/t/1mm75; *Gannon v. Canada (Attorney General)*, 2006 FC 600 http://canlii.ca/t/1nc80.

54. However, another line of cases evolved through Federal Court decisions regarding relationship to service. The focus of this alternate line of decisions stemmed from the recognition of two different tests for establishing relationship to service: the "directly connected" test and the "arose out of" test. The Federal Court decision in *Cole v. Attorney General of Canada*[12] is considered a watershed case for providing guidance to the Board regarding the interpretation and application of these tests.

Cole

55. Cole was medically discharged for four conditions including major depression and chronic dysthymia with obsessive compulsive traits. Cole's application for a disability pension for major depression was denied by Veterans Affairs Canada because of a lack of causal connection between the claimed condition and her military service. There was evidence in the record before the Panel that Cole's depression could be traced to factors related to military service as well as factors related to her personal life. Nevertheless, the Panel rejected the application for failing to establish that military service factors caused or aggravated the claimed condition. The Federal Court upheld the Board's decision, concluding that

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[11] I-31, p. 11

[12] *Cole v. Attorney General of Canada*, 2015 FCA 119

subsection 21(2) (a) of the *Pension Act* required that the Applicant establish that military service was the "primary cause" when applying the statute's phrase "arose out of or was directly connected with". However, the Federal Court of Appeal took a different view.

56. In its analysis, the Federal Court of Appeal considered the distinction between the entitlement language in subsection 21(1) and subsection 21(2) of the *Pension Act*. The Court noted that subsection 21(1) applied to claims in respect of services rendered during war or special duty service:

> [35] Subsection 21(1) of the *Pension Act* applies in respect of services rendered during war or special duty service. The language in subsection 21(1) of the *Pension Act* requires that the injury, disease or death of a serviceman or woman and his or her wartime or special duty military service must be "attributable to" or "incurred during" such military service. This level of connectivity has been referred to as the "insurance principle", reflecting a desire on the part of Parliament to provide "full coverage" pension protection to men and women exposed to risks when serving their country during wartime or special duty service (see May 27, 1941, Hansard at page 3167). Thus, the phrase "attributable to" contemplates a degree of causal connection between the death, injury or disease and the wartime or special duty service, while the phrase "was incurred during" contemplates only a temporal connection.

57. The Federal Court of Appeal went on to note that subsection 21(2) addressed claims related to different circumstances:

> [36] Subsection 21(2) of the *Pension Act* applies in respect of service in the militia or reserve army in peace time. The connectivity language in subsection 21(2) of the *Pension Act* with respect to injury, disease or death of a serviceman or woman and his or her peacetime military service is "arose out of or was directly connected with" such military service. This language was introduced in 1941, reflecting Parliament's intention to provide less than "full coverage" pension protection in respect of risks to which men and women may be exposed when serving their country in peacetime. Thus, it appears that the phrase "arose out of or was directly connected with" requires a higher degree of causal connection between the death, injury or disease and the peacetime

> military service than is required by the phrase “attributable to or incurred during” in subsection 21(1) of the *Pension Act.*

58. The Federal Court of Appeal went on to observe that since the *Frye* decision, divergent views regarding the causal connection to service had developed:

> [65] There is disagreement at the Federal Court level, particularly since this Court’s decision in *Frye*, as to whether the primary cause level of causal connection is required by the phrase “arose out of or was directly connected with” in paragraph 21(2)(*a*) of the *Pension Act*. (See *John Doe v. Canada (Attorney General)*, 2004 FC 451, [2004] F.C.J. No. 555; *Boisvert v. Canada (Attorney General)*, 2009 FC 735, [2009] F.C.J. No. 1377; and *Hall v. Canada (Attorney General,* 2011 FC 1431, [2011] F.C.J. No 1806.) And, because the Federal Court reviews decisions of the Board on this interpretative question, the divergence of views at the Federal Court level impacts upon decisions at the Board level.

59. The Federal Court of Appeal in *Cole* then considered the import of its earlier decision in Frye, noting:

> [71] The Court agreed that the *type* of connection contemplated by the phrase “directly connected with” was a direct factual connection between the fatal injury and the decedent’s military service. In the circumstances, being struck by the truck was the direct factual cause of Corporal Berger’s fatal injury and that unfortunate event was not directly connected with his military service. As such, the Court agreed with the Board that the “directly connected with” element was not satisfied.
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> [72] The Court went on to conclude that a different *type* of causal connection between the fatal injury and the decedent’s military service was contemplated by the phrase “arose out of”. In other words, some kind of connection other than a direct or immediate one would be sufficient. While the Court did not offer a specific formulation of this *type* of acceptable non-direct causal connection, it did state that an acceptable causal connection would not extend so far as to include a mere temporal connection, such as simply serving in the armed forces at the time of the fatal injury.
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> …
>
> [75] The decision in *Frye* teaches that the causal connection requirements of the phrase “arose out of or was directly connected

> with" can be satisfied by either of the two *types*: a direct causal connection or a non-direct causal connection. In reaching its decision, in my view, the Court found that Corporal Berger's militarily-mandated recreational swimming activities were the non-[direct cause of his fatal injury, and therefore his fatal injury "arose out of" his military service.

60. In applying the *Frye* reasoning to the circumstances in *Cole*, the Federal Court of Appeal noted that whereas *Frye* dealt with a single non-direct causal connection between the fatal injury and military service, in *Cole* there were two sets of distinct and directly connected causal factors. Furthermore, the military factors contributing to the claimed condition did not outweigh the personal factors. Therefore, the Federal Court of Appeal found that the "directly connected with" test was not met.[13]

61. The Federal Court of Appeal then engaged in a statutory interpretation analysis of the language in subsection 21(2) of the *Pension Act*. In doing so, the Court found that neither the "but for" test nor the requirement that the Applicant establish that military service was the primary cause of the claimed condition were consistent with the legislative scheme. However, the *Cole* decision went on to comment that while entitlement did not require military service to be the predominant cause of the claimed condition, the Federal Court of Appeal also rejected the argument that any level or degree of causal connection would be sufficient. The Federal Court of Appeal held that the applicant needed to establish causal connection that is "significant but less than primary".

    Cole, para 89, 94, 97

62. The significant cause test as described by the Federal Court of Appeal in *Cole* continues to be the standard by which the Board assesses applications for entitlement. The Board recognizes that subsection 21(2) of the *Pension Act*, and Section 45 of the *Veterans Well-being Act* offer two potential means of establishing a relationship to service: a "directly connected" test, and an "arose out of" test. The Board also accepts that an applicant does not need to show that a military factor was the primary contributor to the claimed condition or claimed disability. Nevertheless, the requirement that the factor be significant does not mean that any level or degree of causal connection would be sufficient;

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[13] *Cole, FCA paras 76, 80*

something more than a tenuous connection to service is needed to establish entitlement.

Fournier (2018) and (2019)

63. Understandably, the divergent approaches to determining claims for disabilities incurred in the course of medical or dental treatment created questions for the Board regarding how these lines of reasoning were to be applied by its panels. These questions were confronted recently in the matter of *Fournier.* Fournier, a member of the Canadian Armed Forces, was prescribed quinine for restless leg syndrome by a civilian doctor. To comply with military medical procedure, the prescription was submitted to a military physician for approval, which was received. When presenting the prescription to the pharmacist, Fournier was advised that a blood test was needed. Fournier checked with the military physician and was advised that it was not needed. Within a few days of starting on the quinine medication, Fournier began experiencing symptoms of pain and tiredness in his legs, and developed a rash. Fournier was soon diagnosed with drug-induced vasculitis. Fournier subsequently applied for disability benefits under Section 45 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act (*now known as the *Veterans Well-being Act).* His application was denied by Veterans Affairs Canada. When the matter came before the VRAB Entitlement Review Panel, Decision I-25 was applied. The Review Panel concluded that Fournier had not established that the military health professionals failed to comply with the appropriate standard of care. Fournier then sought a decision from the VRAB Entitlement Appeal Panel, arguing that the case law sets out that it is not necessary to establish medical negligence and that Decision I-25 was no longer to be followed. The VRAB Appeal Panel dismissed Fournier's Appeal, finding that medical negligence was still a required element, and that Interpretation Decision I-25 still applied. The Appeal Panel affirmed the Review Panel's decision. Fournier then took the matter to the Federal Court. In doing so, Fournier submitted six arguments:

    1. The legislation must be given a liberal and broad interpretation due to its purpose.[14]
    2. A disability caused by care that was provided, prescribed or authorized by the Canadian Armed Forces is entitled under the legislative scheme because of the connection between the disability and service.[15]

[14] *Fournier,* FC para 37
[15] *Fournier,* FC, para 38

3. The Federal Court in *Hall* displaced the burden of proving negligence.[16]
4. Decision I-25 is not a binding precedent on Board panels, and under the legislative scheme proving negligence is no longer appropriate.[17]
5. The Supreme Court of Canada decision in *Mérineau* must not be followed because it addresses another subject and leads to the impression that Decision I-25 is not within the *Act.*[18]
6. The obligation of military members to consult military health professionals, and the obligation on the Canadian Armed Forces to provide medical care establishes the requisite connection to military service for any disability incurred in that medical care.[19]

64. After reviewing the impact of Decision I-25, the Federal Court went on to observe:

> [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 I25, the premise that provides entitlement to an award in case of medical negligence first requires that the disease not be service-related.
>
> [86] A reading of Decision I25 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, only to them.[20]

65. The Federal Court then turned to an examination of *Mérineau* and the subsequent Interpretation Decision I-31 holding that the Federal Court could not endorse I-31's reasoning that *Mérineau* was *per incuriam*.[21]

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[16] *Fournier*, FC para 41
[17] *Fournier,* FC para 42
[18] *Fournier*, FC para 43
[19] *Fournier,* FC para 44
[20] *Fournier c. Canada (Procureur général)*, 2018 FC 464, paras 85-86
[21] *Fournier c. Canada (Procureur général*), 2018 FC 464, para 96

66. Indeed, in *Fournier,* the Federal Court held that it was unintelligible and incorrect to disregard the Supreme Court decision in *Mérineau*. It referred the matter back to the Appeal Panel to determine whether the concept of entitlement set out in I-25 falls within the *Pension Act*, and in doing so, it must take into the account the Supreme Court decision in *Mérineau*.[22]

67. The Federal Court of Appeal upheld the Federal Court decision in *Fournier* (2018), offering the following observations:

> [32] … It is true that the Federal Court does not appear to have adopted the appellant's interpretation that a disability resulting from the care provided by an employee of the Forces in the treatment of a first, non-service-related condition may constitute a new service-related disability in the event of negligence. Rather, the Federal Court appears to have viewed this as an enhancement of the scheme created by s. 45(1)(a) of the Act, relying on a passage in Decision I-25 ("not very happily worded", the appellant concedes at paragraph 47 of his factum) which refers to this as a non-service-related disability.
>
> [33] Although the appellant's proposed interpretation does not appear to have been questioned since it was put forward by the Board in 1978, and had not been raised by the parties in the present case, and although it appears *a priori* to be entirely defensible, it was nevertheless open to the Federal Court to question its validity. However, it will be up to the Board's Appeal panel, as a specialized tribunal, to rule on this issue in light of the representations that the parties may make, as specifically suggested by the Federal Court in the conclusion of its reasons (Decision at para. 108, 109, cited supra at para. 25).
>
> [34] The Appellant is also concerned about what the Federal Court said about the impact of the *Mérineau* decision on Decision I-25. Once again, the appellant's fears appear to me to be unjustified and unfounded. In fact, the Federal Court merely reiterated a well-established principle in Canadian law, namely that of *stare decisis.* It is difficult for me to see any error in the assertion that the *Mérineau* decision is an inescapable precedent and that the Board

[22] *Fournier c. Canada (Procureur général*), 2018 FC 464, paras 108-109

> could not depart from it in its decision I-31 on the ground that the Supreme Court had rendered its decision *per incuriam.*
>
> [35] That said, the Federal Court's comments do not allow for clear conclusions to be drawn as to the impact the *Mérineau* decision should be given in relation to the issues addressed in I-25. Nor does it prejudge the answer to the question of whether the involvement of military medical personnel in the treatment of Mr. Fournier's Restless Legs Syndrome was sufficient to establish the requisite link between the disability resulting from that treatment and military service. Again, paragraphs 108 and 109 leave these questions open, and the appellant will be free to make submissions on the two grounds he relied on in his application for judicial review, namely that negligence was not required and that the actions of the Forces' attendants were in any event standard.[23]

68. This history of Interpretation Decisions and court decisions set the stage for the considerations of the I-3 Interpretation Panel.

Appendix B – Parties Invited to Make Submissions

Aboriginal Veterans Autochtones

Afghanistan Veterans Association of Canada

ANAVETS

Canadian Aboriginal Veterans and Serving Veterans Association

Canadian Armed Forces

Canadian Association of Veterans in United Nations Peacekeeping

Canadian Peacekeeping Veterans Association

Canadians Veterans Advocacy Group

It's Just 700

National Council of Veterans Association in Canada

National Police Federation

NATO Veterans Organization of Canada

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[23] *Fournier c. Canada (Procureur général*), 2019 CAF 265 *translation*

Persian Gulf Veterans

RCMP Veterans Association

Royal Canadian Legion

Royal Canadian Mounted Police

Veterans Affairs Canada

Veterans Legal Assistance Foundation

Veterans Ombudsman

Veterans UN-NATO Canada

VETS Canada

Wounded Warriors

Appendix C: Submissions

Submissions of BPA

69. BPA submitted that the disability benefits system created by the *Pension Act* and *Veterans Well-being Act* is a no-fault benefits system. The legislative requirements for entitlement do not require the applicant to establish fault or negligence by the CAF or any of its members. BPA contends that one of the primary goals of creating an administrative disability benefits system is to provide compensation to injured applicants quickly without court proceedings and without having to satisfy the requirements of a civil tort claim. Parliament provided clear and express direction within the *Pension Act*, the *VWBA*, and the *VRAB Act* that all provisions of the legislation must be liberally construed and interpreted in order to fulfil the recognized obligation of the people and Government of Canada to show just and due appreciation to "those who have served their country so well and to their dependents".

70. BPA further submitted that both the *Pension Act* and the *VWBA* contain a clear direction that the nation's great moral debt to members and Veterans must be recognized and acknowledged through equitable compensation and other benefits made available under the Acts. The provisions expressly direct that all Acts related to the benefits scheme are to be liberally construed and interpreted, and claims are to be heard and determined as informally and expeditiously as the circumstances and considerations of fairness permit. BPA also observed that Parliament provided generous evidentiary rules and multiple statutory and regulatory presumptions designed to alleviate the burden of proof on applicants,

with the intent of assisting applicants in establishing the necessary service relationship.

71. BPA submitted that jurisprudence has relied on these textual indications of Parliamentary intent to conclude that the Acts, including the causal connection required to engage them, must be interpreted in a manner that best facilitates entitlement and maximizes benefits: *Hall, Frye, Chief Pensions Advocate, Cole*. In effect, there is only one legislative constraint placed on the conferral of benefits for disabilities that may be broadly related to military service. That constraint lies in the legislated distinction between wartime or special duty service and peacetime service.

72. BPA submitted that while it accepts that disabilities arising from CAF negligence fall within the scope of the disability benefits scheme, it does not follow that proof of negligence is required in order to establish entitlement in respect of a disability resulting from medical care decisions made by or on behalf of the CAF. The former Pension Review Board's decision to rely on the civil liability concept of medical negligence to establish a service relationship for such disabilities is contrary to the fundamental premise of the no-fault benefits scheme under the *Pension Act* and *VWBA*. The BPA further submitted that nothing in the relevant Acts or Regulations supports the introduction of fault-based criteria for entitlement to disability benefits: *John Doe v. Canada (Attorney General),* 2004 FC 451. Importing the concept of negligence liability defeats the objective of providing a no-fault administrative system in which benefits may be obtained quickly, informally, and at minimum expense. Moreover, the BPA submitted that the jurisprudence in recent years emphasizes the need to recognize the distinctive legal environment created by the statutory administrative scheme. While traditional civil or criminal law principles may inform such a system, such principles should not readily be imported to define its scope, which is properly found within the enabling statute itself: *Godbout v. Pagé*, 2017 SCC 18; *Westmount (City) v. Rossy*, 2012 SCC 30; *Vavilov*, *supra*, para. 113. BPA contended it is inherently unjust and procedurally unfair to allow determinations of negligence to be made in circumstances where the individual whose conduct is at issue has no right to be heard and can introduce no defence. The practical consequences for medical practitioners of introducing such a requirement are infinitely more significant now that the Board's decisions are readily and nearly immediately available to members of the public through online publication.

73. BPA further submitted that the interpretation of the *Pension Act* and the *VWBA* have evolved significantly since the 1983 Supreme Court of Canada decision in *Mérineau*. The Court found that a Veteran's civil action in negligence was not

barred by the availability of a disability pension for the resulting disability. Furthermore, although there was a connection between the Veteran's disability and his military service, that connection was too remote to be "directly connected" to service within the meaning of s. 12 (now s. 21) of the *Pension Act*.

74. Nevertheless, BPA submitted that the Mérineau decision does not preclude or remove the Board's jurisdiction to interpret other aspects of s. 21 of the *Pension Act* or s. 45 of the *VWBA*. Nor does it preclude the award of benefits for disabilities attributable to, arising from or directly connected with medical negligence by or on behalf of the CAF. The responsibility for interpreting the governing statutes and the scope of the disability benefits regime rests with the Board in the first instance. The *VRAB Act* specifically grants the Board jurisdiction to hear and decide questions of interpretation relating to any Act of Parliament pursuant to which an appeal may be taken to the Board. BPA noted that the Supreme Court of Canada recently reconfirmed the jurisdiction of administrative tribunals to interpret their home statutes. The Court stated clearly that a tribunal's reasonable interpretation decision should be respected and should not be subject to interference from the courts except in very limited prescribed circumstances. Indeed the Supreme Court held that "a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker": *Canada (Min. of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 124.

75. Furthermore, BPA submitted that the question of the scope of s. 21 of the *Pension Act* was not before the Supreme Court in *Mérineau*. As the decision flowed from a finding of remoteness in the particular circumstances of the case, the decision may legitimately be considered limited to its particular facts. There is no indication within the decision that the Court intended to pronounce a rule or principle of general application. Neither the dissenting Justice of the Court of Appeal, whose conclusion the Supreme Court adopted, nor the Supreme Court itself, offered extensive reasons. More specifically, and significantly, the *Mérineau* decision does not directly address the "arose out of" branch of the s. 21 *Pension Act* test. Decisions subsequent to the *Mérineau* decision have been found to be an alternate, less stringent path to entitlement: *Amos v. Insurance Corp of British Columbia*, 1995 CanLII 66 (SCC); *Frye*, and *Hall*. In fact, *Mérineau* was released before the substantial evolution in the interpretation of the phrase "arose out of" as it appears within the *Pension Act* and *VWBA* as well as in other statutes. BPA contended that the jurisprudence of the Federal Courts and of the Supreme Court itself now supports a much broader interpretation than in *Mérineau*. This interpretive evolution gave rise to *obiter dicta* in the Federal Court

reasoning in *Hall* (2011) as to whether *Mérineau* would be decided in the same way today.

76. For the last several decades, the Federal Court has consistently considered disabilities caused by medical negligence by or on behalf of the CAF to fall within the disability benefits scheme. As the Alberta Court of Queen's Bench concluded in 2002, the whole legislative scheme of the *Pension Act* as it relates to members of the Armed Forces supports the conferral of benefits within the scope of the *Act* on members and Veterans who suffer disabilities as a result of improper conduct by CAF authorities. The Alberta Court found that "it simply does not make any sense in the scheme of what basically are no fault provisions to deny a member of the Forces a pension because of improper conduct on behalf of the authorities." *Levesque v. Canada (Attorney General)*, 2002 ABQB 520.

77. In the decisions in *Fournier v. Canada (Attorney General)*, 2018 CF 464 (FC) and 2019 CAF 265 (FCA), both the Federal Court and the Federal Court of Appeal have invited the Board to re-examine the impact of *Mérineau*. The courts indicated that the Board needed to address the interpretation of the phrase "arose out of or directly connected with service" as it relates to disabilities resulting from medical care provided, administered, and managed by the CAF.

78. In the course of the BPA submissions, it initially made an assertion that: If a serving member receives, is denied, or is unable to obtain medical or dental treatment that causes or permanently aggravates a disability, that disability is compensable. However, by the completion of its submissions, the BPA had offered more nuances to its position.

79. In oral arguments, BPA critiqued Interpretation Decision I-25, which adopted a “medical misadventure” model for entitlement where medical issues gave rise to claims. BPA noted that I-25 expressed a wish to avoid the concept of malpractice and blame-finding. The BPA also noted that I-25 assumed that “*The patient is always informed and his consent sought if serious risks are involved.*” BPA submitted that consent is an element of medical negligence but it was assumed from the beginning, as noted in I-25, that these “captive patients” were giving their consent. BPA then explored various aspects of service that may deny or impair a serving member’s ability to give consent.

80. BPA also noted that when I-25 was issued, there was a very limited sample of cases that had raised the issues being addressed in the decision. BPA submitted that burden of proving a lack of medical competence was a problem passed to the applicant. The BPA further took issue with the fact VAC’s treatment of this issue is “trust us, we will know it when we see and it and we will be generous”.

The BPA submitted that this is not an appropriate system, particularly where the evidence is primarily in-service medical records prepared by the military medical system. BPA referred the Interpretation Panel to several examples where there appeared to be *a priori* evidence of medical mistake or lack of appropriate medical management which were nevertheless denied.

81. BPA further submitted that while Board and court decisions regularly refer to a need to be more generous, this is belied by a reliance on an approach that seeks negligence. The BPA contended that this is far away from the informal, simple system intended to ensure that veterans receive benefits to which they are entitled.

82. The BPA submitted that all of the parties before this Board agree *Mérineau* does little to assist the Panel in interpreting the “arose out of “ aspect of the test for relationship to service.

83. The BPA noted that both the Federal Court and the Federal Court of Appeal in *Fournier* found it difficult to apply the legislated tests. The BPA submitted that it is necessary to understand the broader legislative framework in which a CAF member, and to a lesser extent, an RCMP member, is caught. BPA criticized the Department’s application of the Insurance and Compensation principles, submitting that such an approach reduces to a kind of workers compensation evaluation.

84. BPA then elaborated on the unique legislative framework in which CAF members live and work. The *Constitution Act* places responsibility upon the Federal Government for providing medical care to members of the Canadian Armed Forces (CAF). This is because the *Canada Health Act* and the provincial health insurance acts exclude CAF members from the list of "insured persons" for the purpose of provincial health care coverage. Accordingly, on behalf of the Department of National Defence (DND) and CAF, commanders are given the responsibility of ensuring that the health services requirements of CAF members are met. The Commander CF Health Services Group develops and maintains an organizational structure to assist CAF health care personnel and enable commanders, within the chain of command, to fulfill their responsibilities for the provision of health care to entitled members. Specifically, every CAF member is subject to a medical examination upon enrolment in the CAF and may be rejected for service on medical grounds. And throughout their service, CAF members are expected to meet and maintain universal fitness standards termed "universality of service" as well as trade-specific fitness standards. Universality of service is of such fundamental importance that it is excluded from the duty of accommodation under the *Canadian Human Rights Act*.

85. Furthermore, CAF members are required to undergo periodic medical and dental examinations throughout their service in compliance with orders issued by the Chief of Defence Staff. (QR&0 34.16; 35.03). One of the primary goals of the CAF's administration and management of service members' health care is to sustain or restore a serving member to an operationally effective and deployable member of the CAF. In this way, the CAF's administration of health care services is directly linked to the performance of a CAF member's duty. CAF medical and dental care is subject to many rules and regulations and a large administrative machinery which finds its source within the Queen's Regulations and Orders ("QR&Os"), chapters 34 and 35, Volume l: Administration. The primary reason for this broad assertion of control and management is the CAF's goal of ensuring that its members are operationally fit and ready to meet the demands of service anywhere in the world that they may be required to serve. For that reason, members of the CAF are required by regulations and orders to submit to medical examinations at various points in their careers, to maintain a specified level of fitness for service and for their respective trades, to seek their medical care from CAF sources or obtain prior authorization for outside medical care, and to report all treatment received as soon as practicable whether or not the treatment relates to a service-related injury or disease. In this context, receipt of medical care from a CAF authorized medical practitioner is by its nature an activity related to service: it is a mandatory aspect of the member's employment in the CAF: *Hall*, para. 48.

86. The BPA submitted that the practical reality of military life is that members must accept any treatment recommended by CAF medical advisors or risk being found temporarily or permanently unfit for deployment, unfit for promotion, unfit for service in their chosen trade, or ultimately unfit for continued service in the CAF. The concept of free and informed consent so fundamental to the civil law of medical negligence does not fit practically or comfortably within the military administration of medical care in which refusal by service members may have serious and long-lasting implications for their career and livelihoods, and may constitute refusal of a lawful order with serious consequences. Additional factors affect the applicability of free and informed consent within the military context. Military doctors often hold higher ranks than their patients such that consultations involve interaction with a superior officer. The inculcation of military culture, ethos, and particularly, respect for the chain of command are not insignificant factors to be considered in determining the strength of service connection for a disability resulting from medical care decisions made by the CAF. Moreover, the unique operational and administrative demands of military service may have a significant impact on medical and dental care decisions and their consequences,

whether or not the underlying condition may have pre-existed or developed unrelated to a members' military service. Seemingly appropriate clinical management decisions may result in serious medical consequences due to service related factors outside both the patient's and the CAF medical practitioner's control. For example, remote or foreign postings or frequent changes in postings may result in delays in diagnosis or in securing treatment services or create administrative difficulties in accessing accurate and up to date medical records. For this reason, the Veterans Affairs Canada Entitlement Eligibility Guidelines recognize that a service related inability to obtain appropriate clinical management may contribute to the evolution of a disability or its aggravation, and/or result in a new disability and as such is a legitimate basis for entitlement irrespective of any medical negligence.

87. The BPA further submitted that the relationship to military service is established by the captive patient concept (for Regular Force and for Reserve Force in some circumstances) but also by several other aspects of military ethos, culture, organization, and control, which affect all health care and all members. It includes the code of service discipline, lawful orders, the issue of unlimited liability, the issue of not being able to fake, feign or delay cure of an injury or disability whether personal related or related to service; there is a wide area of so-called personal illness and injuries that are not actually personal because you have to get them treated; fitness of the individual affects group fitness; offences that arise from actions of members of the CAF, the fact that some interventions are clearly without consent. The BPA further submitted that the CAF framework is unique in that in terms of disclosure of medical conditions, there is a two way relationship between CAF and the member. Furthermore, there is the importance of dental exams. In addition, there is the potential for release, the whole notion of what it means to be part of CAF: esprit de corps, service before self, and the culture which is ‘suck it up butter cup”, the moral shaming on sick parade. It is important that every member who serves has a special relationship with medical services. It can be the end of their career if they are not fit but if for any reason they don’t meet their fitness goals, they may not be deployable. BPA emphasized that this understanding of the CAF system is important. A CAF member who is receiving medical services is following orders, is on duty and that person is receiving treatments that have results, either from other members of CAF or by CAF sanctioned medical personnel. Many of the provisions in the legislation demonstrate an intention to employ the fullest and most inclusive definition of service. Furthermore, the presumptions in the legislation, some of which include sports, transportation, environmental dangers, administration duties and customary practices, are presumed to be part of service.

88. For the above reasons, BPA submits that all health care is service-related. Nonetheless, BPA went on to note that a case by case analysis is still required to determine the impact these service-related factors had on the onset or worsening of the claimed disability. BPA submitted that most treatments and care will be helpful, not harmful to the patient. BPA agreed that “the mere fact that treatment is not successful does not bring [the treated condition] within the provisions” of veterans legislation. However, where care (or lack thereof) causes harm with lasting disability, BPA submitted that the military nature of the care cannot be overlooked simply because a disabled Veteran cannot prove a breach of the standard of care of the day. Therefore, all consequences of health care (or lack thereof) should be considered.

89. During the hearing, the BPA went through the VAC documentation for a number of examples of injuries claimed to be caused by medical treatment. It was submitted that the current system of requiring a finding in respect to standard of care and then a finding of negligence is overly complex. It asks that legal concepts be decided on by adjudicators who do not have legal training. Often no medical advisory is prepared. Furthermore, there appears to be a reluctance on the part of the medical advisors to assign blame and they often provide defensive conclusions. When the inquiry is in respect to negligence, there is an attempt to deflect blame and the person who takes the burden of that is the applicant. The BPA submitted that the results of applying these tests leads to nonsensical decisions and inconsistent standards. The issue of negligence is not apt or necessary. There is a reliable legal test for service connection that exists in the statutes.

90. The BPA submitted that all parties agree that disabilities caused by medical negligence should be covered as entitled conditions under the legislation. The BPA submitted that the fact of negligence does relate to the causation issue. If negligence can be demonstrated, the applicant has exceeded the *Cole* requirements for establishing service relationship.

91. The BPA submitted that the decisions in *Hall, Lebrasseur* and *Frye* all allow for a broader path to entitlement. Furthermore, in the *Amos* decision, the Supreme Court of Canada found that “arose out of” must be applied in a broad manner, and that there is no need to be proximate.

92. In its oral submissions, BPA again stated that, consistent with *Cole*, negligence is not required to support an award. There is only one test for entitlement for peacetime service – whether it arose out of or is directly connected to service. I-25 did not create a bonus scheme but it did import a test from outside the act and that is the problematic piece. The finding of entitlement should not involve an

assessment of whether or not a particular medical decision was appropriate, was justified, or was in any way faultless. BPA referred to the Federal Court decision in *John Doe,* at para 33, where the Court held *whether such a decision was justified or not is not at all our concern.* BPA submitted that there does not need to be wrong doing, only that a condition arose out of or was directly connected with service. Nothing more is required.

93. Considering the impact of the Federal Court decision in *Frye,* BPA stated that the language regarding service relationship is intentionally broad. It is meant to capture all impacts of service whether or not direct and immediate or less direct or immediate (*Frye*). It is meant to meet the obligation that we all share to those that served our country. Instead of asking what's in, the question should be whether there is a reason for something to be out.

94. BPA referred the Panel to the *Bradley* case wherein the Federal Court erred in focusing only on whether the act of showering was "duty-related". The test in the legislation was broader.

95. BPA referred to the test in *Fournier* (2005) as an example of where a list of factors to be considered went awry. Based on the unique CAF legislative and healthcare framework BPA submitted that military health care is, by its nature, service related. BPA submitted that for analysis, the question is whether there are service related elements involved, and then if there is military health care, there is a military factor, and the remaining analysis should turn to causation which is a separate element.

96. When BPA was asked whether medical care for issues that do not impact considerations for universality of service should be considered service related, BPA responded that given the potential for many unexpected elements in the military environment, BPA was not prepared to say that any health care is totally unrelated to military service. BPA referred the Interpretation Panel to the circumstances in *Hall* where treatment for acne had a relationship to service.

97. BPA was asked about its position in cases where medical outcomes are known at the outset of treatment, and are part of the risk/benefit tradeoff. BPA responded that depending upon the circumstances of the case and treatment, it can be very challenging to tease out what aspects of treatment may or may not be service-related, or expected. BPA cautioned that the serving members should not be subject to blame for accepting risk. Again, a case by case analysis is needed.

98. BPA was asked whether there is a point when the military aspect of treatment becomes merely incidental, for example, where the only connection to military

service is a referral to a civilian specialist. The BPA responded that that scenario presupposes that those are the only key facts. Context matters. The Board must consider the scenario carefully, regarding all the aspects already discussed, including whether treatment is necessary to do a member's job.

99. BPA summarized its key points:

- It is not logical to find that military health care is service related when it is incompetently delivered but it's not service related when it's competently delivered. The service relationship does not change. It is service-related.
- When a health care decision causes a new disability or causes the permanent worsening of an existing disability, those consequences are compensable under the legislation.
- There is no need to look outside the statutes to find a reliable and useful test for service connection.
- Once service relationship is established, the applicant must still establish causation.
- It is not advisable or practical to say that every individual has to establish that military health care is a service related factor. It is not reasonable for every applicant to have to bring evidence of the context of military environment as part of their applications.
- The starting point of analysis in these cases should not be the circumstances of onset of the injury or disease for which medical care is sought: *Frye* and *Hall*. The entitlement test requires an analysis as to whether the circumstances in which the treatment was received were sufficiently related to military service to warrant an award.

100. In respect to the submission made by the AGC in respect to subsection 15 (9) of the *Canadian Human Rights Act*, BPA is not challenging the constitutionality of the section. BPA is not taking any position on the validity of the individual standards that make up the Universality of Service policy. BPA accepts that the CAF has the duty to accommodate up to the point of undue hardship for circumstances that don't touch the principles of U of S. The case law is clear, there is an exception for those circumstances that do touch U of S and BPA submitted that there are not many situations that don't touch on U of S. That is the key and unique fact about CAF.

Conclusion

101. The BPA concluded that both the courts and the Board have affirmed time and again that disability benefits decisions must be made in consideration of all the circumstances and that no single factor is controlling or determinative of the

outcome. Imposing on members and Veterans the significantly onerous burden of establishing the acceptable medical or dental standard of care of the day and then proving its breach as a pre-requisite to entitlement runs counter to this prevailing principle, to the evolution of the jurisprudence, to the required liberal interpretation of the legislation, and most importantly to its overarching purpose.

Submissions of AGC

102. At the outset of the AGC's submissions, an issue of procedural fairness was raised by the AGC. During a pre-hearing teleconference, the AGC asked for an opportunity to make supplemental submissions in response to unanticipated arguments raised by the BPA, as well as challenging some of the evidence contained in the affidavit evidence of other participating parties. As this is a non-adversarial process, the Interpretation Panel gave permission for supplemental submissions on unanticipated arguments, but declined to accept written submissions challenging the affidavit evidence of other participating parties. At the hearing, AGC raised the issue of procedural fairness, submitting that it was not given permission to fully respond to some of the detailed arguments made by the BPA in respect to how the CAF and RCMP provide health services to its members.

103. The AGC submitted that this Interpretation Hearing is a response to the recent *Fournier* decision the Federal Court and the Federal Court of Appeal expressed concerns with Interpretation Decision I-25 and I-31.

104. The AGC submitted that injury or disease resulting from health care provided by the CAF is insufficient on its own to establish that the claim "arose out of or was directly connected with service" for the purposes of disability entitlement under either the *VWBA* or the *Pension Act*. Something more is required. For CAF members, who receive their health care from CAF, medical negligence is one of many relevant factors that may establish a connection between service and an injury or disease for the purposes of disability entitlement. The AGC submitted that negligence should continue to be a relevant factor for CAF members. The AGC disagreed with the position of the BPA which was understood to be that all consequences of health care should be covered. The AGC contended that this was equivalent to the BPA asking the Board to create a presumption. The AGC submitted that it is only Parliament that can create such a presumption.

105. The AGC submitted that BPA was contending that the presumption under 21(3)(f) of the *Pension Act* / 50(f) of the *VWB* Regulations is applicable. However, the AGC submitted that this presumption applies where the injury or

disability occurs when a CAF member is working. The AGC further submitted that there is not a lot of case law in respect to subsection 21(3)(f) of the *Pension Act* and subsection 50(f) of the *VWB Regulations* because usually it is obvious that there is a relationship to service; therefore, it is rarely necessary to specifically mention this provision.

106. The AGC referred to three decisions where the courts have previously ruled on this presumption:

1. The Federal Court of Appeal's 2014 decision in *Newman v. Canada*, 2014 FCA 218, which was in respect to whether the applicant's mental illness was incurred during military service:

> According to paragraph 50(f) of the Regulations, Ms. Newman is presumed, in the absence of evidence to the contrary, to have established that her chronic dysthymia has a service related cause if her evidence demonstrates that her chronic dysthymia was incurred in the course of "any military operation, training or administration, as a result of either a specific order or an established military custom or practice" or, in other words, in the course of the work she was assigned to do as a member of the Canadian Forces.

2. Another decision the AGC referred to that referenced this provision is *MacDonald v. Canada (Attorney General)* 1999, 164 F.T.R. 42, para 12, where the applicant suffered an injury while riding in the back of a truck with other members of his unit and was in an accident during the course of his military service:

> In further assistance to applicants, the *Pension Act* creates favourable presumptions; the relevant one for the purposes of the case at bar is contained in subsection 21(3):
>
> 21(3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of
>
> > (f) any military operation, training or administration, either as a result of a specific order or established military custom or practice, whether or not failure to perform the act that resulted in

> the disease or injury or aggravation thereof would have resulted in disciplinary action against the member.
>
> Thus, in the absence of evidence to the contrary, causation is presumed if the injury was incurred during the course of the applicant's service.

3. Thirdly, in a case involving whether the applicant's psychiatric condition relating to anxiety was either caused or aggravated by military service involving working with armaments, the Federal Court in *MacNeill v Canada*, 1998, T2222-97, found that due to 21(3)(f), "causation is presumed if the injury was incurred during the course of the applicant's service".

107. In response to the BPA's submission that this presumption be triggered by health treatment, the AGC submitted that where the injury did not occur during military service, the presumption in 21(3)(f) does not apply. Instead, a case-by-case analysis must be done.

108. The AGC then referred to court cases where a case by case analysis was described. The AGC started with the 2005 *Fournier*[24] decision, affirmed by the Federal Court of Appeal in 2006, which lists a set of factors to be considered in determining relationship to service at para 35:

> It is clear from the jurisprudence that factors such as the location where the accident occurred, the nature of the activity being carried on by the applicant at the time, the degree of control exercised by the military over the applicant when the accident occurred and whether she was on duty at the time are all relevant to the determination that the Board must make that the injury arose out of or was connected to the applicant's military service. However, it is also clear from the cases that no one factor is determinative.

109. The AGC further submitted that the Federal Court recently considered the *Fournier 2005)* decision in *Greene-Kelly v. Canada,* 2018 FC 1188, where the applicant was injured on her way home from French language training. The Appeal Panel relied on the test in *Fournier*, as the Court stated at para 21:

> In my view, the Appeal Panel in this case correctly interpreted and applied the test to establish entitlement to a disability pension under paragraph 21(2) (a) of the *Pension Act*. It did not, as the Applicant suggests, adopt a novel test and incorrectly interpret the phrase

[24] Note that the 2005 and 2006 *Fournier* decisions involved a different veteran and different fact situation from the 2018 and 2019 *Fournier* decisions discussed elsewhere in the Interpretation Panel decision.

"arose out of or was directly connected with" as contained in paragraph 21(2) (a). On the contrary, the Appeal Panel specifically referenced the non-exhaustive factors as stated in *Fournier* when considering whether the Applicant's medical condition arose out of or related to her RCMP service. The Appeal Panel's reliance upon *Fournier* shows that it interpreted paragraph 21(2) (a) of the *Pension Act* correctly.

110. The AGC submitted that the BPA is asking the Board to bypass the analysis, as detailed in *Fournier*, and to go straight from finding an injury caused by CAF healthcare to concluding that it is service related. The BPA suggest that the blueprint for this is in *Hall*[25] and *Frye*[26]. However, the AGC submitted that these cases do not skip the assessment. In *Frye*,[27] a specific analysis was done in order to decide if the recreational swim was service related. The AGC submitted that *Frye* supports its position that a *Fournier* (2005)-like assessment is required in claims related to treatment outcomes.

111. The AGC also referred to the *Hall* decision. In that case, the VRAB Appeal Panel found the applicant was not engaged in military duties when he was receiving the UV treatments for acne. The treatment caused his claimed condition, but he was denied a pension as it was not service-related. However, the Federal Court did not agree as military duty was not the test to be applied. The matter was sent back to the Board to look at all of the facts. The AGC concluded that a case-by-case analysis needs to be done on all of the facts for each case.

112. Turning to the BPA's submissions regarding the legislative scheme and the application of the insurance principle versus the compensation principle, the AGC submitted that Parliament clearly differentiated entitlement for service in wartime from entitlement for service in peacetime. It intended injury or disease incurred during peacetime to be linked to military service where it "arose out of or was directly connected" to military service while it intended injury or disease incurred during special duty service and wartime service to be fully covered. This contrast was explained in *Bradley v Canada (Attorney General),* 2001 FCT 793:

Subsection 21(2) provides coverage under the Compensation Principle, i.e., pension benefits may be awarded if a disability, disabling condition, the aggravation of a disability, or death, arose out of or was directly connected with the demands of military service in peacetime. Since former members covered

[25] *Hall* CITE
[26] *Frye* CITE
[27] *Frye*, para 33-35

under this subsection are not considered to be on duty twenty-four hours a day, claimed disabilities must be directly related to a service event or factor. When a particular service event cannot be pinpointed as the cause of death, disability, or the aggravation of a disability, it must be shown that the risks associated with military service are more likely to be causal factors than the risks associated with the normal activities of daily living.

113. The AGC concluded Parliament has clearly indicated when it intended a blanket application.

114. The AGC took issue with the BPA's position that not all injuries arising from health care will be compensable as it will depend on whether the condition is a natural consequence of an injury versus a consequence of a treatment. The AGC submitted that it would be very difficult to know how to apply this test and that it would not be an effective way to assess claims from injuries from health care.

115. The AGC took issue with BPA's argument that due to the uniqueness of military service, healthcare and military service are intimately linked and therefore all consequences from healthcare are compensable. The AGC had two problems with this argument:

1. The unique factors of the CAF are over-generalized by BPA. The AGC stated that it is much more nuanced than presented by BPA.
2. These unique factors can be factors on their own when doing a case by case analysis.

116. The AGC stated that the CAF is responsible for the provision of full spectrum, high quality health care services to CAF members, wherever they serve. Health services may be provided directly by CAF or on behalf of and at the expense of CAF by a civilian provider in a civilian facility. CAF operates a number of out-patient health services at military bases across Canada. CAF no longer operates hospitals within Canada. The AGC submitted that generally, CAF members are provided their choice of physician when health care is outsourced. Out-sourced health services are administered by a third party health insurer with whom the Government of Canada contracts. Currently there are over 140,000 health care providers registered. The AGC submitted that the CAF cannot actively oversee or exert professional-technical control over these health care providers except requiring them to be qualified and have the proper credentials.

117. In challenging the accuracy of BPA's contention that CAF exerts control over all aspects of its members' healthcare, the AGC referred to the affidavit of Dr. Lorenzen. For example, a member's commanding officer's authorization is

no longer needed to receive care from outside a CAF facility. Also, only limited information related to employment limitations is permitted to be shared with a member's commanding officer without the member's consent. Also, a member has the right to ask for the physician of their choice.

118. The AGC further submitted that although members are required to undergo periodic assessments of fitness for military duties, a member retains the right to participate or not in the process. The AGC submitted that some health services may be required as a direct consequence of service and provided by the CAF while others are personal choices and have little or nothing to do with military service and are provided by an outsourced service provider. The medical and dental services provided by CAF vary widely in type, provider, location, motive and with respect to the level of control exerted by CAF, if any.

119. The AGC submitted that Dr. Lorenzen's affidavit was based on fact and supported by exhibits whereas BPA's affidavit by Dr. Dauphin was based on his personal experience, not on how CAF healthcare is actually administered. The AGC submitted that there were errors in Dr. Dauphin's affidavit but those issues could not be addressed given that the AGC could not file additional evidence on that issue.

120. The AGC took issue with BPA's statement that consent can never truly be freely given. AGC submitted that there are situations where a refusal to consent will not impact a career. The BPA stated that if a member refuses to get a vaccine, they could be fired. The AGC stated that there was no evidence provided that this is true and the AGC would have liked to provide evidence on this point.

121. The AGC further submitted that the idea that all health care decisions are made based on a member's career fails to recognize that health care decisions are made for all kinds of reasons. AGC felt the assertion by Dr. Dauphin that members tend to hide their symptoms was an over-generalization. The AGC also submitted that the assertion that members moving around can impact their continuity of care is also an over-generalization. The AGC submitted that the fact that CAF members move to a new location does not mean negative repercussions for their health care.

122. The AGC referred the Interpretation Panel to the Supreme Court of Canada in *Vavilov* which confirmed that tribunals must "interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue". The AGC further submitted that although jurisprudence from the Federal Court of Appeal has clarified that

the phrase “arose out of” in subsection 21(2) should be interpreted in a broad manner (*Frye*), this does not mean that every occasion is considered to be linked to service (*Schut v. Canada (Attorney General*), 2000 186 FTR 212, para 26). The case law has demonstrated that no two cases are ever the same (*Bradley v. Canada,* 2011 FC 309) and no one factor is determinative (*Fournier v. Canada,* 2005 FC 453, para 35 aff’d 2006 FCA 19).

123. The AGC stated that every case will be different in terms of how it relates to military service. Factors are non-exhaustive. Considerations could be control, whether there was informed consent, universality of service. Negligence is not the only way to prove it is service related.

124. When asked by the Panel for a list of factors, the AGC suggested: being seen in a civilian facility versus military one, whether healthcare required is related to Universality of Service (U of S) requirements, and did they choose their health care provider?

125. When asked by the Panel when 21(3)(f) may apply, the AGC stated whether healthcare is needed as part of their work duties may be a factor. However, the case law on these sections, as indicated earlier, indicates that this presumption normally applies when a member is performing their duty.

126. The AGC further submitted that some health care is more service related than others.

127. The AGC responded to BPA’s submission that because of U of S, members waive their constitutional rights and there is a total absence of constitutional protections when U of S is at stake. The AGC submitted that the BPA overstated the impact of U of S on the rights of CAF members. The AGC stated that the CAF is subject to both the Constitution and the *Canadian Human Rights Act*, (CHRA), and the CAF has an obligation to accommodate to the point of undue hardship. The CAF’s U of S policy, as recognized at subsection 15(9) of the CHRA provides that all members of the CAF’s Regular Force and Primary Reserve must be able to meet certain common standards so that they can perform common functions as required, regardless of their trades or occupations. If breaching these particular standards is not in play, the CAF still has the same duties as any other “employer” under the CHRA to accommodate members to the point of undue hardship. The AGC furthermore submitted that the BPA’s argument in respect to U of S does not assist in establishing that injury or disease resulting from CAF administered health care is sufficient on its own to establish a link between service and injury for the purposes of disability entitlement.

128. The AGC submitted that the RCMP is not responsible for the basic health care for its members, who receive their care in the community under provincial and territorial health insurance. Although the RCMP employs doctors, nurses and other health care professionals, their primary role is the investigation and assessment of a member's fitness for duty pursuant to their Occupational Health Program. In exceptional circumstances, for example in a remote posting, a Health Service Officer (HSO) may provide health care. The AGC concluded that given that generally RCMP members do not receive basic health care from their employer, any injuries may be outliers and exceptions to the general rule and do not justify the creation or a rule or principle for RCMP members. Rather, any injury arising from a member's participation in the RCMP's occupational health program should be determined in the same manner as it is currently considered - on a case by case basis considering all the circumstances.

129. The AGC summarized Canada's position as follows:

- In *Mérineau,* the SCC did not address "arose out of". The AGC agrees with the other parties on that issue. The AGC submitted that *Mérineau* does not preclude injury from health care being compensable.
- The AGC submitted that the Court in *Fournier* (2019) questioned whether I-25 established a bonus which is outside the Board's empowering legislation. Canada's position is that I-25 is just badly worded. It does not create a bonus.
- In respect to negligence, the AGC submitted that CAF is responsible for health care. If CAF is negligent, if CAF members caused the error, then it is service related. If there is no negligence and a member suffers an injury from healthcare, it makes no difference whether it is civilian or military healthcare. The only reason the healthcare is relevant to a service relationship is if it was provided negligently. Therefore, the AGC submitted that negligence is a service factor and has been in the past. AGC further submitted that using negligence as the test has not been a problem in the past. The AGC submitted that there is no evidence that it is difficult to access medical files. The AGC submitted that the argument that proving negligence is difficult may be valid for many disability claim, i.e. many claims are difficult to prove. The AGC further submitted that the suggestion that a member may be reluctant to allege negligence against other CAF members is speculative. The AGC concluded that negligence, or some other service-related factor, is required to prove an injury from health care arose from or is directly connected to service in the context of the receipt of health care from CAF.

Submissions of NPF

130. The National Police Federation, (NPF) participated in the hearing to assist the Board by providing context in respect to RCMP medical and dental care. In addition, the NPF reviewed relevant legislation and case law, focusing on how the term “arose out of” could be applicable. It also provided some comments in respect to the interrelationship between injuries incurred through medical treatment and a no-fault regime, with lessons learned from other jurisdictions. The NPF did not take a position on the ultimate disposition.

131. The NPF submitted that the Board is bound by the Supreme Court of Canada decision in *Mérineau* due to stare decisis. However, the NPF submitted that *Mérineau* did not expressly decide on “arose out of”, and that the interpretation of that phrase has broadened since 1983. Therefore, *Mérineau* is not determinative of the issues before the Board.

132. The NPF looked at relevant case law in respect to “arose out of”, referring to the analysis in *Frye* as later confirmed in *Cole.* Relying on *Frye* and *Cole*, the NPF concluded that “arose out of” means a non-direct significant causal connection.

133. The NPF further submitted that one factor in determining whether there is a significant causal connection to the injury is the *type* of care received by the RCMP member. In respect to *basic* health care (BHC), in practice, very little control is exercised by the RCMP. Since 1 April 2013, basic health care has been covered through provincial health care insurance plans. In rare cases, a Health Services Officer (HSO) provides primary treatment. *Supplemental* health care is available through a health benefit insurance plan. *Occupational* health care (OHC) is the area where the RCMP have significant control given that the Commanding Officer (CO) or delegate has financial authority to approve treatment and services. The HSO has authority for medical pre-authorization. The OHC provisions may apply when obtaining care through the publicly funded health care system would involve unacceptable waiting times thereby impeding operations due to absenteeism or work restrictions. Fitness for duty assessments are normally conducted every three years by a designated physician or by an HSO.

134. The NPF submitted that a second factor in determining whether there is a significant causal connection between the injury and RCMP service is the nature of the treatment. For example, whether the injury was a natural consequence of the treatment which the member consented to.

135. The NPF submitted that a third factor in determining whether there is a significant causal connection between the injury and RCMP service are the actions by the members. For example, does the member ignore or follow instructions by the HSO.

136. The NPF submitted that a fourth factor would be the level of control exercised by the RCMP. The RCMP will exert more or less control depending on the nature of the injury or disability. For example, where the condition impacts the member's fitness to work, the RCMP may direct the OHC treatment.

137. The NPF looked at provincial workers' compensation cases, automobile accident cases and tort cases, finding that the workers' compensation legislation and case law were most analogous to the *Pension Act*. In workers' compensation case law in Canada, the new injury created by medical treatment for a workplace injury can be found to have "arisen out of" the worker's employment.

138. The NPF submitted that there is no statutory basis for negligence to be a controlling feature in the issues before the Board. The NPF submitted that the concept of negligence does not fit neatly within a "no fault" regime, citing the experiences of New Zealand and the United Kingdom.

NPF Conclusions

139. RCMP health services are very different from the Canadian Armed Forces health services. However, the RCMP does exercise some control. The degree of control depends on the nature of the injury, whether occupational or not, and other factors. The Supreme Court of Canada decision in *Mérineau* is binding but not determinative of the issues before the Board. "Arose out of" should be understood to be a non-direct significant causal connection.

140. The NPF submitted that there is no statutory basis for negligence to be a controlling feature in the questions before the Board. The NPF concluded that given that OHC is very different from BHC, there is no one single answer for RCMP members in terms of the questions before the Board.

THE INTERPRETATION PANEL DECIDES:

The Interpretation Panel finds that both CAF and RCMP applicants may be eligible for disabilities arising from a service-related treatment injury. In all cases, the claim must be analyzed on a case-by-case basis to determine whether there is a significant relationship to service, without holding applicants to a requirement of establishing negligence.

Applicable Statutes:

Canada Human Rights Act

Constitution Act

Interpretation Act

Pension Act

RCMP Superannuation Act

Veterans Well-being Act, [S.C. 2005, c.21.]

Veterans Review and Appeal Board Act, [S.C. 1987, c. 25, s. 1; R.S.C. 1985, c. 20 (3rd Supp.), s. 1; S.C. 1994-95, c. 18, s. 1; SI/95-108.]

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