



Disabled Soldiers' Lawsuit Update - September 21st, 2015

Canada's Disabled Soldiers' Lawsuit vs. Federal Political Party Positions:

In 2012, Miller Thomson LLP ("Miller Thomson") filed a class action lawsuit in the Supreme Court of British Columbia on behalf of disabled soldiers who had received low settlements under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, also known as the New Veterans Charter ("NVC").

The NVC replaced the *Pension Act* for new disability claims, and came into force on April 1, 2006. Since Miller Thomson was acting *'pro bono'* (i.e. charging no legal fees), the Equitas Disabled Soldiers Funding Society ("Equitas") signed an agreement with Miller Thomson to provide funds to cover all the disbursement costs of a proposed class action lawsuit on behalf of the disabled soldiers. The class action notice of claim lists six representative plaintiffs, all of whom were disabled in the Afghan War as members and/or reservists in the Canadian Forces, and who instituted the action on behalf of all those who suffered similar such disabilities and received inadequate settlements under the NVC. (See all legal documents at <http://equitassociety.ca/legal-action.html>).

One example of the difference between the *Pension Act* and the NVC concerns Canadian Forces members who are moderately disabled (e.g. one foot amputated) in the service of Canada. If these disabled members are unable to meet the "universality of service" requirement of the Canadian Forces, they eventually are released from the Canadian Forces (fired). Under the *Pension Act* these soldiers would have received a life-long pension. Under the NVC these same disabled members receive a portion of a lump sum payment, are provided transitional programs and are released from the Canadian Forces to self-generate income for themselves and their families often despite difficulty finding a new job. This example is one of the many reductions in benefits commonly referred to as "gaps" in the NVC.

In 2015, by which time the disabled soldiers' case was before the B.C. Court of Appeal, the appellate court (see below, p. 3: "Background of Events") agreed to an abeyance period for this litigation until May of 2016. The period was intended to permit the current Government or a possible new Government formed after the October 2015 federal election to fix the "gaps" in the NVC. Otherwise, prior to the resumption of litigation on May 15, 2016, the B.C. Court of Appeal is prepared to make its ruling on the constitutional rights of disabled soldiers as advanced in the lawsuit against the Government of Canada.

The courts are prepared to resume their role in this matter, and it is expected that provisions of Bill C-58, legislation that was passed late in the outgoing Parliament dissolved in August 2015, will close some of the disabled soldiers' benefit gaps at the center of the lawsuit. However, Bill C-58 in itself does not provide enough revised benefits to end the lawsuit. Therefore, the positions, promises and actions of the major political party positions that could affect the outcome of the lawsuit need to be carefully evaluated. After conducting an assessment the representative plaintiffs, with Equitas' backing, together with counsel at Miller Thomson will decide if they need to return to the courts to fight for the required disabled soldier benefits that were sought in the original lawsuit. The various party positions can be summarized as follows in no particular rank order:

The Green Party of Canada combines RCMP and Canadian Forces veterans in their policy despite there being different legislation to meet each group's needs. For Canadian Forces veterans they advocate a return to the *Pension Act* benefits, and to repeal the lump-sum payment for disability awards¹. This position would reinstate life-long tax free pensions to disabled veterans, their spouses, and children who live at home, while restoring the tax free widows' benefit for life. The *Pension Act* benefits would be in addition to the NVC's taxable programs available to all veterans such as rehabilitation, re-education, and the Earnings Loss Benefits ("ELB"). As the *Pension Act* is the standard being fought for in court, a return to the *Pension Act* would resolve the current lawsuit.

The Conservative Party of Canada as the Government of Canada has enacted Bill C-58 designed to close "gaps" in the NVC. They have stated they will keep the tax free, lump-sum and bundle other taxable NVC benefits (including the ELB) with the C.P.P., and the Canadian Forces Superannuation (if veterans qualify) as a life-long pension. Only severely disabled veterans, not partially or moderately disabled veterans, will qualify for a life-long pension. Without further advancements from this position the likelihood of resumed litigation is high.

The New Democratic Party ("NDP") declare that they will not return to the *Pension Act*. They have announced that they are supportive of fixing "gaps" in the NVC. Their policy doesn't mention the bundling of other benefits into a life-long pension. Moreover, they promise to introduce an updated policy after launching a review process. They also promise to increase widow's pensions under the *Pension Act*, life-long benefits that widows do not qualify for under the NVC, and to create a "*One Veteran, One Standard*" policy combining RCMP and Canadian Forces veterans (despite different legislation) if they become the Government. Although, the NDP has made broad undertakings that are welcome, whether or not the litigation would resume if the NDP formed Government is difficult to gauge at this time without specific details on these programs.

The Liberal Party of Canada would not return to the *Pension Act*. However, they are promising to increase the tax free lump-sum payment, and declared to provide a (probably taxable²) life-long pension model for all disabled veterans, not just the severely disabled. They promise to provide increased educational funding. They also promise to increase widows' pensions under the *Pension Act*, life-long benefits that widows do not qualify for under the NVC. These measures may further close various "gaps" in the NVC and could have an impact on ending the litigation. However, if they form Government specifics of their policy will need to be studied carefully to determine the actual way forward with regard to resumed litigation.

Of the promises made by all political parties, the Green Party of Canada's indication of a return to the *Pension Act* benefits if they formed Government would have the greatest impact in ending this litigation. With regard to the three major parties that realistically could form Government, or could be a major part of a minority Government after October 19th the following assessment has been made. At this time, Equitas believes that although they do not address the significant gaps created by replacing the *Pension Act* with Part III of the NVC, the package of reforms announced by the Liberal Party of Canada, specifically the undertaking to deliver a form of lifelong pensions to all disabled soldiers for economic loss in transition while increasing other benefits, has the potential to best address the problems with the NVC. These reforms target the problem many disabled soldiers experience transitioning to civilian life, and the issue of better benefits for spouses and widows who can become permanent caregivers to the disabled and unable to secure long-term income for themselves. Nevertheless, there still is remaining time during the election campaign for both the Conservative Party of Canada and the NDP to define clearly how each of them propose to fix the outstanding "gaps" in the NVC.

¹ Retrieved from: <http://www.greenparty.ca/en/policy/vision-green/people/veterans>

² Remains to be clarified on whether taxable or not

Background of Events (Disabled Soldiers' Lawsuit):

On October 30, 2012, the law firm Miller Thomson LLP ("Miller Thomson") filed a class action lawsuit against the Government of Canada in the Supreme Court of British Columbia on behalf of six disabled soldiers from the Afghan War who had received disproportionately low benefits under the NVC.

On May 30, 2013 the Government of Canada filed a notice of application in the B.C. Supreme Court to strike out the disabled soldiers' lawsuit. In July 2013, the Government of Canada's application was heard before B.C. Supreme Court Justice Weatherill. On September 6, 2013 Mr. Justice Weatherill ruled against the Government of Canada and allowed the disabled soldiers' lawsuit to proceed to the next stage.

On October 2, 2013 the Government of Canada filed an appeal of Mr. Justice Weatherill's judgement in the B.C. Court of Appeal. This appeal was heard in December 2014, during which hearing counsel for the Government of Canada continued to argue that the Government has no social contract or legally binding responsibility to take care of disabled soldiers. When the Government's position became known to the public there was considerable public dissatisfaction. To date, for reasons that will be explained, the B.C. Court of Appeal has not ruled on this case.

In January 2015, the newly-appointed Veterans Affairs Minister, Hon. Erin O'Toole, a veteran himself, reached out to Miller Thomson, the plaintiffs and Equitas to explore the possibility of an out-of-court settlement to address the issues identified in the lawsuit. Extensive 'without prejudice' discussions took place over several months. The Government tabled legislation in Parliament to enact certain veterans' program reforms which, while welcomed, were not regarded by the plaintiffs as comprehensive enough to justify a complete settlement of the lawsuit. The Government promised that further veterans program reforms would be instituted following a consultation process, and that better internal processes would be created within Veterans Affairs Canada ("VAC") to assist with NVC claims. With a fixed election date in October 2015, it was clear that the consultation process and any resulting changes would not be completed before the true value of these Government promises could be assessed at an individual basis and argued before the Courts.

While their dialogue was ongoing with Veterans Affairs Minister O'Toole, Miller Thomson, the plaintiffs and Equitas had extensive discussions with the Veterans Affairs parliamentary critics of the NDP and the Liberal Party of Canada to explore their proposals for veterans' program reforms.

On May 27, 2015 the Veterans Affairs Minister signed an agreement with the plaintiffs, through their counsel, Miller Thomson, to abandon the Government of Canada's appeal of Mr. Justice Weatherill's judgement allowing the plaintiffs the right to go straight to trial with their lawsuit. In return the plaintiffs agreed that the legal action in the trial court would be put into abeyance until May 2016. During the abeyance period the consultations promised by the Government, involving ongoing face-to-face meetings, were to take place in an attempt to resolve the outstanding issues that created the need for the disabled soldiers' lawsuit.

Since the appeal had already been argued before the B.C. Court of Appeal, and judgement on the case was reserved, the agreement to abandon the appeal was required to be submitted to the Court of Appeal for approval. When presented to the B.C. Court of Appeal, the agreement to the abeyance period for the entire litigation was approved; however, the court did not allow the Government of Canada to abandon their appeal. This means that, notwithstanding the agreement, the B.C. Court of Appeal will issue a ruling.

As stated in court by the presiding Judge, Mr. Justice Groberman, the reason for the B.C. Court of Appeal ruling was that the constitutional issues surrounding disabled soldiers' and class members' claims are too important for the Government of Canada to argue their case in front of the trial court without the benefit of a ruling on those issues from the B. C. Court of Appeal.

As a result of this decision, the B.C. Court of Appeal proceedings remain alive, and if a settlement cannot be reached in early 2016 the B.C. Court of Appeal will make its ruling prior to any resumption of proceedings in the trial court by the representative plaintiffs. The Court may require the parties to make further submissions on the appeal because of the changes to the governing law since the case was argued before the Court. The plaintiffs, Equitas and the Government of Canada have honoured the agreement by having two plaintiffs and one other Equitas member involved in the direct consultative processes with the Government of Canada addressing disabled veterans' issues with members of a larger stakeholder committee. Feedback from these Equitas members is that the talks are beneficial, productive and demonstrate that veterans are now holding key positions within VAC; however, the results confirmed to date are not sufficient or comprehensive enough to resolve the issues raised in the disabled soldiers' lawsuit.

In May 2015, prior to the Government of Canada consultation process beginning, an NDP Member of Parliament, Mr. Fin Donnelly, presented an Opposition Day Motion in the House of Commons:

“That, in the opinion of the House, there exists a standalone covenant of moral, social, legal, and fiduciary obligation between the people and Government of Canada to provide equitable financial compensation and support services to past and active members of the armed forces who have been injured, disabled or have died as a result of military service, and to their dependents, and which the Government of Canada is obligated to fulfill. Further, that the guiding principle for their recognition, care and compensation must always include compassion and dignity while properly taking into account the unique nature of military service.”

The representatives of all political parties, in concert with independent Members of the House of Commons, joined together in a unanimous vote of all those present - 266 yeas vs. 0 nays - supporting this resolution.

Within party policy, the federal NDP have vowed to review and update the NVC along with the lump-sum payments. However, the NDP have stated they will not advocate for the return to the *Pension Act* for new claims, and will continue with the NVC as the source of disability payments. They have further promised to replace the Veterans Review and Appeal Board, to support initiatives to help veterans transition, and to expand the Veterans Independence program for all veterans, widows and widowers. In addition, they have committed to providing equal access to the long-term care program (facilities). Lastly, the NDP have promised parity for injured reservists and to enhance veteran's rights.

On June 23, 2015, as part of an Omnibus Budget Bill, Government Bill 58 was given Royal Assent. Called “*An Act to amend the Canadian Forces Members and Veterans Re-establishment and Compensation Act and to make consequential amendments to another Act*”, this bill brought in:

- (1) A form of pension for disabled soldiers at age 65;
- (2) A critical injury benefit for soldiers having injuries that “*immediately caused a severe impairment and severe interference in their quality of life*”;
- (3) Limited care-giver allowances;
- (4) Stronger wording regarding Canadian Forces members' transition to civilian life; and
- (5) A form of social covenant, as follows:

“The purpose of this Act is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners

or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.”

In addition, the Conservative Government changed regulations to extend benefits to reservists, and to broaden entitlements to the Earning Loss Benefit (“ELB”) and the Permanent Impairment Allowance.

On August 2, 2015 a general federal election was called.

On August 14, 2015 Green Party Leader Elizabeth May detailed support for veterans that includes increased funding for former soldiers in need, a comprehensive review of the NVC, a reorganization of the Veterans Review and Appeal Board and the re-opening of recently closed Veterans Affairs offices. She also pressed for an end to lump-sum payments for disabled veterans. The Green of Party Canada’s stated policy is: *“The lifetime pension for injuries under the Pension Act (which preceded the NVC) must be reinstated.”* The Green Party of Canada is the only party to advocate a return to *Pension Act* benefits to cover disabled soldiers’ claims.

On August 24, 2015 Liberal Party of Canada Leader Justin Trudeau announced that he would re-establish lifelong pensions for disabled veterans, as well as increase the value of the disability award. The disability award would be a tax-free sum of money to be awarded to injured members or veterans of the Canadian Forces. He also pledged to re-open nine regional Veterans Affairs offices that were closed recently and provide education funding. Retired Lieutenant-General Andrew Leslie, a Liberal candidate together with Lieutenant-Colonel (Ret'd) Harjit Sajjan, also a Liberal candidate, clarified to Equitas that the lifelong pension would apply to all disabled veterans, not just severely disabled veterans, and that other benefits such as the lump-sum payments when applicable would be increased by a Liberal Government.

On September 21, 2015 NDP leader Tom Mulcair announced that the NDP if they formed Government would³:

- (1) Improve, review, and update the New Veterans Charter to ensure that it evolves, and benefits and services truly serve the needs of Canada's veterans and their families;
- (2) Develop a “One Veteran, One Standard” policy so all veterans will be treated equally;
- (3) Work to end service pension claw-backs for retired and disabled Canadian Forces and RCMP veterans;
- (4) Fix the Veterans Review and Appeal Board;
- (5) Improve & expand PTSD support for veterans to ensure they get the care they need, when they need it;
- (6) Reverse cuts to long-term care for veterans, and expand the Veterans Independence Program;
- (7) Provide the necessary funding to ensure that all veterans can be guaranteed a dignified funeral;
- (8) Increase veterans’ survivors’ pensions, and remove the restrictive marriage clause;
- (9) Immediately expand the powers of the Veterans Ombudsman to ensure that programs for veterans are delivered efficiently, effectively, and transparently; and
- (10) Reopen the nine Veterans Affairs offices that were closed by the Government.

³ Written policy sent to Equitas by the NDP for this newsletter

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NOTE: This document underwent an internal and external vetting process, including giving an advance draft newsletter copy to the Conservative Party, the Liberal Party and the New Democratic Party so they could provide clarification of their individual party positions.