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T-1343-21
2022 FC 1186

Deborah Patterson (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: *PATTERSON V. CANADA (ATTORNEY GENERAL)*

Federal Court, Brown J.—By videoconference, July 12; Ottawa, August 10, 2022.

Public Service — Pensions — Application for judicial review of decision by Pension Centre determining that pensionable service accumulated under Canadian Forces Superannuation Act (CFSA) by applicant, Reserve Force Member from 1979 until 2008, qualified as "other pensionable service" pursuant to Public Service Superannuation Act (PSSA), s. 5(5)(c) — Pension Centre determined that applicant's CFSA pensionable service (28+ years) counted against 35-year maximum accrual of pensionable service under PSSA — Applicant ceased to be eligible to contribute to her Public Service Pension Plan pension when her combined pensionable service under both CFSA, PSSA reached 35 years, pursuant to PSSA, s. 5(3) — Pension benefits under CFSA for Reserve Force Members calculated based only on paid or part paid days in Reserves (in applicant's case totalling 12+ years) — Issue concerned applicant's pension entitlements under PSSA — Applicant wished to accumulate full pension credit for time worked in public service under PSSA — Applicant's total pensionable service became capped at 19 years, 161 days combined Canadian Forces service under CFSA, full-time work under PSSA — Maternity leave not pensionable under CFSA, excluded from applicant's total service in Reserves — Applicant submitting unreasonable to count her full 28+ years pensionable service in Reserve Forces against 35-year cap on pensionable service as public servant under PSSA because she did not receive superannuation benefits for her full 28+ years but only for 12+ years — Asking to construe PSSA, s. 5(5) to enable her to accrue full, 35-year pension, by only counting her Canadian Forces service time (12+ years) against 35-year maximum pensionable service cap in PSSA — Also submitting, inter alia, Pension Centre's interpretation failed to give legislation broad, liberal, purposive application that extends full benefits of pension scheme to intended targets, namely those who work, contribute for full 35 years — Whether Pension Centre's decision reasonable — Decision not unreasonable — Ordinary meaning of PSSA, ss. 5(3), 5(5)(c) is that pensionable service accrued under CFSA, payable from Canadian Forces Pension Fund counts against 35-year maximum accrual under PSSA — Clear, unequivocal that term "other pensionable service" referring to "pensionable service" accrued under CFSA — Other pensionable service per s. 5(3),(5) not to be confused with Canadian Forces service time — Words "other pensionable service" in s. 5(5) cannot be read as referring to another concept such as "Canadian Forces service or CF service" — Parliament could easily have referred to "Canadian Forces service" in ss. 5(3),(5) — In choosing term "other pensionable service" in s. 5(3), listing CFSA at s. 5(5), Parliament had definition, meaning of "pensionable service" under CFSA in mind — Parliament appearing to have made some

trade-offs favourable to persons in applicant's position — Cannot be said there is no benefit from having common definition of pensionable service across CFSA, PSSA — Applicant's interpretation meaning that pensionable service of not only all Reservists but also all part-time employees under PSSA should be reduced to their actual paid time — Such narrow interpretation for essentially "legislative purpose" reasons without doing injustice elsewhere could not be made — Legislative amendment rather that judicial construction solution to issue raised in this case — Adjustment of amount of pension benefit accounting for periods of part-time employment, reflects lower contributions made to pension fund — This proportionality principle also important in overall purpose of schemes — Legislative scheme permitting employees to accrue 35 year maximum pension not its only or determinative purpose — Accepting applicant's submissions not faithful to clear wording of provisions at issue — Application dismissed.

This was an application for judicial review of a decision by the Government of Canada Pension Centre determining that the pensionable service accumulated under the *Canadian Forces Superannuation Act* (CFSA) by the applicant, who was a Reserve Force Member of the Canadian Armed Forces from 1979 until 2008, qualified as "other pensionable service" pursuant to paragraph 5(5)(c) of the *Public Service Superannuation Act* (PSSA).

The applicant began her career in the federal public service with the Department of National Defence in 2009. The Pension Centre determined that the applicant's CFSA pensionable service, amounting to 28 years and 88 days (28+ years), counted against the 35-year maximum accrual of pensionable service under the PSSA. As a result of this decision, the applicant ceased to be eligible to contribute to her Public Service Pension Plan pension on August 12, 2015, when her total combined pensionable service (based on elapsed time) under both the CFSA and PSSA reached 35 years, pursuant to subsection 5(3) of the PSSA—notwithstanding she was still working and continues to work in the public service. Underlying this judicial review was the fact that *pension benefits* under the CFSA for Reserve Force Members are calculated based only on paid or part paid days in the Reserves, which in the applicant's case total 12 years and 249 days (12+ years). The issue concerned the applicant's pension entitlements under the PSSA. The applicant wished to accumulate full pension credit for the time she works in the public service under the PSSA. The applicant noted that if she had worked full time in the Reserves she would have earned a full 35 years of pensionable service under the combined CFSA and PSSA as of August 12, 2015, and would have been entitled to receive a full 35-year pension at that time. Instead, because the entirety of her 28+ year's total elapsed service with the Reserve Forces is deducted from the 35-year cap under the PSSA, no matter how long she now works as a full time public servant, she will never accumulate the right to additional pension benefits for services provided after August 12, 2015. As of that date, her total pensionable service became capped at 19 years and 161 days combined Canadian Forces service under the CFSA and full-time work under the PSSA. The applicant spent a significant part of her unpaid or partially paid time in the Reserve Forces on maternity leaves and or in respect of childcare responsibilities. The Pension Centre advised the applicant that maternity leave was not pensionable under CFSA and was excluded from her total service in the Reserves. The applicant submitted that it was unreasonable to count her full 28+ years pensionable service in the Reserve Forces against the 35-year cap on pensionable service as a public servant under the PSSA because she did not receive superannuation benefits for her full 28+ years but only for 12+ years. She asked the Court to construe subsection 5(5) of the PSSA to enable her to accrue a full, 35-year pension, by only counting her Canadian Forces service time (12+ years) against the 35-year maximum pensionable service cap in the PSSA. The applicant submitted that the Pension Centre's interpretation creates an absurdity in which civilian public service employees are penalized for longer periods of service in the Reserve Force, despite accumulating 35 years or more of full-time paid work between the military and public service. She also submitted the Pension Centre's interpretation failed to give the legislation a broad and liberal and purposive application that extends the full benefits of the pension scheme to its intended targets, namely those who work and contribute for a full 35 years. The respondent submitted that the Pension Centre's interpretation of "other pensionable service" in subsection 5(5) of the PSSA is reasonable because it accords with its ordinary meaning, and that the plain and ordinary meaning should play a dominant role in its interpretation. The respondent submitted that the applicant's proposed interpretation was inconsistent with the scheme of the pension legislation at issue and, if accepted, may have a serious

negative impact on many Reservists and part-time employees.

At issue was whether the Pension Centre's decision was reasonable.

Held, the application should be dismissed.

The applicant did not show that the decision was unreasonable for the purposes of judicial review. The ordinary meaning of subsection 5(3) and paragraph 5(5)(c) of the PSSA is that pensionable service accrued under the CFSA and payable from the Canadian Forces Pension Fund counts against the 35-year maximum accrual under the PSSA. It is clear and unequivocal that the term "other pensionable service" refers to "pensionable service" accrued under the CFSA, which is a calculation based on elapsed time and not just time during which the applicant was paid or partially paid. Other pensionable service per subsections 5(3) and (5) should not be confused with Canadian Forces service time, which is used to calculate an individual's *pension benefit*, and which is quite distinct from pensionable service and other pensionable service. The words "other pensionable service" in subsection 5(5) cannot be read as referring to another concept such as "Canadian Forces service or CF service". If Parliament wished to refer to "Canadian Forces service" in subsections 5(3) or 5(5) of the PSSA, it could easily have said so, as it does elsewhere in both the *Canadian Forces Superannuation Regulations* and the CFSA. In choosing the term "other pensionable service" in subsection 5(3) of the PSSA, and listing the CFSA at subsection 5(5), Parliament had the definition and meaning of "pensionable service" under the CFSA in mind. If Parliament had intended only CF service be counted for the purposes of subsection 5(3), it would have used that term. In designing the scheme as it did, Parliament also appears to have made some trade-offs favourable to persons in the applicant's position. First, while those in the applicant's situation may no longer make pension contributions towards a larger pension, their pension related payroll deduction drops from 9 percent of salary to only 1 percent of salary. In addition, the calculation of basic annuity is improved pursuant to section 15. Because pensionable service is used (elapsed time) and not CF service (paid time), an annuity is available sooner. Thus, it cannot be said there is no benefit from having a common definition of pensionable service across the CFSA and PSSA. Notably, the advantages set out here would not be available if pensionable service was calculated based on the much lower paid CF service in the applicant's case. The applicant's interpretation meant that the pensionable service of not only all Reservists but also all part-time employees under the PSSA should be reduced to their actual paid time. This would affect many people and the way the scheme has been understood and administered. The applicant's interpretation would require such part-time employees to have worked for 60 years in order to be eligible to a pension benefit without "penalty" at age 55. This was manifestly absurd. Such a narrow interpretation for essentially "legislative purpose" reasons without doing injustice elsewhere could not be made. Legislative amendment rather that judicial construction was the solution to the issue raised in this case. What the applicant sought had merit provided it could be achieved without injustice elsewhere, and that those like the applicant contributed to the increased benefit they would obtain. The adjustment of the amount of the pension benefit (either under the PSSA or the CFSA Part I) accounts for periods of part-time employment, and reflects the lower contributions that were made to the pension fund. This proportionality principle is also important in the overall purpose of the schemes. While one aspect of the legislative scheme is to permit employees to accrue a 35 year maximum pension, that is not its only or determinative purpose. The applicant did not meet the eligibility requirements as set out by Parliament. To accept the applicant's submissions would not have been faithful to the clear wording of the provisions at issue.

STATUTES AND REGULATIONS CITED

Canadian Forces Superannuation Act, R.S.C., 1985, c. C-17, Parts I, I.1, ss. 6, 15, 16, 18(2),(3).

Canadian Forces Superannuation Regulations, C.R.C., c. 396, s. 3, 12.2(3), 16.6.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 18.4(1).

Old Age Security Act, R.S.C., 1985, c. O-9.

Public Service Superannuation Act, R.S.C., 1985, C. P-36, SS. 5, 13(1)(c)(i).

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653

CONSIDERED:

Canada Post Corp v. Canadian Union of Postal Workers, 2019 SCC 67, [2019] 4 S.C.R. 900; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada (Attorney General) v. Burke*, 2022 FCA 44, [2022] 4 F.C.R. 142.

REFERRED TO:

Proulx v. Canada (Attorney General), 2018 FC 761, 42 C.C.P.B. (2nd) 77; *Landriault v. Canada (Attorney General)*, 2016 FC 664, 27 C.C.P.B. (2nd) 140; *Lamarche v. Canada (Attorney General),* 2019 FC 1303, 50 C.C.P.B. (2nd) 196, [2020] 1 F.C.R. D-2; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3, leave to appeal to S.C.C. granted, no. 39855 (March 3, 2022).

APPLICATION for judicial review of a decision by the Pension Centre determining that the applicant's pensionable service accumulated under the *Canadian Forces Superannuation Act* qualifies as "other pensionable service" pursuant to paragraph 5(5)(c) of the *Public Service Superannuation Act*. Application dismissed.

APPEARANCES

Zachary Rodgers for applicant.

Charles Maher for respondent.

SOLICITORS OF RECORD

RavenLaw LLP, Ottawa, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

BROWN J.:

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Government of Canada Pension Centre (Pension Centre), dated August 26, 2021 (Decision). The applicant is now a federal public servant and for pension purposes is now subject to the *Public Service Superannuation Act*, R.S.C., 1985, c. P-36 (PSSA). However, before joining the public service she completed lengthy service in the Canadian Armed Forces' Reserve Force (Reserve Force) where for pension purposes she was subject to the *Canadian Forces Superannuation Act*, R.S.C., 1985, c. C-17 (CFSA).

[2] The Pension Centre determined the applicant's pensionable service accumulated under the CFSA qualifies as "other pensionable service" pursuant to paragraph 5(5)(c)

of the PSSA. The Pension Centre therefore determined her CFSA pensionable service, amounting to 28 years and 88 days (28+ years), counted against the 35-year maximum accrual of pensionable service under the PSSA. As a result she ceased to be eligible to contribute to her Public Service Pension Plan pension on August 12, 2015, when her total combined pensionable service (based on elapsed time) under both the CFSA and PSSA reached 35 years, pursuant to subsection 5(3) of the PSSA—notwithstanding she was still working and continues to work in the public service.

[3] Underlying this judicial review is the fact that *pension benefits* under the CFSA for Reserve Force Members are calculated based only on paid or part paid days in the Reserves (Canadian Forces service, or CF service), which in her case total 12 years and 249 days (12+ years). On the other hand, her *pensionable service* in the Reserve Force was calculated on an elapsed time basis, which included not only her paid time, but also the time when she was partially paid, and time she was not paid at all—totalling 28 years and 88 days (28+ years).

[4] It is not disputed the applicant's pensionable service and CF service under the CFSA are now fixed and are no longer subject to change. She elected to and is now receiving an annual allowance under the CFSA in respect of her work in the Reserve Forces. Her annual allowance is calculated on the basis of CF service, that is, the time she was paid or partially paid in the Reserves. To be clear, her CFSA pension benefit is not calculated on her—far longer—pensionable service with the Reserves.

[5] What is in issue now concerns her pension entitlements under the PSSA. The applicant wishes to accumulate full pension credit for the time she works in the public service under the PSSA. I understood her counsel to confirm she is prepared to pay for that additional accumulation by way of contributions to the PSSA in the same way other public servants contribute to the PSSA.

[6] The applicant notes that if she had worked full time in the Reserves she would have earned a full 35 years of pensionable service under the combined CFSA and PSSA as of August 12, 2015, and would have been entitled to receive a full 35-year pension at that time (albeit possibly reduced due to her age and when it is paid).

[7] Instead, because the entirety of her 28+ years' total elapsed service with the Reserve Forces is deducted from the 35-year cap under the PSSA, no matter how long she now works as a full-time public servant, she will never accumulate the right to additional pension benefits for services provided after August 12, 2015. As of that date, her total pensionable service became capped at 19 years and 161 days combined CF service under the CFSA and full-time work under the PSSA: 12 years and 249 days CF service (paid and part-paid work) under the CFSA plus 5 years and 272 days of full-time work under the PSSA.

[8] Notably, the evidence is that the applicant spent what appears to be a significant part of her unpaid or partially paid time in the Reserve Forces on maternity leaves and or in respect of childcare responsibilities. The evidence is that the Pension Centre advised the applicant that maternity leave was not pensionable under CFSA and was excluded from her total service in the Reserves.

[9] The applicant submits it is unreasonable to count her full 28+ years' pensionable service in the Reserve Forces against the 35-year cap on pensionable service as a

public servant under the PSSA because she did not receive superannuation benefits for her full 28+ years but only for 12+ years, i.e., only her paid CF service.

[10] The applicant asks the Court to construe subsection 5(5) of the PSSA to enable her to accrue a full, 35-year pension, by only counting her CF service time (12+ years) against the 35-year maximum pensionable service cap in the PSSA. While she is planning to retire soon, this construction would enable her to continue to contribute to her pension for so long as she is working, whereas at present she cannot do so because she reached the 35-year cap on pensionable service in 2015.

[11] The applicant submits the Pension Centre's interpretation creates an absurdity in which civilian public service employees are penalized for longer periods of service in the Reserve Force, despite accumulating 35 years or more of full-time paid work between the military and public service—which is certainly true where a Reserve Force Member works for less than full pay for a period of time. She also submits the Pension Centre's interpretation fails to give the legislation a broad and liberal and purposive application that extends the full benefits of the pension scheme to its intended targets, namely those who work and contribute for a full 35 years. She submits that whereas the purpose of both pension plans is to afford a pension benefit to civilian and military public servants up to a 35-year maximum, the Pension Centre's interpretation prevents the applicant from accruing a 35-year pension. She says this Court's intervention is required to correct this unreasonable interpretation.

[12] The respondent submits the Pension Centre's interpretation of "other pensionable service" in subsection 5(5) of the PSSA is reasonable because it accords with its ordinary meaning, and that the plain and ordinary meaning should play a dominant role in its interpretation. The respondent submits the applicant's proposed interpretation—that pensionable service must mirror a contributor's actual paid days (in her case her CF service days)—is inconsistent with the scheme of the pension legislation at issue and, if accepted, may have a serious negative impact on many Reservists and part-time employees.

II. Background Facts

[13] Since at least 1959, service in the Regular Forces has entitled Regular Force members (Army, Navy, RCAF, etc.) to a pension benefit under the CFSA Part I. This defined benefit plan is governed by the *Canadian Forces Superannuation Regulations*, C.R.C., c. 396 (CFSR).

[14] Prior to March 1, 2007, only Regular Force Members were included in this plan. Reservists were excluded from coverage, and indeed had no comparable pension plan within the CFSA. On 1 March 2007, the CFSA Part I.1 came into force, which created the Reserve Force Pension Plan as a defined benefit plan.

[15] Importantly, other changes within the CFSA Part I came into force permitting some Reserve Force Members—including the applicant—to become CFSA Part I contributors if certain service and/or earnings criteria were met. The applicant elected to participate in the CFSA Part I pension plan known as the Regular Force Pension Plan.

[16] Further changes to both the CFSA Part I and Part I.1 allowed Reservists—such as the applicant—who met the eligibility criteria to "buy back" previous years of service

into whichever plan of which they were a member, in this case the CFSA Part I plan. Specifically, CFSA Part I contributors like the applicant may buy back past service up to a maximum of 35 years cumulative with any other pensionable service they may have in the PSSA. This mechanism generally enables Reserve Force Members to both obtain a larger benefit and to enable them to meet certain other requirements and thresholds sooner than other contributors.

A. *The applicant's time in the Reserve Force and her CFSA buyback and benefits*

[17] From 1979 until 2008, the applicant was a Reserve Force Member of the Canadian Armed Forces (Reserve Force Member).

[18] Following the coming into force of the changes on March 1, 2007, the applicant became a contributor to the CFSA pension plan. On February 21, 2010, she elected to buy back her Reserve Force service under the CFSA (from 1979 to March 1, 2007). Her buyback was comprised of 27 years and 56 days elapsed time of pensionable service under the CFSA. Of this, 12 years and 249 days counted as CF service, which is service for which she was paid or partially paid. She also accumulated additional elapsed time of 1 year and 32 days of pensionable service between March 1, 2007 and March 31, 2008, as an active (as opposed to Reserve Force) contributor under the CFSA.

[19] Her total CFSA pensionable service was therefore 28 years 88 days (28+ years). However, her pension benefits under the CFSA were calculated and based on the days and partial days in respect of which payment was authorized for her, that is, paid and partially paid days; these days are referred to as Canadian Forces service days or CF service days. The applicant's CF service days total 12 years and 249 days (12+ years). The quantum of these calculations are not in dispute.

[20] As noted, the applicant elected under the CFSA to receive an annual allowance with immediate effect. This annual allowance has been paid to her since her election in 2010, with a reduction because of her age at the time payments started.

B. *The applicant's time in the public service and her PSSA benefits*

[21] In 2009, the applicant began her career in the federal public service with the Department of National Defence. On November 14, 2009, she started contributing towards pension benefits under the PSSA. On July 31, 2010, she elected to buy back her prior public service under the PSSA from September 15, 2008, to November 14, 2009 (1 year and 5 days).

[22] As early as December 2013, the Pension Centre advised the applicant she would reach 35 years of pensionable service on August 12, 2015, counting her pensionable service accrued under the CFSA (28 years and 88 days) and her pensionable service under the PSSA, assuming she continued to work full time as a civilian at DND until then.

[23] On May 25, 2017, the Pension Centre wrote the applicant advising her that as of August 12, 2015, she could no longer contribute to her PSSA Public Service Pension Plan pension because she had reached the combined maximum 35 years of pensionable service allowed under the CFSA and PSSA plans.

[24] Counsel for the applicant wrote to the Pension Centre on four occasions requesting clarification of her pension entitlements. In letters dated November 19 and 20, 2019, October 7, 2020, and March 4, 2021, the Pension Centre explained the applicant accumulated 28 years and 88 days (28+ years) of pensionable service under the CFSA, which is the total of the current service and the elected service under CFSA Part I, that is, service when she was paid, when she was partially paid and time when she was not paid at all (elapsed time). That said, the *pension benefit* she receives and the cost of her election were adjusted to reflect only fully or partially paid days of work rather than the total amount of time (elapsed time or pensionable time) she spent in the Reserve Force.

[25] Pursuant to the applicable provisions including subsections 5(5) and 5(3) of the PSSA, the Pension Centre counted all of her pensionable service accrued under the CFSA as "other pensionable service" under subsection 5(5) of the PSSA.

[26] On June 29, 2021, the applicant made submissions to the Pension Centre for reconsideration. By letter dated August 26, 2021 (actually July 26, 2021), the Pension Centre maintained its decision, which forms the subject matter of this application for judicial review. At issue are the parties' different interpretations of subsection 5(5) of the PSSA and specifically their differing interpretations of "other pensionable service".

III. Decision under review

[27] The entirety of the Pension Centre's Decision is:

> This is in response to your letter dated July 8, 2021, regarding Ms. Patterson's buyback of prior Reserve Force service in the Canadian Forces pension plan and the effect of that buyback is having on her eligibility to continue to accrue service under the Public Service pension plan.
>
> I would like to assure you that within the Pension Centre's process of determining Ms. Patterson's 35 year date, the pension legislation was applied correctly as directed by the Canadian Forces and public service pension plan sponsors. Regrettably, the application of these provisions is not a matter over which any discretion can be exercised regardless of the circumstances of the case.
>
> That said, we have taken the liberty of sharing a copy of your correspondence with the plan sponsors, the Department of National Defence and the Treasury Board Secretariat, for their consideration as part of any legislative review exercise.

IV. Issues

[28] The only issue is whether the Decision is reasonable.

V. Standard of Review

[29] Both the applicant the respondent submit the standard is reasonableness for decisions of the Pension Centre: *Proulx v. Canada (Attorney General)*, 2018 FC 761, 42 C.C.P.B. (2nd) 77, at paragraph 25; *Landriault v. Canada (Attorney General)*, 2016 FC 664, 27 C.C.P.B. (2nd) 140 (*per* Strickland J.), at paragraph 16; *Lamarche v. Canada (Attorney General),* 2019 FC 1303, 50 C.C.P.B. (2nd) 196, [2020] 1 F.C.R. D-2 (*per* Southcott J.), at paragraphs 25–26.

[30] This case is one of statutory interpretation. The parties, quite properly in my view, approached this case in oral argument on the following basis (as submitted by the applicant):

> 32. In *Vavilov*, the Supreme Court recognized that when reviewing a statutory interpretation decision made by an administrative decision maker, it is possible that the scope of reasonable outcomes available to the decision maker is considerably narrower than what could be expected when the decision maker is tasked with applying the law to certain facts:
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> > [E]ven though the task of a court conducting a reasonableness review is not to perform a de novo analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, … it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.
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> > *Vavilov, supra* at para 124, AAR Vol III, Tab 15.
>
> 33. Administrative decision makers such as the Pension Centre are thus constrained by the text, context and purpose of the legislation they are called on to interpret. In this case, the Pension Centre interpreted the text of section 5 of the PSSA, in the context of its interaction with the CFSA and the regulations promulgated thereunder. In examining the degree of constraint imposed on administrative decision makers, courts look to the statute itself in order to assess the degree of discretion the decision maker is entitled to in its interpretation. A reviewing court looks to the statute to determine whether it provides "broad statutory wording that is capable of an array of meanings" or "specific methodologies and strict language … like recipes that must be followed."
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> > *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, AAR Vol III, Tab 17.
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> 34. The Supreme Court of Canada has held on multiple occasions that only one reasonable answer was available to the question of legislative interpretation raised by an administrative decision. [Court comment: The Federal Court of Appeal held to the same effect in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93]
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> > See e.g. *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 64, AAR Vol III, Tab 14; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 25, AAR Vol III, Tab 23.

[31] In addition, see *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3 (*per* Stratas J.A., Rennie and MacTavish JJ.A. concurring) at paragraphs 16–19, leave to appeal to Supreme Court of Canada granted, file no. 39855 (March 3, 2022). That appeal awaits a hearing by the Supreme Court of Canada in the fall of 2022; I was not asked to defer consideration until the Supreme Court's reasons are delivered, which in any event is not likely until the spring, summer or later in 2023. I will make my decision now having regard to the provisions of subsection 18.4(1) [of the *Federal Courts Act*, R.S.C., 1985, c. F-7], which requires judgments of this Court to be issued "without delay and in a summary way". Regarding reasonableness, in *Canada Post Corp v. Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 S.C.R. 900, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), the majority *per* Justice Rowe explains what is required for a reasonable

decision, and what is required of a court reviewing on the reasonableness standard [at paragraphs 31–33]:

> A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> A reviewing court should consider whether the decision as a whole is reasonable: "… what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on … are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). [Emphasis added.]

[32] Moreover, *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues [at paragraph 128]:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39. [Emphasis added.]

VI. Relevant law

[33] Subsection 5(3) of the PSSA states:

> **5** …
>
> **Contribution rates — 35 years of service**
>
> **(3)** A person who has to his or her credit, on or after January 1, 2013, a period of pensionable service — or a period of pensionable service and other pensionable service — totalling at least 35 years is not required to contribute under subsection (2) but is required to contribute, by reservation from salary or otherwise, to the Public Service Pension Fund, in respect of the period beginning on the later of January 1, 2013 and the day on which the person has to his or her credit those 35 years, in addition to any other amount required

under this Act, at the rates determined by the Treasury Board on the recommendation of the Minister.

[Emphasis added.]

[34] Subsection 5(5) of the PSSA states:

> **5 ...**
>
> **Other pensionable service**
>
> **(5)** For the purpose of subsection (3), ***other pensionable service*** means years of service giving rise to a superannuation or pension benefit of a kind specified in the regulations that is payable
>
> **(a)** out of the Consolidated Revenue Fund, or out of any account in the accounts of Canada other than the Superannuation Account;
>
> **(b)** out of or under a superannuation or pension fund or plan pursuant to which contributions have been paid out of the Consolidated Revenue Fund in respect of employees engaged locally outside of Canada; or
>
> **(c)** out of the Canadian Forces Pension Fund within the meaning of the *Canadian Forces Superannuation Act* or the Royal Canadian Mounted Police Pension Fund within the meaning of the *Royal Canadian Mounted Police Superannuation Act*.
> [Underlining added, italics and bolding in original.]

VII. Analysis

A. *Is the Pension Centre Decision reasonable?*

[35] A reviewing court should ensure the decision maker has interpreted the relevant statutory provisions "in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue", see *Vavilov*, at paragraph 121. This is consistent with the purposive approach to legislative interpretation and interpretation of a section in the entire context of the relevant statutory regime discussed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraphs 21–22.

(1) Interpretation of subsection 5(5) of the PSSA

[36] The applicant submits the 35-year limitation on pensionable service accumulation pursuant to subsection 5(5) of the PSSA is directed towards the quantum of the annuity benefit payable out of the Canadian Forces Pension Fund. The applicant submits the reality for most former Reserve Force Members who have accessed benefits under the CFSA is that their annuities are calculated using CF service rather than pensionable service. I should say at the outset, and with respect, that while the latter is possibly and perhaps likely the case, I am not persuaded that factual circumstance requires the interpretation submitted by the applicant.

[37] It is common ground that in the case of Reserve Force Members in the position of the applicant who are contributors under the CFSA, an '"adjustment"' set out in subsection 16.6(2) of the CFSR is applied to the calculation of their *pension benefits* under section 15 of the CFSA. I note however that this does not affect the calculation of *pensionable service*. The adjustment requires the Pension Centre to calculate the *pension benefit* that reflects the contributor's actual paid or partially paid days of work

rather than the total amount of time—referred to as elapsed time or pensionable time—the person spent in the Reserves. While the CFSR provides specific rules governing how to calculate CF service based on an individual's situation (see for example section 3 of the CFSR), the effect is that only paid or partially days of service or "CF service" are counted for the purposes of calculating the applicable *pension benefit* under the CFSA. To emphasize, the adjustment under the CFSR is to the contributor's *pension benefit* not to their *pensionable service*: the concepts are different and distinct.

[38] The applicant submits subsection 5(5) of the PSSA should be interpreted to give effect to the actual 35-year pensionable service accrual limitation for public service employee—one that reflects the *pension benefit* payable under the CFSA. The applicant submits the effect of the CFSA's interaction with the PSSA cannot reasonably be interpreted to create an arbitrary limitation of PSSA pension accrual due to years of unpaid "pensionable service" under the CFSA from which no pension benefit flows to the applicant. The applicant submits this is confirmed by the use of the words "that is payable… out of the Canadian Forces Pension Fund" (emphasis added).

[39] The respondent submits otherwise. Counsel submits that "where, for example, the words used are 'precise and unequivocal', their ordinary meaning will usually play a more significant role in the interpretive exercise" (*Vavilov*, at paragraph 120). I am of course bound by *Vavilov*.

[40] In this, I agree with the respondent, although not without some reservation. In my view, the ordinary meaning of subsection 5(3) and paragraph 5(5)(c) of the PSSA is that pensionable service accrued under the CFSA and payable from the Canadian Forces Pension Fund counts against the 35-year maximum accrual under the PSSA. With respect, I have concluded it is clear and unequivocal that the term "other pensionable service" refers to "pensionable service" accrued under the CFSA, which is a calculation based on elapsed time and not just time during which the applicant was paid or partially paid. Other pensionable service per subsections 5(3) and (5) should not be confused with CF service time, which is used to calculate an individual's *pension benefit*, and which so far as I am able to ascertain, is quite distinct from pensionable service and other pensionable service.

[41] In particular, I am unable to read the words "other pensionable service" in subsection 5(5) as referring to another concept such as "Canadian Forces service or CF service" as the applicant contends. I am compelled to agree with the respondent that if Parliament wished to refer to "Canadian Forces service" in subsections 5(3) and/or 5(5) of the PSSA, it could easily have said so, as it does elsewhere in both the CFSA and the CFSR, see for example paragraph 3(1)(b) of the CFSR and paragraph 16(1)(a) of the CFSA.

[42] In this connection, I note the term "pensionable service" is used some 80 times in the CFSA, and almost 150 times in the PSSA. The term "Canadian Forces service" (or CF service) is used twice in the CFSA, and 14 times in the CFSR. These facts alone give me pause. I take cognizance of the complexity of federal superannuation legislation under both the CFSA and PSSA. I am reluctant to ascribe a novel construction to the term "pensionable service" in either because of the possibility of unintended consequential shifts in the interpretation of that term as used with such frequency elsewhere in both the CFSA and PSSA.

[43] For one example, if the Court were to construe subsection 5(5) as proposed by the applicant, such that it means Canadian Forces service or CF service, what is one to do with the 35-year limitation on employee contributions into the plan created by subsection 5(3) of the PSSA which says in effect that after 35 years of pensionable service an employee is no longer "required to contribute"? I asked this question at the hearing and was advised by applicant's counsel that adjustments would have to be made, but and with respect I am not persuaded this is a simply a matter of "adjustments".

[44] The respondent points to the following legislative provisions, which also lead me to conclude the Pension Centre's interpretation of section 5 of the PSSA is reasonable.

[45] Under the CFSA, pensionable service is defined in section 6. Subsection 6(b) includes elective service. Pursuant to clauses 6(b)(ii)(G) and (H) of the CFSA, elective service includes all elective Reserve Force service, including intermittent periods during which a Reservist does not perform any work and is not paid, and during which there are no pension contributions made:

> **Pensionable service**
>
> **6** Subject to this Act, the following service may be counted by a contributor as pensionable service for the purposes of this Act, namely,
>
> …
>
> **(b)** elective service, comprising,
>
> …
>
> **(ii)** in the case of any contributor,
>
> …
>
> **(G)** any continuous period of full-time service of three months or more in the Canadian Forces or in the naval, army or air forces of Her Majesty raised by Canada, other than the regular force, if he elects, within one year of becoming a contributor under this Act, to pay for that service,
>
> **(H)** one-fourth of any period of service in the Canadian Forces or in the naval, army or air forces of Her Majesty raised by Canada, other than the regular force, during which he was liable to be called out for periodic training or duty by the Governor in Council otherwise than during an emergency, except any such service that may be counted by him under clause (C) or (G), if he elects, within one year of becoming a contributor under this Act, to pay for that service,

[46] Pursuant to subsection 12.2(3) of the CFSR, a Reservist who elects to buy back Reserve Force service has no choice but to buy it back in its entirety—this is what the applicant did in this case. She bought back "all" of her pensionable service in the Reserve Force:

> Election for Reserve Force Service
>
> **12.2** …

> **(3)** The election for reserve force service set out in clauses 6(b)(ii)(G) and (H) of the Act, as adapted by subsection (2), is for all of the contributor's reserve force service. However, there shall be counted as years of pensionable service, starting with the most recent, only those that would result in a maximum of 35 years of pensionable service to the credit of the contributor. [Emphasis added.]

[47] Reserve Force service bought back by a Reservist under Part I of the CFSA generally gives rise to an equivalent number of years of pensionable service; as noted pensionable service includes time spend with the Reserves whether paid, partially paid or not paid at all.

[48] In the case at bar, when the applicant elected to buy back 27 years and 56 days of pensionable service, the cost was proportional to the hours she worked and the salary she received, and was based on what she would have contributed had she been a contributor during her Reserve Force service, namely a pension equivalent to 12 years and 249 days of full-time service (that is, her CF Service). She also accumulated an additional 1 year and 32 days of pensionable service between March 1, 2007 and March 31, 2008, as a contributor.

[49] I agree with the respondent that in choosing the term "other pensionable service" in subsection 5(3) of the PSSA, and listing the CFSA at subsection 5(5), Parliament had the definition and meaning of "pensionable service" under the CFSA in mind. If Parliament had intended only CF service be counted for the purposes of subsection 5(3), it would have used that term. As already noted, that is not what Parliament did, although the term CF service (Canadian Forces service) is used elsewhere 16 times in the CFSA and CFSR. Moreover, the term "pensionable service" is used about 80 times in the CFSA, and about 148 times in the PSSA.

[50] In this connection I note that in designing the scheme as it did, Parliament also appears to have made some trade-offs favourable to persons in the applicant's position. First, while those in the applicant's situation may no longer make pension contributions towards a larger pension, their pension-related payroll deduction drops from 9 percent of salary to only 1 percent of salary. Thus, while their pension will not grow through increased years or increased salary base, the contributor's disposable income increases by 8 percent of salary, which increased disposable income may be invested in tax-free savings accounts (TFSA), and non-registered investments such as bonds and stocks. The issue of registered retirement savings plan (RRSP) contributions was canvassed at the hearing without resolution one way or the other.

[51] In addition, the calculation of basic annuity is improved pursuant to section 15. Paragraphs 16(1)(c), (d) and (e) of the CFSA, pensionable service—determined by elapsed time, and not just CF service paid time—are used to trigger entitlement early access to an unreduced pension; if CF service was used, those and related benefits would take much longer to achieve. Put another way, because pensionable service is used (elapsed time) and not CF service (paid time), an annuity is available sooner. Pension vesting is also improved pursuant to section 16 of CFSA. Again, under subsection 18(3) a larger annual allowance is available, due to reduction calculation, to those with pensionable service approaching 30 years, compared with what would be paid based only on age per subsection 18(2) (i.e., a 14 percent reduction versus 40 percent reduction in the applicant's case).

[52] Thus, it cannot be said there is no benefit from having a common definition of pensionable service across the CFSA and PSSA. Notably, the advantages set out here would not be available if pensionable service was calculated based on the much lower paid CF service in the applicant's case.

(2) Purposive interpretation of subsection 5(5) of the PSSA

[53] The applicant submits the purpose of federal pension legislation is to confer a benefit on contributors who meet certain thresholds. The PSSA imposes a 35-year maximum pensionable service threshold, which directly corresponds to the pensionable benefit a public service employee is able to achieve upon retirement because the benefit is calculated based on service. The CFSA affords an opportunity for members of the Armed Forces to collect pension benefits that are subject to the same 35-year maximum. However, as already noted, the calculation of elapsed time or time served for the purposes of determining a *pension benefit* for Reserve Force Members who elected to buy back prior service is subject to an "adjustment" determined by the CFSR. The adjustment imposed by section 16.6 of the CFSR reduces each year of pensionable service to reflect CF service, or paid days, when the pension benefit/annuity calculation is performed.

[54] In other words, the applicant is left with a pension reduced by the amount of time she was in the Reserve but not paid in respect of which she received no *pension benefit*. The applicant submits this results in the relatively small group of people in her position being treated in a highly prejudicial manner due to unpaid service to the Crown. The applicant submits this is not in accord with the purposes of the CFSA and PSSA.

[55] However, the respondent submits the applicant's proposed purposive interpretation cannot stand because the Pension Centre's interpretation actually upholds the purpose of the scheme and the applicant benefits from her 28 years of pensionable service by receiving annual allowance to which a lesser reduction is applied, as noted above. In addition, as noted, as well as being a factor in the formula for the calculation of the basic annuity, pensionable service is important for all classes of employees, particularly for part-time employees and Reservists, because it is used in the PSSA and the CFSA to determine certain benefit entitlement thresholds, reductions associated with anticipated retirement, and vesting of benefits.

[56] The respondent also submits the applicant's interpretation means that the pensionable service of not only all Reservists but also all part-time employees under the PSSA should be reduced to their actual paid time. This may affect many people and the way the scheme has been understood and administered. The respondent posits the following example: if pensionable service is based only on CF service (part-time service under the PSSA), part-time employees and Reservists would require a longer period of employment before becoming vested, and before reaching the service requirement associated with early retirement. Under the PSSA, Group 1 contributors (members who became contributors before January 1, 2013) who reach age 55 and 30 years of pensionable service are entitled to an unreduced annuity per PSSA, subparagraph 13(1)(c)(i). If the applicant's interpretation were accepted, contributors who have worked on a part-time basis in the public service would not be eligible for an unreduced pension.

[57] Effectively, the applicant's interpretation will require such part-time employees to have worked for 60 years in order to be eligible to a pension benefit without "penalty" at age 55. This is manifestly absurd. It took the applicant essentially to concede this point, but counsel emphasized she is not seeking to amend one or both pieces of legislation throughout, but only targeted subsections 5(3) and 5(5) of the PSSA.

[58] I am not persuaded I may make such a narrow interpretation for essentially "legislative purpose" reasons without doing injustice elsewhere, confirming my view that legislative amendment rather than judicial construction is the solution to the issue raised in this case. I should add that in my respectful view, as a judge and not a legislator, what the applicant seeks has merit provided it may be achieved without injustice elsewhere, and that those like the applicant contribute to the increased benefit they would obtain.

[59] In this connection and regarding the purpose of the scheme, the respondent submits:

> 73. Parliament established a maximum of 35 years of pensionable service, determined on a combined basis, to limit the size of the pensions the Government provides. In doing so, the legislator knew that some full-time employees with 35 years of pensionable service would not receive the maximum pension possible because of reductions in their pension benefits. Similarly, the legislator knew that some people would not necessarily accumulate a pension entitlement as if they had worked for 35 years on a full-time basis. The adjustment of the amount of the pension benefit (either under the *PSSA* or the *CFSA* Part I) accounts for periods of part-time employment, and reflects the lower contributions that were made to the pension fund. This proportionality principle is also important in the overall purpose of the schemes.

[60] I accept this submission. Therefore, while one aspect of the legislative scheme is to permit employees to accrue a 35-year maximum pension, that is not its only or determinative purpose. For example, in *Canada (Attorney General) v. Burke*, 2022 FCA 44, [2022] 4 F.C.R. 142 (*Burke*), the Federal Court of Appeal acknowledged the social benefit-conferring purpose of the *Old Age Security Act*, R.S.C., 1985, c. O-9 but concluded the scheme's purpose cannot be restricted to this, albeit important, purpose. In *Burke,* the Court refused to adopt an interpretation that would confer benefits on a person who did not meet the eligibility criteria. As in *Burke*, I have concluded the applicant does not meet the eligibility requirements as set out by Parliament. To accept the applicant's submissions would not be faithful to the clear wording of the provisions at issue.

VIII. Conclusion

[61] In my respectful view, the applicant has not shown that the Decision is unreasonable for the purposes of judicial review. Therefore, this application will be dismissed.

[62] However as indicated above it is my hope the respondent will accept the recommendation of the Pension Centre and have this matter reviewed for possible legislative review.

IX. Costs

[63] The parties agreed that the respondent would pay the applicant $2,500.00 if the applicant were successful, while the respondent did not seek costs. While the application will be dismissed, in my view the applicant should be awarded modest costs, which in the circumstances I assess at $1,000.00 all inclusive, for very ably albeit unsuccessfully advancing a meritorious issue that in my respectful view requires consideration in legislative review, as the Respondent Pension Centre itself notes in its Decision.

JUDGMENT in T-1343-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs of $1,000.00 are awarded to the applicant payable by the respondent.