A-719-98

2001 FCA 228

William Fredrick McCague (*Appellant*)

v.

Her Majesty the Queen, as represented by the Minister of National Defence (*Respondent*)

INDEXED AS: MCCAGUE V. CANADA (MINISTER OF NATIONAL DEFENCE) (C.A.)

Court of Appeal, Isaac, Sexton and Sharlow JJ.A.—Toronto, April 2; Ottawa, July 4, 2001.

Armed Forces — Pensions — Appeal from F.C.T.D. decision Canadian Forces Superannuation Act (CFSA), s. 19(1)(c)(i) properly applied to reduce annuity otherwise payable to appellant on retirement from Canadian Force's reserve force — Upon retirement from regular force in 1981 at age 40, appellant's pension reduced by 30% under s. 19(1)(c) (5% times number of full years age less than mandatory retirement age determined according to rank) — Serving with reserve force in variety of full-, part-time positions for next 12 years — Serving full-time with reserve force from July 1994 until January 1996 — S. 41(2) deeming him re-enrolled in regular force for purposes of CFSA — Required to make pension contributions with respect to full-time service — Appeal dismissed (Sharlow J.A. dissenting) — CFSA intended to provide for payment of benefits to persons retiring from regular force — Penalizes, through reduction in annuity payable, those retiring prior to completion of contractual engagement — Not providing for deemed second retirement at conclusion of member's service in reserve force — Interpretation complies with legislative text, promotes legislative purpose, provides reasonable, just outcomes — Pension increased even after 30% reduction — Within six years of retirement from reserve force, total monetary benefit accruing to appellant exceeding amount of contributions committed to making in respect of service in reserve force — Further service, additional contributions have, therefore, benefitted him.

Estoppel — Upon retirement from regular force of Canadian Forces in 1981 prior to mandatory retirement age, appellant's pension reduced by 30% under Canadian Forces Superannuation Act, s. 19(1)(c) — Prior to undertaking full-time service in reserve force from July 1994 until January 1996, DND's Pay Services Directorate advising if completed full-time reserve service after reaching age 54, for purpose of s. 19(1) retirement age would be considered to be 55, recalculated annuity would not be subject to reduction — Contrary to such advice, annuity on release from reserve force reduced by 30% — Crown cannot be estopped from applying proper interpretation of statute — Duty of courts to determine proper interpretation of statute — Having arrived at proper interpretation, Court bound to apply it.

Construction of Statutes — Canadian Forces Superannuation Act (CFSA) — S. 19(1)(c) providing for reduction of annuity by 5% times number of full years between age, mandatory retirement age — S. 41(2) deeming person entitled to annuity by virtue of service in regular force, on expiration of continuous full-time service of one year in reserve force, re-enrolled in regular force for purposes of CFSA — Contextual approach to statutory interpretation requiring consideration of text, legislative scheme, other indicia of legislative intent — If various factors pointing to differing conclusions, Court must weigh competing factors, test possible interpretations against plausibility, efficacy, acceptability — Appellant submitting deemed re-enrollment meaning deemed retirement upon conclusion of that service — Interpretation proposed by appellant leading to anomalous or absurd results — Modern

contextual approach supporting interpretation urged by Minister, accepted by Motions Judge — Appeal dismissed.

This was an appeal from the Trial Division decision that the Crown had correctly applied subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* (CFSA) to reduce by 30% the annuity that would otherwise have been payable to the appellant upon his retirement from the Canadian Forces' reserve force in 1996. The appellant had been a member of the regular force of the Canadian Forces from 1961 until he retired in 1981 at age 40. CFSA, subparagraph 19(1)(*c*)(i) provides that a contributor who, not having reached retirement age, ceases to be a member of the regular force is entitled, if he has served in the regular force for 20 or more years, but less than 25 years, in the case of an officer, to an immediate annuity reduced by five per cent for each full year by which his age at the time of his retirement is less than the retirement age applicable to his rank. "Retirement age" is defined as such age as is fixed by the regulations made under the National Defence Act according to rank. The *Queen's Regulations and Orders for the Canadian Forces* are regulations made under the *National Defence Act*. Article 15.17 thereof provides that retirement age is the age set out in the table according to rank. Under that table the appellant's mandatory retirement age was 47. Thus there were six full years between the appellant's age at retirement from the regular force and the mandatory retirement age and his annuity was reduced by 30% according to subparagraph 19(1)(*c*)(i).

After his retirement, the appellant had served in a variety of part- and full-time roles with the reserve force over a period of 12 years. On July 1, 1994, he commenced a period of full-time service that lasted until January 1996. Subsection 41(2) deems a person who was entitled to an annuity by virtue of having served in the regular force who transfers to the reserve force, on the expiration of any continuous period of full-time service of one year, re-enrolled in the regular force at the commencement of that period for the purposes of the CFSA. The appellant was deemed re-enrolled in the regular force, and was therefore required to make pension contributions with respect to the period of full-time reserve service. Once "deemed re-enrolled" the appellant exercised the right to make additional voluntary contributions to his superannuation account so as to increase his pensionable service to include his other full- and part-time service with the reserve force after November 17, 1981. The appellant completed his last period of pensionable service within a year of the compulsory retirement age of 55 that applied to all reserve force officers.

Prior to undertaking the period of continuous full-time service that would exceed one year in length, the Department of National Defence's Directorate of Pay Services told the appellant that for the purposes of subsection 19(1) his retirement age would be considered to be 55, so that if he completed his full-time reserve service after reaching 54, his recalculated annuity would not be subject to any penalty. Contrary to that advice, his annuity was recalculated to account for his increased pensionable service and the increase in the average annual pay of his "best six years", but the respondent continued to apply a 30% reduction to the appellant's annuity.

The appellant submitted that his deemed re-enrollment in the regular force meant that, for the purposes of the CFSA, he was deemed to have retired from the regular force upon the conclusion of his final period of full-time reserve service. Since this retirement date was within a year of his compulsory retirement age, he argued that there should have been no reduction in his annuity. The application for judicial review of the decision to reduce the recalculated annuity by 30% was dismissed.

The issues were: (1) what is the proper interpretation of the relevant provisions of the Canadian Forces Superannuation Act; and (2) whether the respondent should be estopped from applying a new interpretation of the Act to the appellant's situation.

Held (Sharlow J.A. *dissenting*), the appeal should be dismissed.

Per Sexton J.A. (Isaac J.A. concurring): The statutory scheme is unacceptably confusing and in dire need of amendment.

(1) The contextual approach to statutory interpretation requires the Court to consider a broad range of factors such as the text of the provision to be interpreted, the legislative scheme within which the provision appears and other indicia of legislative intent. If the various factors point to differing conclusions, then the Court must weigh the competing factors and test possible interpretations against plausibility, efficacy and acceptability.

Having regard to the fact that the Act defines "regular force" and "member of the regular force" without providing similar definitions for the "reserve force"; that "every member of the regular force" is required to contribute to the plan; and that there is no entitlement to benefit unless the prospective annuitant has retired from the regular force, the purpose of the Act must be to provide a pension plan for members of the regular force of the Canadian Forces. In general, the Act is not directed at providing benefits to members of the reserve force since they mostly serve on a part-time basis only, although there are some situations where members of the reserve force do serve for periods of full-time service. Subsection 41(2) addresses such an exceptional situation, and allows the person to increase his benefits under the CFSA by increasing his pensionable service time and potentially increasing the average of the best six years of annual pay. It does not make any explicit provision for a deemed second retirement, nor does a deemed re-enrollment for the purposes of the Act lead, by necessary implication, to a deemed retirement upon completion of the reservist's period of full-time employment.

The purpose of paragraph 19(1)(*c*) is obscure, as is the impact of the Act's definition of "retirement age" upon subsections 19(1) and 41(2). It was surmised that the purpose of paragraph 19(1)(c) is to deter service members from leaving the Canadian Forces prior to the conclusion of a contractual engagement.

In any event, where the various indicia point to possible differing conclusions, the contextual approach requires consideration of the consequences of the competing interpretations. The proper interpretation will be the one that provides outcomes that are reasonable and just. The interpretation proposed by the appellant fails to meet this criterion since it leads to results which are anomalous or absurd, as illustrated by examples. Under the appellant's interpretation, an officer who enrolled in the regular force at age 20, served 20 years, retired six years before the designated retirement age, with a 30% reduction in his pension, could enroll in the reserve force at age 53, serve full-time for one year and one day before leaving the military within one full year of the compulsory retirement age for reserve officers, and be entitled to an unreduced annuity, having served for only 21 years. A second officer who serves 27 years, retires at the compulsory retirement age with an unreduced pension, immediately transfers to the reserve force and serves full-time for one year and one day before leaving the Canadian Forces at age 48, six years before the compulsory retirement age of 55 would be subject to a 30% reduction. Parliament cannot have intended such absurd, unjust results. The modern contextual approach supports the interpretation of the CFSA urged by the Minister and accepted by the Motions Judge. Appellant has been able to secure an increased annuity, the 30% reduction notwithstanding. The additional benefit will exceed the contributions made in respect of his service in the reserves. Thus his further service and contributions have benefited appellant considerably.

(2) The Crown cannot be estopped from applying the proper interpretation of a statute. It is the duty of the courts to determine the proper interpretation of a statute. Having arrived at the proper interpretation, the Court and the Crown are bound to apply it.

Per Sharlow J.A. (*dissenting*): According to the definition in subsection 2(1), "retirement age" is fixed by regulations. The QR&O are regulations made under the National Defence Act. Article 15.17

refers to the retirement age for officers. Article 15.17(4) provides that reserve officers shall be released upon reaching the appropriate age prescribed in subparagraph (1)(a) (i.e. the age for his rank set out in the table), except as otherwise prescribed. The Chief of the Defence Staff (CDS) has prescribed a compulsory retirement age for officers in the reserve force in CFAO 49-10. The Crown argued that the mandatory retirement age for officers of the reserve force is not fixed by QR&O, but by CFAO 49-10 which is not a regulation made under the National Defence Act. Therefore, a person has no "retirement age" as defined in the Canadian Forces Superannuation Act by virtue of retiring from the reserve force. Thus the "retirement age applicable to his rank" under QR&O remains at 47 and can never change. If that is so, the 30% reduction in the annuity can never be altered by subsequent service with the reserve force. The Crown's interpretation renders meaningless the reference in article 15.17(4) to "the appropriate age prescribed under subparagraph (1)(*a*)", which must be a reference to the tables in article 15.17. Article 15.17(4) clearly contemplates the inclusion of reserve officers in those tables. That is the necessary implication of the language of article 15.17(4) and is also consistent with the definition of "officer" in the QR&O, which includes officers of both the regular and reserve forces. The Crown's interpretation also leads to an anomalous result in the case of a person in the appellant's situation because his annuity can never be more than 70% of the annuity that would have been commensurate with his 25 years and 308 days of pensionable service, which is approximately what he would have accumulated if he had retired at age 47 from the regular force. After retirement from the regular force, the appellant provided six years of pensionable service with the reserve force. It is unfair that contributions after 1981 for those six years, accumulated at 100% of the statutory rate, should result in an annuity that can never exceed 70% of the annuity that he would have received had he served in the regular force for an additional six years.

The legal basis for fixing the mandatory retirement age for reserve officers is article 15.17(4) of the QR&O, which is a regulation made under the National Defence Act. An officer of the reserve force who has been deemed by subsection 41(2) to have been re-enrolled in the regular force may thereby obtain a new "retirement age" for purposes of the CFSA. Therefore the appellant's service as an officer in the reserve force created a "retirement age applicable to his rank" as of January 17, 1996 that was different from the "retirement age applicable to his rank" as of November 17, 1981. CFAO 49-10 would have required the appellant to retire from the reserve force on his 55th birthday. As there was less than one full year between the appellant's age on January 17, 1996 and his mandatory retirement age of 55, his annuity should not have been reduced. Under this interpretation of article 15.17, it is irrelevant that CFAO 49-10 is not itself a regulation under the National Defence Act.

The authority granted to the CDS in article 15.17(4) of the QR&O to fix the mandatory retirement age for reserve officers was exercised by the promulgation of an order in the CFAO, which was the appropriate method for exercising that authority. However, the manner in which the CDS exercised his authority does not derogate from the fact that it is a regulation under the National Defence Act that is the root of the authority granted to the CDS to fix the mandatory retirement age for reserve officers.

This interpretation is consistent with the statutory language and leads to a result that is reasonable and just from the appellant's standpoint. The objective of CFSA, subsection 41(2), which is to provide an opportunity for additional pensionable service in the reserve force after retirement from the regular force, is entitled to the same respect as subparagraph 19(1)(c)(i). The interpretation propounded by the appellant struck a reasonable balance between the two objectives of both provisions, while the Crown's interpretation did not.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Forces Administrative Orders, 49-10, Annex E, s. 6.

Canadian Forces Superannuation Act, R.S.C., 1985, c. C-17, ss. 2(1), “contributor” (as am. by S.C. 1999, c. 34, s. 115), “member of the regular force” (as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 61), “officer”, “regular force”, “retirement age”, 4 (as am. by S.C. 1999, c. 34, s. 116), 5 (as am. by S.C. 1992, c. 46, s. 33), 6 (as am. *idem*, s. 34), 15 (as am. *idem*, s. 40; 1999, c. 26, s. 14; c. 34, s. 127), 16, 17, 18, 19, 20, 21, 22, 41(2) (as am. by S.C. 1992, c. 46, s. 46).

Labour Adjustment Benefits Act, S.C. 1980-81-82-83, c. 89.

National Defence Act, R.S.C., 1985, c. N-5, ss. 2(1) (as am. by S.C. 1995, c. 39, s. 175), 15(1) (as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 60), (3) (as am. *idem*), 18.

Queen’s Regulations and Orders for the Canadian Forces (1994 Revision), art. 1.23, 15.17.

CASES JUDICIALLY CONSIDERED

APPLIED:

Rizzo & Rizzo Shoes Ltd. (*Re*), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *Merck & Co. v. Nu-Pharm Inc.* (2000), 5 C.P.R. (4th) 138; 254 N.R. 68 (F.C.A.); *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621 (1992), 6 Admin. L.R. (2d) 62; 16 Imm. L.R. (2d) 241; 136 N.R. 254 (C.A.); *Granger v. Canada Employment and Immigration Commission*, [1986] 3 F.C. 70 (1986), 29 D.L.R. (4th) 501; 69 N.R. 212 (C.A.); affd [1989] 1 S.C.R. 141; (1989), 91 N.R. 63.

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Hall, Geof R. “Statutory Interpretation in the Supreme Court of Canada: The Triumph of a Common Law Methodology” (1998), 21 *Advocates’ Q*. 38.

Sullivan, Ruth. *Driedger on the Construction of Statutes*, 3rd ed. Toronto: Butterworths, 1994.

Sullivan, R. “Statutory Interpretation in the Supreme Court of Canada” (1998-99), 30 *Ottawa L. Rev*. 175.

APPEAL from the Federal Court Trial Division decision that the Crown had correctly applied subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* to reduce by 30% the annuity that would otherwise have been payable to the appellant upon his retirement from the Canadian Forces’ reserve force in 1996 (M*cCague v. Canada (Minister of National Defence)* (1998), 155 F.T.R. 201 (F.C.T.D.)). Appeal dismissed (Sharlow J.A. dissenting).

APPEARANCES:

Robert J. Fenn for appellant.

Ian R. Dick for respondent.

SOLICITORS OF RECORD:

Rohmer & Fenn, Richmond Hill, Ontario, for appellant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1] SEXTON J.A.: This is an appeal from the decision of the Trial Division reported as *McCague v. Canada (Minister of National Defence)*.[1] The Motions Judge held that the respondent Crown had correctly applied subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* (the CFSA),[2] to reduce by 30% the annuity that would otherwise have been payable to the appellant upon his retirement from the Canadian Forces' reserve force in 1996. The appeal raises issues regarding the proper interpretation of the CFSA and whether the respondent can be estopped from changing its interpretation of that statute.

Facts

[2] The facts are not in dispute. On September 8, 1961, the appellant joined the regular force of the Canadian Forces. He retired on November 17, 1981, having attained the rank of Major. He would have been entitled to an annuity of $12,423.25 at that time, but for subparagraph 19(1)(*c*)(i) of the CFSA, which reads as follows:

> 19. (1) A contributor who, not having reached retirement age, ceases to be a member of the regular force … is, … entitled to a benefit determined as follows:
>
> …
>
> (*c*) if he has served in the regular force for twenty or more years but less than twenty-five years, he is entitled,
>
> (i) in the case of an officer, to an immediate annuity reduced by five per cent for each full year by which his age at the time of his retirement is less than the retirement age applicable to his rank.

[3] The appellant's age when he retired from the regular force on November 17, 1981 was 40. His "retirement age" for purposes of the *Canadian Forces Superannuation Act* fell to be determined by reference to the definition of that term in subsection 2(1), which reads as follows:

> 2. (1) …
>
> "retirement age", as applied to any rank of contributor, means such age as is fixed by the regulations made under the *National Defence Act* as the retirement age applicable to that rank;

[4] The *Queen's Regulations and Orders for the Canadian Forces* (1994 Revision) (QR&O) are regulations made under the *National Defence Act*, R.S.C., 1985, c. N-5.

Article 15.17 of the QR&O sets out the mandatory retirement age for officers. The portion of article 15.17 that applied to the appellant on November 17, 1981 reads as follows:

> 15.17 …
>
> (1) Except where the Minister has otherwise prescribed under paragraph (2), the retirement age of an officer is the first to occur of the following ages:
>
> (a) the age for his rank set out in the table to this article that applies to him; or

[5] Under the table that applied to the appellant, his mandatory retirement age at that time was 47. As a result, there were six full years between the appellant's age at the time of his retirement from the regular force and the mandatory retirement age applicable to his rank at that time. Therefore, subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* required the appellant's annuity as of November 17, 1981 to be reduced by five per cent for each of the six years. The annuity to which he would have been entitled, $12,423.25, was reduced by 30% to $8,696.28. The annual reduction was $3,726.97. It is common ground that this 30% reduction was correctly applied to the appellant upon his retirement in 1981.

[6] Upon his retirement from the regular force, the appellant transferred to the reserve force. Over the next 12 years, he served in a variety of part-time and full-time roles. On July 1, 1994, having attained the rank of Colonel, the appellant commenced a period of full-time service that lasted until January 17, 1996. As a result of his serving a period of continuous full-time service exceeding one year in length, he was deemed re-enrolled in the regular force by virtue of subsection 41(2) [as am. by S.C. 1992, c. 46, s. 46] of the CFSA, which reads as follows:

> 41.…
>
> (2) For the purposes of this Act, a person who, before the day on which this subsection comes into force, has become entitled to an annuity under this Act or a pension under Part V of the former Act by virtue of having served in the regular force and who, after having become so entitled and before that day, is enrolled in or transferred to the reserve force shall, on the expiration of any continuous period of full-time service therein of one year, commencing before the day on which this subsection comes into force, be deemed to have been re-enrolled in the regular force at the commencement of that period, and, in any such case, section 5 shall be deemed to have applied in respect of that period but nothing in this section shall be held to require the repayment by the person of such part of that annuity or pension, as during that period, the person was entitled to receive under this Act or the former Act. [Emphasis added.]

[7] As a result of his "deemed re-enrollment" in the regular force, the appellant was required to make pension contributions (and thereby accumulated further pensionable service) with respect to the period of full-time reserve service that had commenced in July 1994. He made these contributions in one lump sum payment of $6,763.05 following the completion of his service.

[8] Once “deemed re-enrolled,” the appellant also had the right to make additional voluntary contributions to his Superannuation Account so as to increase his pensionable service under section 6 [as am. idem, s. 34] of the CFSA to include his other full- and part-time service with the reserve force after November 17, 1981. He exercised this right and committed himself to make contributions in the form of monthly deductions of $139.16 from his annuity payment, lasting until August 2040.

[9] The appellant completed his last period of pensionable service on January 17, 1996, within a year of the compulsory retirement age of 55 that applied to all reserve force officers. His annuity was recalculated to account for his increased pensionable service and the increase in the average annual pay of his “best six years”. There is no dispute as to this calculation, which yielded an amount of $31,657.31.

[10] However, the respondent, in accordance with its interpretation of the CFSA, continued to apply a 30% reduction to the appellant’s annuity, resulting in an annuity of $22,160.11. That decision is the source of the parties’ disagreement.

Decision Appealed From

[11] The appellant sought judicial review of the decision to reduce his recalculated annuity by 30%. He argued that his deemed re-enrollment in the regular force meant that, for the purposes of the CFSA, he was deemed to have retired from the regular force upon the conclusion of his final period of full-time reserve service, in January 1996. Since this retirement date was within a year of his compulsory retirement age, he claimed that there should have been no reduction in his annuity.

[12] In the alternative, he argued that he had made his decision to serve more than a full year of continuous, full-time service based upon advice from DND personnel that the Department’s interpretation of the Act would result in the elimination of the 30% reduction to his annuity. He asserted that DND should be estopped from applying a differing interpretation to the detriment of his pension entitlement.

[13] The Associate Chief Justice adopted a contextual approach to interpretation of the CFSA. He held that the appellant could not be deemed to have retired from the regular force in 1996 since the term “retirement age”, as used in the CFSA, referred only to regular force personnel and not to those in the reserve force. He held that the appellant had retired from the regular force only once—in 1981—and that the continued application of the 30% reduction was based upon the correct interpretation of the Act. He also rejected the estoppel argument, holding that the Crown’s interpretation of a statute cannot give rise to an estoppel and, in any event, that the interpretation had not been to the detriment of the appellant since he had never received an annuity that had not been reduced.

Issues

[14] The appellant appeals to this Court, arguing that the Motions Judge erred with respect to both issues placed before him:

1. What is the proper interpretation of the relevant provisions of the Canadian Forces Superannuation Act; and

2. Should the respondent be estopped from applying a new interpretation of the Act to the appellant's situation.

Analysis

Proper Interpretation of the CFSA

[15] The central issue in this appeal is the proper interpretation of those portions of the CFSA which apply to the appellant's circumstances. Addressing this issue is complicated, in my view, by a statutory scheme that is unacceptably confusing and in dire need of amendment. However, I am required to interpret the statute as it is. For the reasons that appear below, I am in substantial agreement with the approach and interpretation of the learned Motions Judge.

[16] Legal scholars and practitioners have long been critical of the failure of Canadian courts to adopt a consistent and coherent approach to statutory interpretation.[3] However, beginning with the recent case of Rizzo & Rizzo Shoes Ltd. (Re),[4] a majority of the Supreme Court has applied, with varying degrees of elaboration, the "modern contextual approach" advocated by L'Heureux-Dubé J. This approach has gained wide acceptance. It has been adopted by this Court[5] and, indeed, formed the basis of the analysis conducted by the Judge below.

[17] Perhaps the best-known statement of the contextual approach is found in Driedger on the Construction of Statutes:

> *The modern rule*. There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.[6]

[18] The contextual approach requires that the Court consider a broad range of factors such as the text of the provision to be interpreted, the legislative scheme within which the provision appears and other indicia of legislative intent. If the various factors point to differing conclusions, then the Court must weigh the competing factors and test possible interpretations against the broad criteria laid out in the passage quoted above. In the end, it is the duty of the Court to decide and to provide reasons for its arrival at that decision.

[19] In my opinion, the appropriate starting point for my analysis is the statutory scheme of the CFSA as a whole. It seems clear from its construction that the purpose of

the Act is to provide for a pension plan for members of the regular force of the Canadian Forces—those engaged for lengthy periods of continuing, full-time service.

[20] There are a number of indicia that support this conclusion. The interpretation section of the Act defines the terms “regular force” and “member of the regular force” [as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 61] without similar definitions for the reserve force. The term “officer” is defined to include only officers of the regular force. It is “every member of the regular force” that is required to contribute to the plan under section 5 [as am. by S.C. 1992, c. 46, s. 33]. Sections 16-22 of the Act lay out specific rules of entitlement to benefits upon retirement. There is no entitlement to any benefit under these provisions unless the prospective annuitant has retired from the regular force. Indeed, the entitlements, except for those based upon disability or force reduction initiatives, are tied to specific terms of service under which only members of the regular force member are engaged. For example, subsection 17(1) deals with benefits payable upon retirement at the end of an “intermediate engagement”. Members of the reserve force do not serve under any of these terms of service but, rather, under three classes of contract of relatively limited duration.

[21] Thus, in general, the CFSA is not directed at providing benefits to members of the reserve force. This is rational since, for the most part, members of the reserve force serve on a part-time basis only, working a certain number of days over a set period of time without being liable for full-time service without their consent. There are some situations where members of the reserve force do serve for periods of full-time service. In exceptional circumstances such a period of full-time service can extend beyond one year.

[22] Subsection 41(2) of the Act addresses such an exceptional situation—a member of the reserve force who is an annuitant under the CFSA and who serves a continuous period of full-time service of greater than one year. In such a situation, subsection 41(2) provides that the person will be deemed to be re-enrolled in the regular force <u>for the purposes of the CFSA</u> only. This has the effect of re-enrolling the person in the regular force’s pension plan and allows the person to increase their benefits under the CFSA as the appellant did—by increasing their pensionable service time and potentially increasing the average of their “best six years” of annual pay. In this manner, the appellant increased the net amount of his annuity (after the 30% reduction) from $8,696.28 to $22,160.11.

[23] As I have pointed out above, entitlement to CFSA benefits is, on the face of it, predicated solely upon retirement from the regular force. Subsection 41(2) does not make any explicit provision for a deemed second retirement. The question, therefore, is whether a deemed re-enrollment for the purposes of the Act leads, by necessary implication, to a deemed retirement upon completion of the reservist’s period of full-time employment. In my opinion, it does not.

[24] Subsection 19(1), the provision under which the appellant became entitled to an annuity in 1981, captures those persons who retire at a time other than at the conclusion of a particular enumerated engagement and for reasons other than disability

or early retirement incentives. It provides for the reduction of the person's annuity by a percentage that is determined by comparing the person's age at the time of retirement to the compulsory retirement age applicable to the person's rank.

[25] In my opinion, the purpose of paragraph 19(1)(*c*), which reduces an annuitant's pension entitlement based upon his age as opposed to his contributions to the pension plan, is obscure. In contrast to these provisions, I note that under section 17 there is no similar reduction imposed upon a person who retires at the end of an intermediate engagement but before reaching compulsory retirement age. I can only surmise that subsection 19(1) is intended to deter service members from leaving the Canadian Forces prior to the conclusion of a contractual engagement.

[26] Also obscure is the impact of the Act's definition of "retirement age" upon subsections 19(1) and 41(2). The CFSA defines "retirement age" by reference to regulations made under the National Defence Act. The applicable regulation is QR&O article 15.17. Under paragraph 4 of the provision, reserve force officers are to be subject to the same retirement age as regular force officers, "[e]xcept as otherwise prescribed by the Chief of the Defence Staff [CDS]." [Underlining added.]

[27] The CDS has, in fact, otherwise prescribed the retirement age for reserve force officers. He has done so, by promulgating Canadian Forces Administrative Orders (CFAO) 49-10. This order fixes the age for retirement of reserve force officers at 55. This administrative order, although made under authority granted to the CDS in a regulation, is not itself a regulation made under the NDA.[7] Thus, the term retirement age in the CFSA cannot refer to the age of retirement from the reserve force, but only to age of retirement from the regular force.

[28] In any event, where, as here, the various indicia point to possible differing conclusions, the modern contextual approach requires that I consider the consequences of the competing interpretations. The proper interpretation will be one that provides outcomes that are reasonable and just. In my opinion, the interpretation urged upon the Court by the appellant fails to meet this criterion since it leads to results which are anomalous or absurd.

[29] Consider the following two examples, each involving an officer who (like the appellant) commenced his or her regular force service at age 20. The first officer, like the appellant, retires from the regular force at age 40, six full years before the designated retirement age, under circumstances that lead to a 30% reduction in his annuity. That person has no involvement with the Canadian Forces for the next 13 years. At the age of 53 he enrolls in the reserve force and undertakes a period of full-time continuous service for a period of one year and one day before again leaving the military within one full year of the compulsory retirement age for reserve officers. Due to the length of his period of full-time service, he is deemed re-enrolled in the regular force for the purposes of the CFSA and makes contributions related to his 366 days of additional service. Under the interpretation proposed by the appellant, this individual, having served a total of 21 years, would be entitled to an unreduced annuity, with his year and a day of additional service between the ages of 53 and 54 being sufficient to

erase the reduction imposed upon him for retiring six full years prior to his “retirement age”.

[30] The second officer, serves a total of 27 years, retiring at the compulsory retirement age with an unreduced pension. He then immediately transfers to the reserve force and serves full-time for a period of one year and one day prior to leaving the Canadian Forces altogether at age 48, six full years before the compulsory retirement age for reserve force officers of 55. Under the appellant’s approach, that person, who was entitled to an unreduced pension at age 47, would by virtue of having served an extra year (for a total of 28), suddenly be subjected to a 30% reduction in benefits.

[31] In my opinion, Parliament cannot have intended that such absurd and unjust results flow from its enactment.

[32] In summary, I believe that the CFSA is essentially intended to provide for payment of benefits to persons retiring from the regular force. It penalizes, through a reduction in the annuity payable, those who retire prior to completing a particular period of engagement. It does not provide for a deemed retirement at the conclusion of a member’s service in the reserve force.

[33] I believe the modern contextual approach supports the interpretation of the CFSA that was propounded by the respondent and accepted by the learned Motions Judge. This interpretation complies with the legislative text, promotes the legislative purpose and provides outcomes that are reasonable and just. In the present case, the appellant has been able to increase his annuity from $8,696.28 to $22,160.11 even taking into account the 30% reduction. This increase is the product of additional contributions on his part that, to date, have amounted to approximately $15,000 and will eventually (if he survives to age 99) total approximately $80,000. Thus, within 6 years of his retirement from the reserve force (or six months from the date of these reasons), the total monetary benefit accruing to him will exceed the amount of the contributions that he has committed to making in respect of his service in the reserve force. The appellant’s further service and additional contributions <u>have</u>, therefore, benefited him considerably.

<u>Does the Doctrine of Estoppel Apply to the Respondent’s Interpretation of the CFSA?</u>

[34] The appellant asserts that prior to undertaking a period of continuous full-time service that would exceed one year in length, he consulted with officials from the Department of National Defence’s Directorate of Pay Services regarding the impact such service would have upon his entitlements under the CFSA. He claims that he was told that, for the purposes of subsection 19(1) of the Act, the respondent would consider his retirement age to be 55, so that if he completed his full-time reserve service after reaching the age of 54, his recalculated annuity would not be subject to any penalty.

[35] The respondent admits that prior to early 1996, it did not interpret the relevant portions of the Act in the manner that I have adopted above and does not deny that the appellant received the advice he describes. In light of the respondent’s change in its

approach to interpreting the CFSA, the appellant argues that the respondent should be estopped from applying its more recent (and correct) interpretation to his situation.

[36] Although it is not clear that estoppel can never bind the Crown under other circumstances, this Court has consistently held that the Crown cannot be estopped from applying the proper interpretation of a statute. In *Canada (Minister of Employment and Immigration) v. Lidder*,[8] Marceau J.A., writing for a unanimous panel on this point, held that:

> The doctrine of estoppel cannot be invoked to preclude the exercise of a statutory duty … or to confer a statutorily defined status on a person who clearly does not fall within the statutory definition. Indeed, common sense would dictate that one cannot fail to apply the law due to the misstatement, the negligence or the simple misrepresentation of a government worker.[9]

[37] It is the duty of the courts, and not of government officials, to determine the proper interpretation of a statute. Having arrived at the proper interpretation, the Court (and the Crown) is bound to apply it. In the case of *Granger v. Canada Employment and Immigration Commission*,[10] the Court dealt with a situation much like that in the case at bar. The appellant had been given advice by the respondent Commission that, under its interpretation of the *Labour Adjustment Benefits Act*,[11] the amount of any pension benefits that were paid directly into an RRSP would not be deducted from benefits payable to him under that statute. After the appellant had made an irrevocable election to have his pension benefits paid directly into his RRSP, the respondent changed its interpretation and began to make deductions from the appellant's statutory benefits. Pratte J.A., writing for the majority, held that the respondent could not be estopped from applying its more recent interpretation, stating that [at page 77]: "A judge is bound by the law. He cannot refuse to apply it, even on grounds of equity."

[38] In my opinion, this Court's previous jurisprudence, and in particular the *Granger* case, is dispositive.

Conclusion

[39] I would dismiss the appeal. However, given the confusing construction of the Act that led to the necessity of this appeal, I would not award costs against the appellant.

ISAAC J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[40] SHARLOW J.A. (*dissenting*): I have read the carefully written reasons of my colleague Justice Sexton, but I must respectfully disagree with his conclusions. While I agree with him as to the principles of statutory interpretation that ought to be applied in this case, my analysis leads me to an answer that is contrary to his.

[41] I am, however, in complete agreement with his opinion that the scheme embodied in the *Canadian Forces Superannuation Act*, R.S.C., 1985, c. C-17, is unacceptably confusing and in dire need of amendment.

[42] The issue in this case is the correct interpretation of subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act*. The determination of that issue requires an interpretation of a number of other provisions of that Act, as well as certain provisions of the *National Defence Act*, R.S.C., 1985, c. N-5, the *Queens Regulations and Orders for the Canadian Forces* (QR&O), and the *Canadian Forces Administrative Orders* (CFAO).

[43] All of these provisions must be read together and interpreted in their total statutory context. If possible, an interpretation must be found that is consistent with the statutory language and objectives, and leads to a result that is reasonable and just: R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at page 131).

[44] The *National Defence Act* governs the establishment and operation of the Canadian Forces. Subsections 15(1) [as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 60] and (3) [as am. *idem*] of the *National Defence Act* establish the "regular force" and the "reserve force" as components of the Canadian Forces. The regular force and the reserve force each consist of officers and non-commissioned members. Subsections 15(1) and (3) read as follows:

> 15. (1) There shall be a component of the Canadian Forces, called the regular force, that consists of officers and non-commissioned members who are enrolled for continuing, full-time military service.
>
> …
>
> (3) There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.

[45] The word "officer" as defined in subsection 2(1) [as am. by S.C. 1995, c. 39, s. 175] in the *National Defence Act* clearly applies to both the regular force and the reserve force. The definition reads as follows:

> 2. (1) …
>
> "officer" means
>
> (*a*) a person who holds Her Majesty's commission in the Canadian Forces,
>
> (*b*) a person who holds the rank of officer cadet in the Canadian Forces, and
>
> (*c*) any person who pursuant to law is attached or seconded as an officer to the Canadian Forces;

[46] The *Canadian Forces Superannuation Act* provides for the payment of annuities to persons who are "contributors" to the Superannuation Account established under

section 4 [as am. by S.C. 1999, c. 34, s. 116]. The statutory annuity scheme has the same elements as most pension schemes. It provides for the determination of pensionable service of contributors, requires contributors to pay into the Superannuation Account a percentage of their salary, and provides for an annuity that generally is a function of annual pay during a period of up to six years of pensionable service (see section 15 [as am. by S.C. 1992, c. 46, s. 40; 1999, c. 26, s. 14; c. 34, s. 127] of the *Canadian Forces Superannuation Act*).

[47] For purposes of the *Canadian Forces Superannuation Act*, "contributor" is defined in subsection 2(1) [as am. by S.C. 1999, c. 34, s. 115] as:

> 2. (1) …
>
> "contributor" means a person who is required by section 5 to contribute to the Superannuation Account or the Canadian Forces Pension Fund, and includes, unless the context otherwise requires,
>
> (*a*) a person who has ceased to be so required to contribute to the Superannuation Account or the Canadian Forces Pension Fund, and
>
> (*b*) for the purposes of sections 26 to 35 and 38 to 40, a contributor under Part V of the former Act who has become entitled to a pension under that Part or has died;

[48] Section 5 of the *Canadian Forces Superannuation Act* requires every "member" of the regular force to contribute to the Superannuation Account, subject to some exceptions that are not relevant to this case. For purposes of the *Canadian Forces Superannuation Act*, subsection 2(1) defines "member of the regular force" as "an officer or non-commissioned member of the regular force", and "officer" as "a commissioned or subordinate officer of the regular force."

[49] Thus, every officer of the regular force is a "contributor" within this definition and, because of paragraph (*a*) of the definition, remains a "contributor" after the cessation of his or her obligation to contribute.

[50] Entitlement to an annuity under the *Canadian Forces Superannuation Act* is based on length of service, with 20 years being the minimum qualifying period (see, for example, paragraphs 16(*c*) and 19(1)(*a*) of the *Canadian Forces Superannuation Act*). It appears that the maximum pensionable service is 35 years (see section 15).

[51] Considering the *Canadian Forces Superannuation Act* as a whole, it is fair to infer that its object is to provide annuities for members of the regular force who are engaged for lengthy periods of continuing, full-time service.

[52] In certain circumstances, an annuity is payable under the *Canadian Forces Superannuation Act* to a person who retires before the mandatory retirement date for his or her rank, but in such case the annuity is reduced. That reduction undoubtedly is intended as a deterrent to early retirement. The early retirement provision in issue in this case is subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act*, which is quoted below.

[53] There is no statutory pension scheme applicable to persons who serve only in the reserve force. By exception, however, subsection 41(2) of the *Canadian Forces Superannuation Act* permits a member of the regular force who qualified for an annuity upon retirement and then joins the reserve force to have his or her service with the reserve force treated as pensionable service for purposes of the *Canadian Forces Superannuation Act*. This is accomplished by the legislative device of "deeming" the person to be re-enrolled as a member of the regular force.

[54] Parliament has not seen fit to specify whether and in what manner pensionable service under subsection 41(2) of the *Canadian Forces Superannuation Act* affects a contributor who retired early from the regular force, thus becoming subject to a reduction under subparagraph 19(1)(*c*)(i). That problem has been left for this Court to resolve on the basis of the application of the principles of statutory interpretation. A choice must be made between two competing interpretations of subparagraph 19(1)(*c*)(i), one propounded by the appellant and the other propounded by the Crown.

[55] One of the problems in this case, as will become apparent from the discussion that follows, is that anomalous results may flow from whatever interpretation is chosen. It follows that little guidance can be obtained from the presumption against an interpretation that leads to absurd results. It also indicates that the statutory scheme is seriously flawed and cries out for review and amendment. In the meantime, however, an interpretation must be adopted for the provisions as now written.

[56] As indicated above, the issue is the correct interpretation of subaragraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act*. I quote it below, together with subparagraph 19(1)(*d*)(i) which may also bear on the issues to be addressed:

> 19. (1) A contributor who, not having reached retirement age, ceases to be a member of the regular force … is, … entitled to a benefit determined as follows:
>
> …
>
> (*c*) if he has served in the regular force for twenty or more years but less than twenty-five years, he is entitled,
>
> (i) in the case of an officer, to an immediate annuity reduced by five per cent for each full year by which his age at the time of his retirement is less than the retirement age applicable to his rank …
>
> …
>
> (*d*) if he has served in the regular force for twenty-five or more years, he is entitled
>
> (i) in the case of an officer, to an immediate annuity reduced by five per cent for each full year by which his age at the time of his retirement is less than the retirement age applicable to his rank … .

[57] The specific issue that arises in this case is whether and how these provisions applied to the appellant on January 17, 1996. In resolving that issue, the first question is whether, on that date, the appellant was a "contributor" within the definition in

subsection 2(1) of the *Canadian Forces Superannuation Act* (quoted above). Clearly he was, and it is necessary to consider the second question.

[58] The second question is whether, on January 17, 1996, the appellant ceased to be a member of the regular force. As a matter of fact, the appellant had ceased to be a member of the regular force on November 17, 1981. However, at some time before January 17, 1996, the appellant was deemed for purposes of the *Canadian Forces Superannuation Act* to be re-enrolled as a member of the regular force. To give effect to the deemed re-enrollment of the appellant as a member of the regular force, the appellant must be considered for purposes of paragraph 19(1)(*c*) of the *Canadian Forces Superannuation Act* to have become a member of the regular force when subsection 41(2) first applied to him and to have ceased to be a member of the regular force upon his release on January 17, 1996. Thus, the answer to the second question is yes, and it is necessary to consider the third question.

[59] The third question is whether, on January 17, 1996, the appellant had served in the regular force for 20 years or more but less than 25 years (paragraph 19(1)(*c*)) or more than 25 years (paragraph 19(1)(*d*)). As a matter of fact he served in the regular force from September 8, 1961 to November 17, 1981, which is more than 20 years and less than 25 years. However, if the appellant's period of deemed re-enrollment under subsection 41(2) of the *Canadian Forces Superannuation Act* is taken into account, his service in the regular force should be considered to have exceeded 25 years, in which case subparagraph 19(1)(*d*)(i) would apply. Either way the answer is yes, and it is necessary to proceed to the fourth question.

[60] The fourth question is the same under either subparagraph 19(1)(*c*)(i) or subparagraph 19(1)(*d*)(i) because those two provisions are identical. The question is whether, on January 17, 1996, the appellant's "age at the time of his retirement" is less than the "retirement age applicable to his rank", and if so by how many full years. This is the critical point, and the one on which the parties argue for opposite answers.

[61] The Crown argues that for purposes of the *Canadian Forces Superannuation Act*, the appellant has had only one "retirement", which occurred on November 17, 1981, and only one "retirement age applicable to his rank", which was 47. If the Crown's interpretation is correct, there were six full years between the appellant's age at the time of his "retirement" on November 17, 1981 and the "retirement age applicable to his rank" on that date, and therefore the 30% reduction must apply to any annuity to which the appellant was entitled on November 17, 1981 or at any time thereafter.

[62] The Crown's interpretation turns on the definition of "retirement age" in subsection 2(1) of the *Canadian Forces Superannuation Act*, which reads as follows:

> 2. (1) …
>
> "retirement age", as applied to any rank of contributor, means such age as is fixed by the regulations made under the National Defence Act as the retirement age applicable to that rank;

[63] The QR&O are regulations made under the *National Defence Act*. They refer in article 15.17 to the mandatory retirement age for officers. For reserve officers, the relevant provisions read as follows:

> 15.17 …
>
> (1) … the retirement age of an officer is the first to occur of the following ages:
>
> (a) the age for his rank set out in the table to this article that applies to him;
>
> …
>
> (4) Except as otherwise prescribed by the Chief of the Defence Staff, an officer of the Reserve Force shall be released upon reaching the appropriate age prescribed under subparagraph (1)(*a*).

[64] The Chief of the Defence Staff, through the promulgation of CFAO 49-10, Annex E, section 6, has prescribed a compulsory retirement age for officers in the reserve force. On that basis, the Crown argues that the mandatory retirement age for officers of the reserve force is not fixed by the QR&O, but by CFAO 49-10, Annex E, section 6, which is not a regulation made under the *National Defence Act*. It follows, according to the Crown, that a person has no "retirement age" as defined in the *Canadian Forces Superannuation Act* by virtue of retiring from the reserve force. Thus, as far as the appellant is concerned, the "retirement age applicable to his rank" under the QR&O remains at 47 and can never change. If that is so, it necessarily follows that the 30% reduction in the appellant's annuity that was required on November 17, 1981 because of subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* can never be altered by any subsequent service with the reserve force, despite the deeming rule in subsection 41(2) of the *Canadian Forces Superannuation Act*.

[65] In my view, the Crown's interpretation renders meaningless the reference in article 15.17(4) to "the appropriate age prescribed under subparagraph 1(*a*)", which must be a reference to the tables in article 15.17. Article 15.17(4) clearly contemplates the inclusion of reserve officers in those tables. That is the necessary implication of the language of article 15.17(4), and is also consistent with the definition of "officer" in the QR&O, which includes officers of the regular force and officers of the reserve force.

[66] The Crown's interpretation also leads to an anomalous result in the case of a person in the situation of the appellant, because his annuity can never be more than 70% of the annuity that would have been commensurate with his 25 years and 308 days of pensionable service (which is approximately the amount of pensionable service he would have accumulated if he had retired at age 47 from the regular force).

[67] It was suggested at the hearing that the result of the Crown's interpretation is not unfair to the appellant because his annuity has been increased from $8,696.28 to $22,160.12, and so he is better off having elected to pay the additional contributions than he would have been without such an election. With due respect to those who would accept that point, I must say that I cannot.

[68] In 1981 the appellant retired approximately six years early from the regular force, but he subsequently provided approximately six years pensionable service with the reserve force. In connection with his service as an officer of the reserve force, he made contributions to the Superannuation Account at a rate that was commensurate with six years of pensionable service as determined under the statute. Those contributions were not reduced by 30%.

[69] It seems to me manifestly unfair that his six years of pensionable service and his contributions after 1981, accumulated at 100% of the statutory rate, should result in an annuity that can never exceed 70% of the annuity that he would have received had he served in the regular force for an additional six years.

[70] Against the Crown's interpretation, the appellant argues that it is article 15.17 of the QR&O that fixes a mandatory retirement age for officers of the regular force and for officers of the reserve force. In my view, this interpretation is more consistent with the language and apparent objective of article 15.17 than the Crown's interpretation, and for that reason should be preferred.

[71] As I read article 15.17(4) of the QR&O, it stipulates two alternative methods for determining the mandatory retirement age for officers of the reserve force. One is by reference to the tables in article 15.17. The other is by reference to the mandatory retirement age prescribed by the Chief of the Defence Staff upon the exercise of authority granted to him by article 15.17(4).

[72] Under either method, the legal basis for fixing the mandatory retirement age for reserve officers is article 15.17(4) of the QR&O, which is a regulation made under the *National Defence Act*. On that basis, I conclude that the retirement age for an officer of the reserve force is "fixed by the regulations made under the *National Defence Act*".

[73] It follows that an officer of the reserve force who has been deemed by subsection 41(2) to have been re-enrolled in the regular force may thereby obtain a new "retirement age" for purposes of the *Canadian Forces Superannuation Act*. On that basis, I conclude that the appellant's service as an officer in the reserve force created a "retirement age applicable to his rank" as of January 17, 1996 that was different from the "retirement age applicable to his rank" as of November 17, 1981.

[74] It is common ground that CFAO 49-10, Annex E, section 6 would have required the appellant to retire from the reserve force on August 20, 1996, his 55th birthday, if he had not already been released on January 17, 1996. As there was less than one full year between the age of the appellant on January 17, 1996 and his mandatory retirement age of 55, his annuity should not have been reduced under either subparagraph 19(1)(*c*)(i) or subparagraph 19(1)(*d*)(i) of the *Canadian Forces Superannuation Act.*

[75] Under this interpretation of article 15.17 of the QR&O, it is irrelevant that CFAO 49-10, Annex E, section 6 is not itself a regulation under the *National Defence Act*. Section 18 of the *National Defence Act* reads as follows:

> 18. (1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.
>
> (2) Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.

[76] Subsection 18(1) gives the Chief of the Defence Staff general authority to control and administer the Canadian Forces, and subsection 18(2) specifies the manner in which the Chief of the Defence Staff must give effect to decisions and directions of the Government of Canada or the Minister. The authority granted to the Chief of the Defence Staff in article 15.17(4) of the QR&O to fix the mandatory retirement age for reserve officers was exercised by the promulgation of an order in the CFAO, which is the appropriate method for exercising that authority (article 1.23 of the QR&O). However, the manner in which the Chief of the Defence Staff exercised his authority does not derogate from the fact that it is a regulation under the *National Defence Act* that is the root of the authority granted to the Chief of the Defence Staff to fix the mandatory retirement age for reserve officers.

[77] I note that article 15.17(4) refers to the “release” of officers of the reserve force, and not “retirement”. In my view, nothing turns on the choice of that word. The word “release” is defined in article 1.02 of the QR&O as follows:

> 1.02
>
> “release” means the termination of the service of an officer or non-commissioned officer in any manner;

The word “retirement” is not defined in the QR&O but it is clear from the context that the word “release” in article 15.17(4) is intended to refer to termination by retirement. I am confirmed in that conclusion by the language of CFAO 49-10, Annex E, section 6, which expressly refers to “retirement”.

[78] This interpretation suffers from none of the objections applicable to the Crown’s interpretation, and is consistent with the statutory language. It leads to a result that is reasonable and just from the standpoint of the appellant. However, it is rejected by Justice Sexton on the basis of the Crown’s submission that it works against the statutory objective of subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act*, which is to deter early retirement from the regular force, and it may lead to anomalous results.

[79] It seems to me that the objective of subsection 41(2) of the *Canadian Forces Superannuation Act*, which is to provide an opportunity for additional pensionable service in the reserve force after retirement from the regular force, is entitled to the same respect as subparagraph 19(1)(*c*)(i). In my view, the interpretation propounded by

the appellant strikes a reasonable balance between the two objectives of both provisions, while the Crown's interpretation does not.

[80] The Crown cited two hypothetical examples of anomalous results that could flow from the appellant's interpretation. Those examples are well described in the reasons of Justice Sexton and I will not repeat them. The record discloses no evidence that these hypothetical situations have arisen, but I am prepared to assume that they may have arisen or may arise in future.

[81] Assuming these are anomalous results, there are two possible cures. One is to adopt the interpretation of subparagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act* propounded by the Crown, ignoring the resulting unfairness to the appellant and others similarly situated. The other is to find a remedy for the two hypothetical situations by the exercise of the substantial powers given to the Chief of the Defence Staff and other decision makers within the Canadian Forces.

[82] For example, an individual who retires early from the regular force and wishes to join the reserve force within two years of the mandatory retirement age of 55 after a 13-year period of no military service does not have to be accepted into the reserve force on a full-time basis. Alternatively, he or she can be accepted for a full-time service for a period that is less than one year so that subsection 41(2) of the *Canadian Forces Superannuation Act* is never engaged.

[83] As for the case of the person who served in the regular force until mandatory retirement and then wishes to serve in the reserve force but might be unfairly penalized by early retirement from the reserve force, I see no reason in principle why the Chief of the Defence Staff could not simply amend the CFAO to ensure that the mandatory retirement age for such a person is the date of his or her actual release from the reserve force or age 55, whichever occurs first.

[84] For the reasons stated above I would allow this appeal with costs, set aside the decision of the Motions Judge, and declare that the appellant is entitled to an annuity unreduced by subparagraph 19(1)(*c*)(i) or subparagraph 19(1)(*d*)(i) of the *Canadian Forces Superannuation Act*.

[85] Given the conclusions that I have reached on the correct interpretation of subpagraph 19(1)(*c*)(i) of the *Canadian Forces Superannuation Act*, I do not need to comment on the estoppel issue raised by the appellant. I will say, however, that I agree with Justice Sexton that the Crown cannot be estopped from applying the proper interpretation of a statute.

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[1] 1 (1998), 155 F.T.R. 201 (F.C.T.D.).

[2] R.S.C., 1985, c. C-17.

[3] See, for ex., R. Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998-99), 30 Ottawa L. Rev. 175; and Geof R. Hall, "Statutory Interpretation in the Supreme

Court of Canada: The Triumph of a Common Law Methodology" (1998), 21 *Advocates' Q*. 38. Both authors offer persuasive rejections of limited or formulaic approaches to interpretation. Instead, they both favour a pragmatic and contextual approach which mirrors the approach taken by the courts in making common law rules. See also W. N. Eskridge and P. P. Frickey, "Statutory Interpretation as Practical Reasoning" (1990), 42 *Stan. L. Rev*. 321, an article which influences the thinking of both Sullivan and Hall.

[4] [1998] 1 S.C.R. 27, at paras. 21-23.

[5] *Merck & Co. v. Nu-Pharm Inc*. (2000), 5 C.P.R. (4th) 138 (F.C.A.), at paras. 36-37.

[6] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 131.

[7] The authority of the CDS to issue orders such as the CFAOs is granted by art. 1.23 of the QR&O.

[8] [1992] 2 F.C. 621 (C.A.).

[9] *Ibid*., at page 625.

[10] 10 [1986] 3 F.C. 70 (C.A.); affd [1989] 1 S.C.R. 41.

[11] S.C. 1980-81-82-83, c. 89.