Federal Court

Cour fédérale

Date: 20200324

Docket: T-1358-18

Citation: 2020 FC 404

Ottawa, Ontario, March 24, 2020

PRESENT: The Honourable Mr. Justice Southcott

CERTIFIED CLASS ACTION

BETWEEN:

SIMON LOGAN

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion filed by the Plaintiff on June 28, 2019, under Rule 220 of the *Federal Courts Rules,* with the consent of the Defendant, requesting that the Court determine a question of law that represents the sole common issue in this class action. The dispute in this action surrounds interpretation of Division 2, Part III(B) of the Canadian Armed

Forces [CAF] Service Income Security Insurance Plan [SISIP] Policy 901102 [the Policy], which governs long-term disability [LTD] benefits for certain categories of members of the CAF.

[2] The Plaintiff, Simon Logan, brought this action on his own behalf and on behalf of certain other former members of the CAF receiving benefits under Division 2, Part III(B) of the Policy. Mr. Logan claims the Defendant, Her Majesty the Queen, breached the terms of the Policy by calculating his monthly income benefits based only on his salary, omitting certain allowances from the calculation. In his case, the allowances are described as a Special Operations Assaulter Allowance, a Post Living Differential, and a Civilian Dress Allowance.

[3] This class action was certified by Order dated March 1, 2019, defining the class as follows [the Class]:

All former members of the Canadian Armed Forces who on or after July 17, 2012 received, long term disability benefits and/or dismemberment benefits under Division 2, Part III(B) of SISIP Policy 901102, and had an allowance from the Canadian Armed Forces in effect on the date of their release from the Canadian Armed Forces or, in the case of a Class “C” member, when the injury was incurred or the illness was contracted.

Tous les anciens membres des Forces armées canadiennes qui, le ou après 17 juillet 2012 ont reçu, des prestations d’invalidité prolongée et / ou des prestations de mutilation en vertu de la section 2 de la partie III (B) de la police du RARM No 901102, et qui ont eu un indemnité des Forces armées canadiennes en vigueur à la date de leur libération des Forces armées canadiennes ou, dans le cas d'un membre en service de réserve de classe « C », au moment où la blessure est survenue ou que la maladie a été contractée.

[4] The question to be decided by the Court on this motion, as articulated jointly by the parties, is as follows [the Question]:

When calculating long term disability benefits and dismemberment benefits under Division 2, Part III(B) of SISIP Policy 901102, should a Class member's allowances in effect on the date of their release from the Canadian Armed Forces (or in the case of a Class “C” member, when the injury was incurred or the illness was contracted) be included in the Class member's monthly pay?

Lors du calcul des prestations d’invalidité prolongée et des prestations de mutilation en vertu de la section 2 de la partie III (B) de la police du RARM No 901102, devraient-ils être inclus les indemnités en vigueur à la date de leur libération des Forces armées canadiennes (ou, dans le cas d’un membre en service de réserve de classe « C », au moment où la blessure est survenue ou que la maladie a été contractée) dans le taux de rémunération du membre de la Groupe?

[5] As explained in greater detail below, I have determined the Question should be answered in the affirmative, i.e. the position advanced by the Plaintiff, although with a qualification: not all allowances should be included in a Class member’s monthly pay for purposes of calculating the relevant benefits. Only those allowances that are paid on a monthly basis should be included.

II. **Background**

[6] Section 35 of the *National Defence Act*, RSC c N-5 [the Act] authorizes the Treasury Board to determine the rates and conditions of issue of pay to CAF members. Once the Treasury Board makes such determinations, the Chief of Defence Staff [CDS] issues Compensation and Benefits Instructions [CBIs] related thereto.

[7] Section 39 of the Act authorizes the CDS to create programs for the benefit of CAF members, former members, or their dependants. The Policy, which is an insurance plan with many components including the LTD component that is the subject of this action, was implemented under s 39. While the LTD insurance under the Policy is administered by Manulife

Financial, the CDS has been described as the *de facto* insurer (see *Manuge v Canada*, 2012 FC 499 [*Manuge*] at para 33).

[8] The record before the Court in this motion consists of an affidavit sworn by Mr. Logan, with exhibits, and an Agreed Statement of Facts [ASF]. The latter sets out certain factual points agreed between the parties and attaches copies of documents to which the parties refer in support of their respective positions on the Question. These documents include French and English versions of the Policy, certain CBIs, and various Department of National Defence [DND] and SISIP website pages. The parties have stipulated that the French and English versions of the Policy are equally authoritative.

[9] This action relates to LTD insurance coverage under Division 2 of Part III(B) of the Policy, s 20 of which confers such coverage upon Regular Force members of the CAF and Class "C" Reserve Force members of the CAF. The latter are defined, by a combination of Division 2, s 20(b) and Division 1, s 1(f)(v) in Part III(B), as members of the Reserve Force employed on a full-time basis with the Regular Force and designated by military authority as being on Class "C" Reserve Service [Class "C" Members]. Section 23(a) of Division 2, Part III(B), provides for the calculation of monthly LTD benefits as follows:

23 (a) Subject to Section 1.g.(iv) and Section 24, the monthly income benefit payable shall be 75% of the member's monthly pay in effect on the date of release from the Canadian Forces or, in the case of Class "C" members, 75% of the monthly pay in effect when the injury was incurred or the illness was contracted.	23 (a) Sous réserve de l'alinéa l.g.(iv) et de l'article 24, les prestations mensuelles équivalent à 75% de la solde mensuelle du membre à la date de libération des Forces canadiennes ou, dans le cas d'un membre en service de réserve de classe « C », à 75% de la solde mensuelle en vigueur au moment où la blessure est survenue ou que la maladie a été contractée.

[10] Mr. Logan's affidavit explains that he joined the CAF on February 11, 1988. As a result of his service including in designated special duty areas, he now suffers from a number of medical conditions. Due to these medical conditions, he no longer met the universal terms of service for the CAF and received an involuntary medical release effective February 16, 2016, having then achieved the rank of Warrant Officer. As of that date, he was receiving the following monthly amounts:

A. $6801.00 as a Warrant Officer;

B. $3730.00 Special Operations Assaulter Allowance;

C. $65.50 Post Living Differential; and

D. $68.50 Civilian Dress Allowance.

[11] These amounts totalled $10,665.00, all of which were taxable with the exception of the civilian dress allowance. Upon his release, Mr. Logan became entitled to a monthly LTD benefit under the Policy. His LTD benefit is currently calculated as 75% of $6801.00. That is, the three allowances he had been receiving prior to his discharge have not been taken into account in the calculation of his LTD benefits.

III. **Issue**

[12] The sole issue in this Rule 220 motion is the determination of the answer to the Question. There is precedent for the use of Rule 220 to resolve a dispute as to contractual interpretation in another class action involving the Policy (see *Manuge*).

IV. **Analysis**

A. Principles of Contractual Interpretation

[13] The parties largely agree on the principles of contractual interpretation applicable to the construction of insurance policies. In addition to general contract interpretation principles, particular principles apply to the interpretation of contracts of insurance, requiring an analysis of (up to) three stages. Relying on a jurisprudence from the Supreme Court of Canada, the Plaintiff summarizes these three stages as follows:

> A. Where the language of the insurance policy is unambiguous, effect should be given to that clear meaning, regarding the contract as a whole;
>
> B. **If** the policy is ambiguous, employ the general rules of contractual construction such as: reasonable expectations of the parties, avoidance of unrealistic results, and consistency with the interpretations of similar insurance policies;
>
> C. **If** ambiguity remains, apply *contra proferentum* to construe the policy against the insurer.
>
> (See *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21 at paras 27-30; *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33 at paras 21-24; *Ledcor Construction Northbridge Ltd v Indemnity Insurance Co*, 2016 SCC 37 [*Ledcor*]at paras 49-51.)

[14] The Defendant does not disagree that these are the governing principles prescribed by the jurisprudence. However, it takes the position that the third stage, invoking the principle of *contra proferentum*, does not apply in the present circumstances. *Contra proferentum* refers to the principle whereby ambiguities in insurance contracts are construed against the insurer, because insurance contracts are essentially contracts of adhesion drafted by the insurer (see, e.g. *Non-Marine Underwriters, Lloyds of London v Scalera*, [2000] 1 SCR 551 at para 70). The Defendant

submits that, because the premiums for coverage under the Policy are all or largely all paid by the Treasury Board Secretariat, such coverage can be understood as a benefit of the insured's employment. Therefore, the Defendant argues the Policy is different from the typical contract of adhesion that arises in a commercial context.

[15] The Defendant cites no authority for this proposition, and I find no principled basis to conclude that the means for funding the relevant premiums detracts from the application of *contra proferentum* in a circumstance where the insurer drafted the insurance contract in its entirety. Moreover, I agree with the Plaintiff's submission that this Court's decision in *Manuge* is a directly applicable authority contrary to the Defendant's proposition. Justice Barnes applied the principle of *contra proferentum* to resolve any ambiguity in the Policy in favour of the plaintiff and other members of the class in that case (at para 64).

[16] I therefore find the principles of contractual interpretation summarized above represent the appropriate framework for resolution of the Question.

*B. **Stage 1 - Language of the Policy***

(1) **The Disputed Terms**

[17] It is common ground that the LTD benefits in dispute are calculated under s 23(a) of Division 2, Part III(B) of the Policy (reproduced earlier in these Reasons).

[18] Section 23(a) calculates the applicable benefits as 75% of the CAF member's "monthly pay" (or, in the French version of the policy, the member's "solde mensuelle"). That term is in turn defined in ss 1(g)(i)(a) and (b) of Division 1, Part III(B), as follows [emphasis added]:

1 (g)(i)(a) For members defined at Section l.f.(i). [Regular Force Members], "monthly pay" and "monthly salary" shall mean the monthly pay in effect on the date of release from the Canadian Forces, and shall include all retroactive pay increases with an effective date on or before the member's date of release from the Canadian Forces.	**1 (g)(i)(a)** Dans le cas des membres définis à l'alinéa l.f.(i)., « solde mensuelle » désigne je taux de rémunération en vigueur à la date de la libération des Forces canadiennes et inclut toutes les augmentations rétroactives de rémunération prenant effet au plus tard à la date de libération des Forces canadienne
(g)(i)(b) For members defined at Section 1.f.(v). [Class "C" Reservists], "monthly pay" or "monthly salary" shall mean the monthly pay in effect when the injury or illness was contracted	**(g)(i)(b)** Dans le cas des membres définis à l'alinéa 1.f.(v)., « solde mensuelle » désigne le taux de rémunération en vigueur au moment où la blessure on la maladie est survenue.

[19] Sections 1(g)(i)(a) and (b), and the underlined terms above, are the principal contract provisions in dispute in this action. In particular, the parties disagree on the meaning of the term "monthly pay" (or, in the French version of the Policy, the term "taux de rémunération") that appears as part of the definitions in each of these sections. The Plaintiff takes the position that the terms "monthly pay" / "taux de rémunération" have a broad meaning that includes not only his salary, but also his allowances. The Defendant argues that these terms include only the salary.

[20] At this first stage of the contractual interpretation framework, in addressing whether the language of the Policy is clear and unambiguous, the Plaintiff relies significantly on dictionary definitions and past judicial interpretations of the disputed terms. The Defendant's principal response to the Plaintiff's arguments is that recourse to such resources is unnecessary and indeed inappropriate because, taking into account the Policy as a whole, the disputed terms are clearly

defined elsewhere within the Policy itself. I will first consider the resources upon which the Plaintiff relies, before turning to the parties' respective arguments on the scope of application of the definitions upon which the Defendant relies.

(2) Ordinary Meaning of Terms "monthly pay" / "taux de rémunération"

[21] Focusing first on the English term "monthly pay", the Plaintiff identifies a number of dictionary definitions and thesaurus resources that he submits ascribe broad meanings to the word "pay" [underlining added in Plaintiff's Memorandum, bold in original]:

***Merriam-Webster's Collegiate Dictionary*, 11th ed, *sub verbo* "pay".**

Pay n. (14c) 1: something paid for a purpose and esp. a salary or wage: REMUNERATION 2 a: the act or fact of paying or being paid b : the status of being paid by an employer , EMPLOY [...]

***The Dictionary of Canadian Law, sub verbo* "pay".**

Pay n. 1. Remuneration in any form. 2. Wages due or paid to an employee and compensation paid or due to an employee but does not include deductions from wage that may lawfully be made by an employer.

***The Canadian Oxford Dictionary,* 2nd ed, *sub verbo* "pay".**

Pay n. wages, payment.

***Black's Law Dictionary,* 10th ed, *sub verbo* "pay".**

Pay n. (14c) 1. Compensation for services performed, salary, wages, stipend, or other remuneration given for work done.

Dictionary.com* (2 August 2019), *online: <www.dictionary.com/browse/pay>.

Pay n. Wages, salary or a stipend.

***Garner's Dictionary of Legal Usage,* 3rd ed, *sub verbo* "pay".**

Pay, n., compensation; wage; salary; stipend; fee; emolument; remuneration; recompense.
These terms all denote money that is earned for one's labor or services. *Pay* is the most general, usual term <total pay package>. Compensation is essentially equivalent, although it can

embrace not just pay received in return for services rendered, but also money paid for a loss (as with damages). *Wage* or *wages* applies mainly to compensation paid daily or weekly for labor, especially for blue-collar labor <a mechanic's wage> <the maid's daily wage>. *Salary* normally refers to fixed compensation paid periodically over a longer time for white-collar work. In BrE, the equivalent of *salary* for a teacher, officeholder, or minister is *stipend*, but in AmE *stipend* usually suggests a modest payment made to someone who is appointed to carry out an assignment over a specified period <the semesterly stipend for research assistants>. *Fee* refers to the price asked by and paid to a professional (broadly defined) <lawyer's fee> <Arnold Palmer's appearance fee>. *Emolument* is a high-flown equivalent of *pay*, used especially as a plural in reference to officeholders <the emoluments of office>. *Remuneration* and *recompense* / **rek**-əm-pen[t]s/ are much the same, except that they can more broadly denote compensation anywhere on the pay scale, from the most modest to the greatest <what remuneration do you require?>. With recompense, there is an additional suggestion of requiting, paying back, or making amends - though the word is not always colored in this way. See **recompense**.

[Bolding and italics in original, Underlying added in Plaintiff's Memo]

***West 's Legal Thesaurus and Dictionary, sub verbo* "pay"**

Pay l. n. Compensation (inadequate pay). Wage, remuneration, salary, commission, fee, allowance, earnings, recompense, payment, consideration, stipend, emolument, return, gain, bonus, honorarium, paycheck, perk, gratuity, fringe, settlement. See also compensation, income.

***Legal Thesaurus, sub verbo* "pay"**

PAY, noun

Allowance, award, compensation, consideration, defrayal, defrayment, earnings, emolument, fee, grant, hire, income,

> indemnity, meed, *merces*, monetary return, payment, perquisite, profit, reckoning, recompense, reimbursement, remittance, remuneration, repayment, return, revenue, reward, salary, settlement, solarium, stipend, *stipendium*, support, wages

[22] Consistent with the principle that insurance policies are to be interpreted as they would be understood by the "average insured" (see *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7 at para 37), I accept that dictionary definitions can inform the interpretation of words used in an insurance policy (see *Brauer v Canada (Attorney General)*, 2014 FC 488 at para 66).

[23] I am conscious of the Defendant's submission that the Court should consider the interpretation of the Policy not from the perspective of the "average person", but rather from the perspective of the "average military person". The Defendant relies on the statement in *Ledcor* that an interpretation should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted (at para 50).

[24] There was some disagreement between the parties at the hearing of this matter as to whether this point (i.e., the extent to which consideration should be given to the particular context in which the Policy applies) forms part of stage 1 or stage 2 of the contract interpretation framework. The passage from *Ledcor* upon which the Defendant relies forms part of the Supreme Court's description of the second stage of the analysis. I also consider the parties' particular arguments on this point to be related principally to that stage. I will therefore return to

this point later in these Reasons. However, I will consider, before leaving stage 1, arguments by both parties surrounding use of the word "pay" in Pay Statements and on the DND website with which CAF members may have been acquainted.

[25] Returning to dictionary definitions, the Plaintiff also relies upon the following definition of the term "rémunération" employed in the definition of "solde mensuelle" [underlining added in Plaintiff's Memorandum, bold in original];

***Dictionnaire canadien des relations du travail,* 2e ed*, sub verbo* « rémunération ».**	**rémunération** f - compensation; remuneration; pay Prix versé à quelqu'un en nature ou en espèces pour un travail qu'il a exécuté ou pour un service qu›il a rendu. La rémunération est un terme d'une portée plus générale que le salaire* qui s'emp1oie lorsque le taux de la rémunération est convenu d'avance et que celle-ci constitue la paiement du travail fourni par un employé. Tout salaire est une rémunération, mais non le contraire. On peut classifier les types de rémunérations sous bien des aspects. Les expressions qui suivent peuvent se regrouper selon le mode de calcul: à 1'acte, au rendement, primaire, selon le mode de paiement, en nature, en espèces, forfaitaire, participatoire, brute. Rétribution*, bénéfice*, traitement*; prime*.

[26] The Plaintiff also refers the Court to jurisprudence that has considered the meaning of "rémunération", in interpreting its usage in federal legislation. Courts have found it is a broad term, having a broader meaning than, for instance, "salary" or "wages" (see *Canadian Pacific Ltd v Canada (Attorney General)*, [1986] 1 SCR 678 at paras 12 (per La Forest J, Dickson CJ, Lamer J, and Le Dain J concurring) and 79 (per Chouinard J, Beetz J, and McIntyre J, dissenting

on the conclusion but concurring on this point); *Snively v Can-Am Services* (1985), 12 CLRBR (NS) 97 (CLRB) at paras 20-23).

[27] These resources cited by the Plaintiff support the conclusion that “pay” is a broad term, that “rémunération” (if anything) is broader, and that these terms are capable of including allowances. I recognize that, in reference to some of the definitions that describe “pay” as compensation for services, the Defendant argues allowances are not paid strictly for services rendered. Rather, as stated in s 35(2) of the Act, allowances are paid to CAF members “in respect of expenses and conditions arising out of their service.” Further, s 205.10(2)(b) of CBI Chapter 205 describes monthly allowances as compensating for a continual liability to exercise a skill, to be exposed to an environment, or to perform a specific duty. While I appreciate the distinctions the Defendant is raising, in my view they do not undermine the reasonableness of the Plaintiff’s position, that there is sufficient relationship between CAF members’ service and allowances they receive that the meanings of “pay” and “rémunération” encompass allowances. At a minimum, that is an available interpretation of those terms, and the Defendant’s argument on this point, at most, raises an ambiguity as to their meaning.

[28] As previously noted, the parties also made submissions based on language used in an example of the Plaintiff’s Pay Statement. The Defendant notes that, in the “Transaction Details” section of the statement, the Plaintiff’s “Regular Force Pay” appears under the heading “Current Pay & Adjustments”, while his allowances fall under separate headings, “Taxable Allowances” and “Non Taxable Allowances”. Those same three categories appear in the “Reconciliation to Previous Statement” section, along with the total that is described as “Current Pay and

Allowances”. The Defendant argues these distinctions between the use of the terms “pay” and “allowances” support its position that the term “pay” does not include allowances.

[29] I accept the logic of that submission. However, the Plaintiff responds by pointing out that the entire document, which includes allowances, is entitled a “Pay Statement”. Also, the document employs the term “Pay Deductions” to capture the deductions such as income tax, Employment Insurance, and Canada Pension Plan, which are applied to both the Plaintiff's Regular Force Pay and his allowances. In the “Reconciliation to Previous Statement” section, the total that results from all amounts payable less all deductions is entitled “Current Pay Entitlement”. That is, the Pay Statement also uses the term “pay” in a manner that include allowances. In my view, the Pay Statement does not particularly favour the position of either party but supports the conclusion that the language of the Policy is ambiguous.

[30] The Plaintiff also relies on portions of the DND website that he submits demonstrates usage of the terms “pay” and “rémunération” that support his position. Relying on a former English language version of the website (which the Plaintiff notes was modified on November 22, 2018, following commencement of this action), the Plaintiff explains that a visitor to the website page entitled Pay will encounter (among other content) a link that reads as follows [link underlined]:

> Compensations & benefits instructions – pay
>
> Find policies that affect pay for Canadian Armed Forces members

[31] Clicking that link will take the visitor to another webpage which presents as follows [links underlined]:

Compensation and Benefits Instructions

Pay

- Chapter 204 -Pay Policy for Officers & Non-Commission Members
- Chapter 205 - Allowances for Officers and NCMs

[32] The Plaintiff submits this series of webpages and links demonstrates the Defendant using the term “pay” in a manner that includes allowances. I accept the logic of the submission. He makes arguments to the same effect relying on the French versions of the same webpages and their use of the term “rémunération”. Again, I agree.

[33] The Defendant presents arguments based on other terms that are defined within Part III(B) of the Policy. As the Defendant notes, the English definition in Division 1, ss 1(g)(i)(a) and (b) actually applies to two defined terms: “monthly pay” and “monthly salary”. Those terms therefore mean the same thing, and one could infer that “pay” is equivalent to “salary”. However, in the case of a defined term, in my view, one must look to the definition, not the term itself, for purposes of identifying the meaning of the term. I therefore place little weight on this point.

[34] In keeping with the principle that the contract is to be read as a whole, the Defendant also argues that its position is supported by the manner in which the terms “annual pay” / “solde annuelle” are defined in Division 1, s 1(g)(iii):

1 (g)(iii) “Annual pay” shall mean the member’s actual rate of pay being paid within the ranges specified in the pay tables for Regular Force personnel. While a member is on any period of service without pay, as	**1 (g)(iii)** « Solde annuel » désigne le taux annuel de rémunération du membre versé selon les échelles prescrites dans les tableaux de solde du personnel de la Force régulière. Lorsque le membre est en période de services

granted by the appropriate authority of the Canadian Forces, such rate of pay shall be that which was in effect for the member on the last day of paid service immediately preceding said period of service without pay.

sans solde, tel qu'accordé par une autorité militaire compétent des Forces canadiennes, le taux de rémunération sera celui en vigueur au dernier jour de service avec solde du membre précédant immédiatement ladite période de service sans solde.

[35] These terms are defined by reference to pay tables for the Regular Force personnel (which appear in CBI Chapter 204). Therefore, the Defendant argues it would create an absurdity if "monthly pay" and "annual pay" did not have consistent meetings. The Plaintiff responds that the difference in the definitions supports his position, as it suggests different intents on the part of the drafter of the Policy. I agree with the Plaintiff's position on this point. As the Plaintiff observes, an analysis of this sort contributed to Justice Barnes' interpretation of the Policy provision at issue in *Manuge* (at para 59):

> [59] I have no doubt that the CDS could have drafted a provision that clearly authorized the deduction of a CF member's *Pension Act* pension benefit from the SISIP LTD benefit. There is, after all, no limit on what the parties to a contract may stipulate. However, the CDS drafted Article 24 of the SISIP Policy by incorporating the limiting term "income" with respect to the offset of *Pension Act* benefits. The CDS did not include that limiting term in a number of other offset provisions in the SISIP Policy or in the *War Veterans Allowance Act*, RSC 1985, c W-3. And more recently, a reduction to the earnings loss benefits payable under the *Canadian Forces Members and Veterans Re-establishment and Compensation Regulations*, SOR/2006-50, was claimed for "disability pension benefits payable under the *Pension Act*": see s 22(a). This provision very clearly captures the *Pension Act* disability benefit and the different approach in Article 24 indicates a different intent.

[36] The Plaintiff therefore argues based on *Manuge* that, if the CDS wished for the meaning of "monthly pay" / "solde mensuelle" to relate solely to CBI Chapter 204, it could have drafted a definition that clearly reflected this meaning. This submission leads to consideration of the

Defendant's principal argument in this action: that the disputed terms are indeed clearly defined elsewhere within the Policy itself. I agree with the Defendant that, if the meaning of the disputed terms is provided fully by a contractual definition, then there is little need to look elsewhere. As such, I turn to considering the definitions upon which the Defendant relies and the parties' respective arguments on the scope of application of those definitions.

(3) **Structure of the Policy**

[37] This analysis requires consideration of the structure of the Policy document. As previously noted, there are both English and French language versions of the Policy, which are equally authoritative. The Policy is divided into a number of Parts. With the exception of Part I (General Provisions), each Part contains a particular component of the overall insurance plan. For example, Part II relates to Survivor Income Benefit Insurance, Part III relates to LTD insurance, and Part IV relates to Dependant Life Insurance.

[38] The Policy document also includes Parts described as "Previous Policies", which set out versions of certain components of the insurance plan that are no longer in force. However, they continue to apply to members who were released from the CAF or otherwise invoked the coverage at a time when those versions were in force. The present dispute relates to the LTD coverage set out in Part III(B) of the Policy, which applies to members who were released after November 30, 1999. The previous version of the LTD coverage is found in Part III(A).

[39] Unlike other Parts of the Policy, Part I does not set out a particular coverage component but rather contains terms that, on their face and as the title (General Provisions) of the Part

suggests, appear to have general application throughout the Policy. Indeed, whether the Part I General Provisions (and in particular a definition therein of the terms “monthly pay” / “solde mensuelle”) apply to Part III(B) is at the heart of the dispute between the parties.

[40] Significant to the Plaintiff’s arguments on this issue is the fact that Part III(B), related to the LTD coverage, is itself divided into several Divisions and has its own set of General Provisions (including several definitions) in Division 1. Part III(B) is the only Part of the Policy that has its own General Provisions. Indeed, Part III(A), which governs LTD coverage for members released before December 1, 1999, has no General Provisions.

(a) *Defendant’s Position on Part I (General Provisions)*

[41] The Defendant’s position on the disputed contractual interpretation issue relies principally upon the following definition of “monthly pay” / “solde mensuelle” in s 1(i)(i) of Part I:

1 (i)(i) “Monthly pay” or “monthly salary” shall mean the member's rate of pay specified in QR and O Chapter 204 pay tables for Regular Force Personnel.	**1 (i)(i)** « Solde mensuelle » désigne le taux mensuelle de rémunération du membre précisé dans le paragraphe 204 des Ordonnances et règlements royaux dans les tableaux de solde du personnel de la Force régulière

[42] It is common ground that the phrase “QR and O Chapter 204 pay tables for Regular Force Personnel”, while employing the acronym for Queen’s Regulations and Orders, represents a reference to the rates of pay presently set out in Compensation and Benefits Instruction, Chapter 204, entitled “Pay of Officers and Non-Commissioned Members”. Chapter 204 contains tables setting out specific monthly rates of pay for variously ranked CAF members. Allowances are

separately described in Chapter 205 of the CBIs, entitled “Allowances for Officers and Non-Commission Members”. The parties have agreed in the ASF to the following description of the nature of allowances:

> Allowances generally serve as additional compensation for one of three purposes: as an incentive to attract and retain properly motivated personnel in positions which experience exposure to abnormal hazard and/or environment which are not normally experienced by other members, as a buffer for higher than normal cost-of-living in certain Canadian locations, and to incentivize and reward the acquisition and employment of special skills in high-risk situations. For example, an environmental allowance is provided under sections 205.29(1) and 205.536(1) of the CBI as compensation for exposure to adverse environmental conditions or biological, faunal, floral, geographic, meteorological, organic or other natural conditions in an area, and is paid for the time that a member spends in those circumstances.

[43] It is clear that the definition of “monthly pay” / “solde mensuelle” in s 1(i)(i) of Part I captures only amounts paid under Chapter 204 and not amounts paid under Chapter 205. The Defendant argues that this definition applies throughout the Policy, including Part III(B), and that the monthly income benefit calculated under s 23(a) as 75% of the member’s “monthly pay” or “solde mensuelle” therefore takes into account only Chapter 204 rates of pay, not Chapter 205 allowances.

[44] The Defendant recognizes the General Provisions found in Division 1 of Part III(B) also contain definitions of “monthly pay” / “solde mensuelle”. It argues these definitions do not operate to the exclusion of, or represent a replacement of, the definitions provided by the Part I General Provisions. Rather, the Defendant submits the purpose of these definitions is to add the

temporal consideration of <u>when</u> to assess “monthly pay” or “solde mensuelle”, i.e. at the time of release for Regular Force members or at the time of injury or illness for Class “C” Members.

(b) *Plaintiff’s Position on Part I (General Provisions)*

[45] The Plaintiff takes the position that the Part I General Provisions have no application to Part III(B), which is intended to be self-contained and employs its own dedicated set of General Provisions found in its Division 1. The Plaintiff notes that many of the terms defined in s 1 of the Part I General Provisions are defined with identical definitions in s 1 of the Part III(B) General Provisions (e.g., the definitions of “Consumer Price Index for Canada”, “Loss of use”, “Pension Act”, and “Policyowner”). He also notes terms that are defined differently in the two sets of General Provisions, referencing the definitions of the terms “total disability” and “totally disabled”.

[46] Most material to the parties’ dispute, the two sets of General Provisions employ different definitions for “monthly pay” / “solde mensuelle”. The Plaintiff describes the Defendant’s argument as a submission that the definition in the Part III(B) General Provisions represents merely a refinement, not a replacement, of the Part I General Provisions definition. The Plaintiff submits the Defendant’s argument, that the purpose of the Part III(B) definition is to add the temporal consideration of <u>when</u> to assess “monthly pay” or “solde mensuelle”, is undermined by the fact that the temporal consideration is already included in s 23 of Division 2, Part III(B). Section 23 expressly provides for the timing at which the member’s monthly pay is to be considered for purposes of calculation of the monthly income benefit. The Plaintiff also argues

the Defendant's submissions do not engage with the equally authoritative French language version of the definitions.

[47] Finally, the Plaintiff argues the Defendant does not provide any jurisprudential or academic support for its position that a specific definition represents a refinement of a general definition. The Plaintiff refers the Court to jurisprudence, in the motor vehicle insurance and criminal law contexts, in which a definition specific to a particular part of a statute has been applied to the exclusion of a definition of the same term employed in the statute's general provisions (see, e.g., *Regele v Slusarczyck* (1997), 33 OR (3d) 556 [*Regele*]; *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348 [*Moulton*]; *Doubleview Capital Corp v Day*, 2016 BCSC 231 [*Doubleview*]).

(c) *Analysis of Application of Part I (General Provisions) to Part III(B)*

[48] In my view, the above authorities relied upon by the Plaintiff are of little assistance. Leaving aside that these cases involve statutory interpretation, rather than contractual interpretation, their conclusions are clearly a function of the particular statutory wording involved.

[49] *Moulton* and *Doubleview* conclude that the definition of "property", found in s 428 within Part XI (Wilful and Forbidden Acts in Respect of Certain Property) of the *Criminal Code*, RSC 1985, c C-46, applies to offences prescribed by Part XI, instead of the definition of "property" found in s 2 (Interpretation). However, the Plaintiff acknowledges these cases contain no analysis leading to this conclusion.

[50] In *Regele,* the Ontario Court of Appeal held the definition of "automobile", in s 224(1) of Part VI (Automobile Insurance) of the *Insurance Act*, RSO 1990, c I.8, was the operative definition for purposes of concluding whether a farm tractor was an automobile for purposes of that Part. The Court did not apply the s 1 definition of "automobile", concluding the definition governing the specific section should override the general definition governing the rest of the statute. However, I read the analysis supporting that conclusion as turning on the particular wording of these provisions and others within the statute.

[51] If any guidance can be drawn from these authorities, it is that the relationship between the Part I General Provisions and the Division 1, Part III(B) General Provisions is to be derived from their language, taking into account the Policy as a whole. That the contract should be assessed as a whole is of course the same principle that guides the first stage of the contract interpretation analysis in which the Court is now engaged.

[52] Turning to the language of the relevant provisions, s 1 of the Part I General Provisions begins, "The following terms shall have the meanings set forth below." Section 1 of the Part III(B) General Provisions begins, "For the purposes of this Part III(B), the following terms shall have the meanings set forth below." The language in Part I supports the conclusion that the Part I definitions apply throughout the Policy. The Part III(B) language does not expressly indicate that Part III(B) definitions operate to the exclusion of the Part I definitions. The Part III(B) language is capable of supporting the conclusion that one looks solely to Part III(B) definitions for purposes of interpreting Part III(B). However, it could also be interpreted as adding supplementary definitions and interpretive provisions. In my view, consideration of the

introductory language in the respective sets of General Provisions is inconclusive. I also see no material difference if I were to conduct that particular analysis employing the French language versions of these provisions.

[53] I find more compelling the Plaintiff's observation that some of the definitions in the Part I General Provisions are duplicated *verbatim* in the Part III(B) General Provisions. The Plaintiff does not argue that the drafter of the Policy cannot duplicate language. However, the inclusion of definitions in Part III(B), when identical definitions are found in Part I, supports an inference that the drafter intended Part III(B) to be self-contained, relying on its own General Provisions rather than those found in Part I.

[54] The particular difference in the definitions of the terms "total disability" and "totally disabled" ("invalidité totale" in the French version) in s 1(h)(i) of the Part I General Provisions and s 1(l) of the Part III(B) General Provisions also supports this conclusion. These provisions read as follows:

Part I (General Provisions)	**Partie I (Dispositions générales)**
1 (h)(i) For the purposes of Part III and VII, "total disability" and "totally disabled" shall mean that the individual has been released from the Canadian Forces and has been incapacitated by a medically determinable physical or mental impairment which prevents him from performing any and every duty of any substantially gainful occupation or employment for which he is reasonably qualified by education, training or experience.	**1 (h)(i)** Pour les besoins de la partie III et VII, le terme « invalidité totale » signifie que la personne a été libérée des Forces canadiennes et qu'il existe des preuves médicales qui confirment, à la satisfaction de l'Assureur, que la personne est frappée d'invalidité par suite d'un handicap physique ou mental actif que la profession médicale est en mesure de reconnaître et qui empêche cette personne de remplir toute tâche ou d'occuper tout emploi effectivement rémunérateur auquel ses études, sa formation ou son expérience l'ont préparée.

Division 1, Part III(B) (General Provisions)	**Section 1, Partie III(B) (Dispositions générales)**
1 (l) “Total disability” and “totally disabled” shall mean that the individual has been released from the Canadian Forces and that there is clear, objective medical evidence, satisfactory to the Insurer, which confirms that the individual is incapacitated by an active, medically determinable physical or mental impairment which prevents him from performing any and every duty of any substantially gainful occupation or employment for which he is reasonably qualified by education, training or experience.	**1 (l)** « Invalidité totale » signifie que la personne a été libérée des Forces canadiennes et qu'il existe des preuves médicales claires et objectives qui confirment, à la satisfaction de l'Assureur, que la personne est frappée d'invalidité par suite d’un handicap physique ou mental actif que la profession médicale est en mesure de reconnaître et qui empêche cette personne de remplir toute tâche ou d`occuper tout emploi effectivement rémunérateur auquel ses études, sa formation ou son expérience l'ont préparée.

[55] There is a material distinction between the English definitions, as only the Part III(B) definition requires objective medical evidence, satisfactory to the insurer, confirming an individual’s incapacitation. It appears clear the Part III(B) definition is intended to replace the Part I definition. I note that section 1(h)(i) of Part I expressly states the definition is for the purposes of Part III. However, this is intelligible as relating to Part III(A), which does not have its own set of General Provision definitions.

[56] The distinction between the French versions of these particular definitions is not as acute as in the English versions. Both the Part I definition and the Part III(B) definition require “[…] preuves médicales […] qui conferment, à la satisfaction de l’Assurer […]”. However, there is still a difference, as the Part III(B) definition includes the language “claires et objectives” in the middle of that phrase. It is not necessary, for purposes of the particular issue in dispute in the present matter, to reconcile the variations as between the English and French versions. Rather, the fact that material differences exist, between the Part I and Part III(B) definitions in both

languages, supports the conclusion that the latter is intended to operate, rather than the former, for purposes of the LTD coverage in Part III(B).

[57] Turning to the particular definitions in issue (i.e. “monthly pay” / “solde mensuelle”), I note that the English definitions of “monthly pay” in ss 1(g)(i)(a) and (b) of Part III(B) are somewhat circular, as they employ the term “monthly pay” within the definition itself [emphasis added]:

> **1 (g)(i)(a)** For members defined at Section l.f.(i). [Regular Force Members], “monthly pay” and “monthly salary” shall mean the monthly pay in effect on the date of release from the Canadian Forces, and shall include all retroactive pay increases with an effective date on or before the member's date of release from the Canadian Forces.
>
> **1 (g)(i)(a)** Dans le cas des membres définis à l'alinéa l.f.(i)., « solde mensuelle » désigne je taux de rémunération en vigueur à la date de la libération des Forces canadiennes et inclut toutes les augmentations rétroactives de rémunération prenant effet au plus tard à la date de libération des Forces canadiennes.
>
> **(g)(i)(b)** For members defined at Section 1.f.(v). [Class "C" Reservists], "monthly pay" or "monthly salary" shall mean the monthly pay in effect when the injury or illness was contracted.
>
> **(g)(i)(b)** Dans le cas des membres définis à l'alinéa 1.f.(v)., « solde mensuelle » désigne le taux de rémunération en vigueur au moment où la blessure on la maladie est survenue

[58] This structure could support an interpretation that the term “monthly pay”, when used within the language of the definition itself, is intended to incorporate the definition of that term from the Part I General Provisions. Such an interpretation would be consistent with the Defendant’s position that the definition of “monthly pay” in Part I has a role to play in Part III(B) and serves to identify that the monthly pay in question is that specified in Chapter 204 of the CBIs.

[59] However, as the Plaintiff emphasizes, the equally authoritative French definitions of "solde mensuelle" in sections 1(g)(i)(a) and (b) of Part III(B) do not support the same interpretation. They do not demonstrate the same circularity as the English definitions, as they do not employ the term "solde mensuelle" in the definitions themselves. Rather, they employ the term "taux de rémunération". Therefore, the French version of these Part III(B) definitions cannot be read as incorporating the Part I definition, as the defined term in Part I is "solde mensuelle", not "taux de rémunération".

[60] On balance, taking the above analysis into account, I am inclined towards the Plaintiff's position, that the Policy is a contract where it is intended that the specific override the general, and that the Part III(B) General Provisions definitions of "monthly pay" / "solde mensuelle" apply within Part II(B), without recourse to the Part I General Provisions definitions of those terma. However, even if the Defendant's proposed interpretation to the contrary was an available interpretation, the Plaintiff's proposed interpretation remains at least a reasonable interpretation and therefore gives rise to an ambiguity (see *Sabean* at para 42).

[61] It is therefore necessary to move to the next stage of the contractual interpretation framework. However, before doing so, I must address one additional argument by the Defendant that I consider significant. The Defendant submits the Plaintiff has focused unduly on the term "rémunération", when the actual phrase employed by the disputed definition is "taux de rémunération". The Plaintiff responds that the use of the words "taux de" does not lessen the broad interpretation applicable to the term "rémunération", as it simply reflects that the term "rémunération" is measured at a particular rate, i.e. monthly. This point is of course consistent

with the English definition, which employs not just the word "pay" but the phrase "monthly pay". However, I regard this point as significant because, in my view, it precludes the disputed definitions being interpreted to include all allowances received by CAF members.

[62] The Defendant has identified that s 205.10 of CBI Chapter 205 sets out a number of factors to be considered by the CDS before designating a position as entitled to an allowance. Those factors include a distinction between a monthly allowance and a casual allowance. Monthly allowances are described as compensating for a continual liability to exercise a skill, to be exposed to an environment, or to perform a specific duty. Casual allowances are described as compensating for the infrequent exercise of skill, exposure to an environment, or liability to perform a specific duty. I will return to the nature of these allowances later in these Reasons, including arguments advanced by the Defendant about events that disentitle a member from receiving an allowance. For present purposes, the point of significance is that not all allowances are monthly allowances.

[63] This conclusion is also apparent from documents attached to the ASF, which summarize the allowances prescribed by Chapter 205. While the allowances are not expressly divided into categories such as monthly allowances and casual allowances, it is clear from reading the descriptions that some allowances are paid monthly, typically based on an obligation to exercise certain skills, perform certain duties, or be exposed to certain conditions on a continuous basis. Other allowances are paid daily or otherwise, based on performance of certain duties on a causal basis or for other reasons. In my view, allowances that are paid on a monthly basis are

reasonably capable of falling within the meanings of the term “monthly pay”, but other allowances are not.

[64] I reach the same conclusion in reliance on the term “taux de rémunération”. While that term does not expressly reference payment on a monthly basis, such an interpretation is available on that language as the term clearly contemplates a rate of payment, and such interpretation is consistent with achieving a harmonious construction of the English and French definitions.

*C. **Stage 2 – General Rules of Contractual Interpretation***

[65] Turning to the second stage of the construction framework, which considers the general rules of contract interpretation, the parties’ submissions focus on the reasonable expectations of the parties. As an initial point, I return briefly to the parties’ disagreement whether the Court should consider the interpretation of the Policy not from the perspective of the “average person”, but rather from the perspective of the “average military person”.

[66] While *Ledcor* (at para 50) refers to contemplation of the commercial atmosphere in which the insurance policy was contracted, the Plaintiff argues the Defendant has not introduced evidence to support any alleged “trade usage of terms” that should be taken into account in construing the Policy from the perspective of military personnel (*see Georgia Construction Co v Pacific Great Eastern Railway*, [1929] SCR 630 [*Georgia Construction*] at 634).

[67] As I understand the Defendant’s arguments in reliance upon *Ledcor*, they focus not upon trade usage applicable to any particular terms, but rather upon the understanding the Defendant

submits that the parties to the Policy would have surrounding the nature of military allowances. Indeed, the Plaintiff's arguments similarly focus upon the nature of particular allowances that he received prior to his release. I do not find the *Georgia Construction* principle to represent an impediment to consideration of the Defendant's arguments.

[68] In support of his position on the reasonable expectations of the parties, the Plaintiff first notes that *Manuge* accepted the characterization of the Policy as an income replacement scheme, representing classic indemnity insurance intended to replace a percentage of a CAF member's lost income due to an inability to work (at para 19). He also refers to *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 57, which described the benefit of LTD insurance as the prospect of continued financial security when a person's disability makes working, and therefore receiving an income, no longer possible. The Plaintiff submits that, given the nature and purpose of LTD insurance, the reasonable expectation of CAF members would be to receive 75% of the entirety of their income, not simply 75% of a component of their income.

[69] The Plaintiff refers in particular to the Post Living Differential and Special Operations Assaulter Allowance that he was receiving prior to his release. In relation to the former, he submits the purpose of such an allowance is to compensate members who are posted to locations where the cost of living is higher. The Plaintiff argues the parties would not expect members to be financially forced to move, following development of a disability, as a result of such an allowance not being taken into account for purposes of calculation of disability benefits.

[70] The Plaintiff characterizes the Special Operations Assaulter Allowance as intended to compensate members for both special skills and exposure to particular hazards. He draws a comparison to CAF members who are employed as medical officers, dental officers and legal officers, and for whom higher salaries are established to compensate for their specific skills. The Plaintiff argues the parties would expect disability benefits to reflect the level at which members are compensated for their skills, regardless of whether such compensation is structured as a salary or an allowance.

[71] In response, the Defendant refers the Court to s 35(2) of the Act, which provides authority for the payment of allowances as follows:

***National Defence Act*, RSC 1985, c N-5**	***Loi sur la défense nationale*, LRC 1985, c N-5**
Pay and Allowances	***Solde et indemnités***
[…]	[…]
Reimbursements and allowances	**Indemnités**
35 (2) The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.	**35 (2)** Les indemnités payables aux officiers et militaires du rang au titre soit des frais de déplacement ou autres, soit des dépenses ou conditions inhérentes au service sont fixées et régies par le Conseil du Trésor.

[72] The Defendant emphasizes that allowances are paid "in respect of expenses and conditions arising out of their service" and that s 205.10(2)(b) of CBI Chapter 205 further describes monthly allowances as paid to compensate for a continual liability to exercise a skill, to be exposed to an environment, or to perform a specific duty [emphasis added]. The Defendant

also refers to provisions of the applicable CBI that disentitle a CAF member from receiving allowances, either generally or in relation to a specific allowance. The Defendant argues CAF members would not reasonably expect to receive allowances while no longer in a position of continual liability to the conditions or risk the allowances are intended to compensate.

[73] I accept that allowances are not on all fours with salary, particularly when they are intended to compensate for expenses. However, as argued by the Plaintiff in relation to the Post Living Differential, expenses may not necessarily be eliminated as a result of the member's release. Moreover, the Defendant's argument is difficult to reconcile with the nature and purpose of LTD insurance. I appreciate that a member's liability to be exposed to a risk, to exercise a skill, or to perform a duty is eliminated once the member is released from the CAF. As such, the basis for compensating that member for such liability no longer exists. However, the same can be said of the member's base salary. The salary represents compensation for the performance of services and, once released, there is no longer a basis to provide such compensation. Rather, the LTD insurance responds as a means of replacing a percentage of the compensation to which the member is no longer entitled.

[74] On balance, I find the Plaintiff's submissions surrounding the reasonable expectations of the parties to be the more compelling and, in my view, to be sufficient to resolve the ambiguity resulting from stage 1 of the interpretation framework. It is therefore unnecessary to turn to stage 3 of the interpretation framework. However, I would also observe that, even if I had considered the Defendant's arguments to be sufficiently compelling to leave the ambiguity unresolved at stage 2, the principle of *contra proferentum* applicable at stage 3 would necessarily resolve the

ambiguity in the Plaintiff's favour. The Defendant's only argument in relation to stage 3 of the analysis is that *contra proferentum* is not applicable to the Policy, which argument I rejected earlier in these Reasons.

V. **Conclusion**

[75] In conclusion, I find that the Question should be answered in the affirmative, although with the qualification explained earlier in these Reasons. A Class member's allowances should be included in the Class member's monthly pay when calculating LTD benefits, but only the allowances that are paid on a monthly basis.

VI. **Costs**

[76] Consistent with Rule 334.39 of the *Federal Courts Rules*, neither party claimed costs on this motion, and no costs will be awarded.

ORDER IN T-1358-18

THIS COURT ORDERS that:

1. The answer to the following question of law posed by the parties in this motion:

When calculating long term disability benefits and dismemberment benefits under Division 2, Part III(B) of SISIP Policy 901102, should a Class member's allowances in effect on the date of their release from the Canadian Armed Forces (or in the case of a Class "C" member, when the injury was incurred or the illness was contracted) be included in the Class member's monthly pay?

Lors du calcul des prestations d'invalidité prolongée et des prestations de mutilation en vertu de la section 2 de la partie III (B) de la police du RARM No 901102, devraient-ils être inclus les indemnités en vigueur à la date de leur libération des Forces armées canadiennes (ou, dans le cas d'un membre en service de réserve de classe « C », au moment où la blessure est survenue ou que la maladie a été contractée) dans le taux de rémunération du membre de la Groupe?

is determined to be as follows:

Yes, but only the allowances that are paid on a monthly basis.

Oui, mais seulement les indemnités qui sont versées sur une base mensuelle.

2. There is no Order as to costs.

" Richard F. Southcott

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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