Betrayal of a Commitment to Canada's Veterans' Community

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The Supreme Court of Canada has recently dismissed the Equitas class action lawsuit, thereby closing the door on the legal claim initiated against the federal government on behalf of Canada's disabled veterans' community.

The determined and courageous class action representatives were essentially seeking a court order compelling the government/Veterans Affairs Canada to address the financial disparity between disability benefits awarded pursuant to the traditional Pension Act and those benefits granted under the New Veterans Charter (now known as the Veterans Well-being Act).

Notwithstanding the Supreme Court of Canada's decision, the battle continues, as the dispute has moved from the legal jurisdiction to the political arena in order to achieve a resolution to this longstanding concern.

It is important to remember that, during the 2015 election campaign, the Prime Minister, in the context of the Equitas class action lawsuit, made a formal commitment to Canada's veterans that, should his party be successful, it would not be necessary for the disabled veterans to continue such a lawsuit as his government would re-establish lifelong pensions as an option to the lump sum disability award. It was clearly understood that this commitment would specifically address the basic discrimination that existed between the Pension Act and the New Veterans Charter/Veterans Well-being Act disability benefits, which disparity has been from the outset at the fundamental core of the class action claim.

As a general overview, the National Council of Veteran Associations (NCVA) continues to contend that the legislation emanating from Bill C-74 Part 4 (which is essentially the legislative implementation of Minister Seamus O'Regan's announcement of December 20, 2017 regarding the long-awaited promise of a "lifelong pension" option) has failed to live up to the Liberal government's 2015 election commitment to address the inequities in the New Veterans Charter. Additionally, it continues to ignore the "elephant in the room" which has overshadowed this entire discussion. The government has not satisfied veterans' expectations with regard to this formal commitment to "re-establish lifelong pensions" under the Charter so as to ensure that a comparable level of financial security is provided to all disabled veterans and their families over their life course.

With specific reference to the provisions of the new legislation effective April 1, 2019, the statutory and regulatory amendments ostensibly reflect the government's attempt to create a form of "pension for life" which includes the following three elements:

1. A disabled veteran will have the option to receive the present lump sum disability award in the form of a new Pain and Suffering Compensation benefit representing a monthly payment in the maximum amount of $1,150 per month for life. For those veterans currently in receipt of a disability award, retroactive assessment would potentially apply to produce a reduced monthly payment for life for such veterans. In effect, VAC has simply converted the amount of the lump sum disability award into a form of a lifetime annuity as an option for those disabled veterans who are eligible.

2. A new Additional Pain and Suffering benefit will essentially replace the Career Impact Allowance (Permanent Impairment Allowance) under the current Veterans Charter, with similar grade levels and monthly payments which reflect a non-taxable non-economic benefit but would be limited in its application to those veterans suffering a "permanent and severe impairment which is creating a barrier to re-establishment in life after service."

3. A new, consolidated Income Replacement Benefit, which is taxable, would combine four pre-existing benefits (Earnings Loss Benefit, Extended Earnings Loss Benefit, Supplementary Retirement Benefit, and Retirement Income Security Benefit) with a proviso that the IRB would be increased by one per cent every year until the veteran reaches what would have been 20 years of service or age 60, and that any veteran who wishes to join the work force may also earn up to $20,000 from employment before any reduction will be made to their IRB payment. It is not without financial significance that the current Career Impact Allowance and Career Impact Allowance Supplement have been eliminated from the Income Replacement Benefit package.

Although, as per usual, "the devil remains in the details" as to the relevance of these new legislative provisions and amended regulations flowing from Bill C-74 Part 4 to individual disabled veterans, it is readily apparent that only a circumscribed number of seriously disabled veterans and their survivors may benefit from the new legislation when compared to the level of entitlement available under the present New Veterans Charter/Veterans Well-being Act. However, the greater majority of disabled veterans will not be materially impacted by the legislation in that the new benefits under these legislative and regulatory amendments will have limited applicability. In addition, it is self-evident that the financial disparity between the *Pension Act* and the New Veterans Charter/Veterans Well-being Act will be perpetuated for this significant cohort of disabled veterans in Canada.

Much more is required to improve the Charter so as to address the proverbial "elephant in the room" in that the legislation stemming from Bill C-74 Part 4 fails to satisfy the priority concerns of the veterans' community in relation to:

(i) Resolving the significant disparity between the financial compensation paid to disabled veterans under the *Pension Act* and the Charter; and

(ii) Ensuring that no veteran under the New Veterans Charter/Veterans Well-being Act receives less compensation than the veteran under the *Pension Act* with the same disability or incapacity in accordance with the "one veteran – one standard" principle.

It is totally unacceptable that we continue to have veterans' legislation in Canada which provides a significantly higher level of compensation to a veteran who is injured prior to 2006 (date of enactment of the New Veterans Charter) when compared to a veteran who is injured post-2006. If applied to the Afghanistan conflict this discrimination results in veterans of the same war having totally different pension benefits.

During the course of discussions following Budget 2017 leading up to the Minister's announcement, there was considerable concern in the veterans' community, which proved to be well founded, that the government would simply establish an option wherein the lump sum payment (disability award) would be apportioned or reworked over the life of the veteran for the purposes of creating a lifelong pension. NCVA and other veteran stakeholders, together with the Ministerial Policy Advisory Group, strongly criticized this proposition as being totally inadequate and not providing the lifetime financial security which was envisaged by the veterans' community.

It is fair to say that the reasonable expectation of veteran stakeholders was that some form of substantive benefit stream needed to be established which would address the financial disparity between the benefits received under the Pension Act and the NVC for all individually disabled veterans.

It has been NCVA's consistent recommendation to the Minister and to the Department that VAC should adopt the major conclusions of the Ministerial Advisory Group Report formally presented to the Veterans Summit in Ottawa in October 2016 together with the recommendations contained in the 2017 NCVA Legislative Program – both of these reports proposed that the combination of the best provisions of the *Pension Act* and the best provisions of the New Veterans Charter would produce a form of lifetime pension in a much more realistic manner in order to secure the financial security for those veterans who need this form of monetary support through their lifetime.

If the "one veteran – one standard" philosophy advocated by VAC has any meaning, this glaring disparity between the *Pension Act* and the New Veterans Charter/Veterans Well-being Act benefits for the greater majority of disabled veterans requires that the government seize the moment and satisfy the financial needs of Canadian veterans and their dependants. The new legislation flowing from Bill C-74 Part 4 has missed an opportunity to recognize that the longstanding social covenant between the Canadian people and the veterans' community demands nothing less.

We would refer to recent NCVA op-ed papers published over recent months in response to the Minister's announcement and subsequent public statements. This analysis, together with Appendices A and B to this paper, address in considerable detail the fundamental deficiencies and flaws contained in the VAC position and outlines a series

of proposals as to what can be done to improve the Pension for Life concept emanating from Bill C-74 Part 4.

We strongly encourage the government to seriously consider the implementation of the following major recommendation of the Ministerial Policy Advisory Group as a first step to addressing this problem of the "elephant in the room":

> "[T]he enhancement of the Earnings Loss Benefit/Career Impact Allowance as a single stream of income for life, the addition of Exceptional Incapacity Allowance, Attendance Allowance and a new monthly family benefit for life in accordance with the *Pension Act* will ensure all veterans receive the care and support they deserve when they need it and through their lifetime."

In specific terms we would also suggest that the following steps would dramatically enhance the legislative provisions and amended regulations relevant to the Pension for Life proposition found in Bill C-74 Part 4 and go a long way to satisfying the "one veteran – one standard" approach presently followed by VAC as a basic principle of administration:

1. Liberalize the eligibility criteria in the legislation and regulatory amendments for the new Additional Pain and Suffering Compensation benefit so that more disabled veterans actually qualify for this benefit – currently, only veterans suffering from a severe and permanent impairment will be eligible. It bears repeating that the greater majority of disabled veterans simply will not qualify for this new component of the proposed lifelong pension.

   It is noteworthy that the new regulations with respect to the Additional Pain and Suffering Compensation benefit ostensibly replicate the eligibility prerequisites of the Permanent Impairment Allowance/Career Impact Allowance. These PIA/CIA provisions have produced restrictive and arbitrary results over the years since their inception and were further complicated with the formula established by VAC in 2017 in relation to the interpretation of the CIA grades through the employment of the "Diminished Earnings Capacity" test.

   A more generous and readily understood approach is required in the amended regulations for the APSC benefit so as to generate a more inclusive class of disabled veterans. It has been the longstanding position of NCVA that the traditional PIA/CIA regulations and policy guideline requirements reflected a "blunt instrument" as opposed to a "precise tool" in evaluating the overall impact that an injury may have on a disabled veteran.

   In NCVA's 2017 Legislative Program, we have argued that the veterans Disability Award (Pain and Suffering Compensation benefit) initially granted should be a major determinant in evaluating CIA (APSC) qualifications. The above-mentioned "Diminished Earnings Capacity" test employed by VAC and the apparent new

criteria set out in the regulatory amendments for APSC qualification represent, in our judgment, a more restrictive approach to the Disability Award evaluation.

In effect, it is the position of NCVA that this employment of the Disability Award (PSC) percentage would produce a more straightforward and easier-understood solution to this ongoing issue of CIA (APSC) eligibility. The following would reflect this form of evaluation criteria for CIA (APSC):

Veteran Disability Award (PSC)	CIA (APSC) Grade
78% or over	1
48% - 78%	2

Alternatively, the DA (PSC) percentage could be applied in a more precise manner by using the percentile against the maximum CIA/APSC compensation available – for example, if a veteran is in receipt of a DA (PSC) of 65% the veteran would receive 65% of the maximum CIA (APSC) allowance. For the purposes of Grade 3 assessment, it is our recommendation that the DA (PSC) percentile could be similarly applied; i.e. if a veteran is in receipt of a DA (PSC) of 25%, the veteran would receive 25% of the maximum CIA (APSC) allowance. Note that this quantification of career impact has been utilized under the *Pension Act* for almost one hundred years in assessing the loss of earning capacity of a disabled veteran for lifetime pension purposes.

The adoption of this type of approach would have the added advantage of enhancing the Pension for Life so as to incorporate more disabled veterans and address the fundamental parity question in relation to *Pension Act* benefits.

With reference to the regulatory amendments emanating from Bill C-74 Part 4, we would also express concern that the regulatory prerequisite for the APSC benefit with regard to the disability of amputation remains arbitrarily defined, both as to eligibility and designated grade level.

It is to be noted that amputation at or above the knee or at or above the elbow is retained as a fundamental requirement for qualification in relation to a single-limb amputee – our years of experience with The War Amputations of Canada make clear that the loss of a limb at any level represents a “severe and permanent impairment” for the veteran amputee – the current arbitrary distinction is not justified and should be amended.

2. Create a new family benefit to parallel the *Pension Act* provision in relation to spousal and child allowances to recognize the impact of the veteran’s disability on his or her family.

3. Incorporate the special allowances under the *Pension Act*, i.e. Exceptional Incapacity Allowance and Attendance Allowance, into the New Veterans

Charter/Veterans Well-being Act to help address the financial disparity between the two statutory regimes.

In my over 40 years of working with The War Amps of Canada, we have literally handled hundreds of special allowance claims and were specifically involved in the formulation of the Exceptional Incapacity Allowance/Attendance Allowance guidelines and grade profiles from the outset. We would indicate that these two special allowances, EIA and AA, represent an integral portion of the compensation available to war amputees and other seriously disabled veterans governed by the *Pension Act*.

It is of further interest in our judgment that the grade levels for these allowances tend to increase over the life of the veterans as the "ravages of age" are confronted – indeed, non-pensioned conditions such as the onset of a heart, cancer or diabetic condition, for example, are part and parcel of the EIA/AA adjudication uniquely carried out under the *Pension Act* policies in this context.

As a sidebar, it is interesting that VAC refers to the new Caregiver Recognition Benefit of $1,000.00 a month as an indication of the government's attempt to address the needs of families of disabled veterans. What continues to mystify the veterans' community is why the government has chosen to "reinvent the wheel" in this area when addressing this need for attendance/caregiving under the New Veterans Charter/Veterans Well-being Act. For many decades, Attendance Allowance (with its five grade levels) has been an effective vehicle in this regard, providing a substantially higher level of compensation and more generous eligibility criteria to satisfy this requirement. In this context, it is noteworthy that the spouses or families of seriously disabled veterans often have to give up significant employment opportunities to fulfill the caregiving needs of the disabled veteran – $1,000.00 a month is simply not sufficient recognition of this income loss. VAC should return to the Attendance Allowance provision and pay such benefit to caregiver directly if so desired.

We would strongly suggest that VAC pursue the incorporation of the EIA/AA special allowances into the New Veterans Charter/Veterans Well-being Act prior to the formal implementation of these legislative/regulatory amendments on April 1, 2019 so as to address these deficiencies in the Pension for Life.

4. Establish a newly-structured Career Impact Allowance which would reflect the following standard of compensation: "What would the veteran have earned in his or her military career had the veteran not been injured?" This form of progressive income model, which has been recommended by the Ministerial Policy Advisory Group and the Veterans Ombudsman's Office, would be unique to the New Veterans Charter/Veterans Well-being Act, and would bolster the potential lifetime compensation of a disabled veteran as to his or her projected lost career earnings as opposed to the nominal one per cent increase provided in the proposed legislation.

As a general observation in relation to the new legislation and the regulatory amendments with regard to the evaluation of the calculation surrounding the new Income Replacement Benefit, we would suggest the following concerns are material:

- With reference to the one percent per year increase in the IRB, it is to be noted that this percentile augmentation ostensibly decreases in financial impact with the higher number of years of military service experienced by the disabled veteran and disappears completely for those veterans who have served for over 20 years prior to suffering their injury or disability.

  It is also of significance that, with the elimination of the Career Impact Allowance supplements ($12,000 per year allowance), new veteran applicants post-April 1, 2019 will potentially be at a disadvantage due to the impact of this mathematical calculation, as for many veterans the one percent increase in the IRB will not make up for the loss of the CIA(S).

- The post-65 benefits of the IRB (current RISB) are substantially impacted by a multitude of financial offsets which reduce the net amount of this benefit to the disabled veteran. Such financial offsets encompass any other income received by the veteran including CPP, OAS, CFSA benefits et al. In reviewing the VAC pension model used in the public statements emanating from the Department and the examples employed in the 2018 budget papers, it would appear that VAC has not factored in these offset elements in the overall analysis.

We would strongly suggest that the Department consider the impact of these factors relative to the new Income Replacement Benefit so as to ensure this one percent increase has substantive and meaningful impact for disabled veterans who require such income replacement for life. In addition, we would submit that VAC ultimately adopt the above-mentioned progressive income model for a newly structured form of CIA in accord with the approach utilized by the Canadian courts as to “future loss of income.”

In summary, it is fundamental to understand that it was truly the expectation of the disabled veteran community that the “re-establishment” of a Pension for Life option would not just attempt to address the concerns of the small minority of disabled veterans but would include a recognition of all disabled veterans who require financial security in coping with their levels of incapacity.

As a final observation, the Minister consistently talks of the significance that the government attaches to the wellness, rehabilitation and education programs under the New Veterans Charter/Veterans Well-being Act. As we have stated on a number of occasions, we commend VAC for its efforts to improve these important policies. NCVA recognizes the value and importance of wellness and rehabilitation programs; however, we take the position that financial security remains a fundamental necessity to the successful implementation of any wellness or rehabilitation strategy. It is readily apparent that this is not a choice between wellness and financial compensation as

advanced by the Minister and the Prime Minister, but a combined requirement to any optimal re-establishment approach to medically released veterans.

Ideally, we would like to believe that VAC, working together with relevant Ministerial Advisory Groups and other veteran stakeholders, could think “outside the box” by jointly striving over time to create a comprehensive program model that would essentially treat all veterans with parallel disabilities in the same manner as to the application of benefits and wellness policies – thereby resulting in the elimination of artificial cut-off dates that arbitrarily distinguish veterans based on whether they were injured before or after 2006.

In our judgment, the adoption of this innovative policy objective would have the added advantage of signaling to the veterans’ community that VAC is prepared to take progressive steps to tackle legislative reform beyond the statute emanating from Bill C-74 Part 4 so as to address this fundamental core issue of concern to Canada’s veterans.

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Appendix A:

A realistic comparison on a “apples to apples” basis reveals that a significant disparity will continue to exist between compensation for seriously disabled veterans under the Pension Act and the New Veterans Charter (Veterans Well-being Act) once the Minister’s proposals, announced on December 20, 2017, take effect in April 2019. It is essential in this context to recognize that the actual maximum amounts of compensation under each statutory regime will be as follows:

NEW VETERANS CHARTER/VETERANS WELL-BEING ACT (2019)

Pain and Suffering Compensation (per month or lump sum)	$1,150.00
Additional Pain and Suffering Compensation	$1,500.00 (limited to veterans suffering permanent and severe impairment)
Caregiver Allowance (per month)	$1,000.00
Total (maximum per month)	$3,650.00

PENSION ACT

- Veteran plus two children

Disability Pension (maximum per month)	$4,118.00
Note: Pension Compensation for family/dependants is not available under the New Veterans Charter	
Exceptional Incapacity Allowance (maximum per month)	$1,478.00
Attendance Allowance (maximum per month)	$1,848.00
Total (maximum per month)	$7,444.00

- Veteran plus spouse

Disability Pension (maximum per month)	$3,491.00
Note: Pension Compensation for family/dependants is not available under the New Veterans Charter	
Exceptional Incapacity Allowance (maximum per month)	$1,478.00
Attendance Allowance (maximum per month)	$1,848.00
Total (maximum per month)	$6,817.00

- Single veteran

Disability Pension (maximum per month)	$2,792.00
Exceptional Incapacity Allowance (maximum per month)	$1,478.00
Attendance Allowance (maximum per month)	$1,848.00
Total (maximum per month)	$6,118.00

In this context, it is noteworthy that the Minister and senior governmental officials of VAC, over recent months in their public pronouncements, have emphasized that additional benefits and services are uniquely available under the New Veterans Charter/Veterans Well-being Act with respect to income replacement, rehabilitation, and wellness programs.

We commend Veterans Affairs Canada for its efforts to improve the Department's wellness and educational policies. However, it should be noted, that a number of programs dealing with essentially parallel income replacement and rehabilitation policies already exist under the *Pension Act* regime by means of services and benefits administered by the Department of National Defence through their SISIP Long Term Disability insurance policy and Vocational Rehabilitation (VOC-REHAB) Programs.

Although, at the time of the enactment of the New Veterans Charter in 2006, Veterans Affairs Canada committed to eliminating SISIP LTD and VOC-REHAB programs and creating a new gold standard in regard to these wellness programs, the reality is that the SISIP LTD and VOC-REHAB insurance policy has been and continues today to be "the first responder" for the greater majority of disabled veterans who have been medically released from the Canadian Armed Forces in relation to both the *Pension Act* and the New Veterans Charter.

As a fundamental tenet of our position we would like to think that the Minister could be convinced that, rather than choosing one statutory regime over the other, the best parts of the *Pension Act* and the best parts of the New Veterans Charter/Veterans Well-being Act would provide a better compensation/wellness model for all disabled veterans in Canada.

Appendix B:

It is of even greater significance to recognize the effect of the Pension for Life policy, in accordance with the Veterans Well-being Act in effect on April 1, 2019, on those disabled veterans who might be considered moderately disabled as the disparity in financial compensation is even more dramatic.

Let us take the illustration of a veteran with a 35% disability assessment:

- Assume the veteran has a mental or physical injury which is deemed not to be a "severe and permanent impairment" – the expected eligibility reality for the greater majority of disabled veterans;
- The veteran enters the rehabilitation program with SISIP LTD as a first responder or VAC;
- Ultimately the veteran finds employment in the public or private sector attaining an income of at least 66-2/3% of his or her former military wage.

It is important to be cognizant of the fact that, once such a veteran earns 66-2/3% of his or her pre-release military income, the veteran is no longer eligible for the Income Replacement Benefit and, due to the fact that the veteran's disability does not equate to a "severe and permanent impairment," the veteran does not qualify for the new Additional Pain and Suffering Compensation Benefit.

Thus, in accord with the Minister's announcement of December 20, 2017, the veteran will receive the following Pain and Suffering compensation benefit:

- 35% of $1,150.00 ($402.50 monthly/$4,830.00 yearly)

On the other hand, the *Pension Act* veteran at 35% will receive as a Disability Pension:

- 35% of $2,792 if single ($977.20 monthly/$11,726.40 yearly)
- 35% of $3,491 with spouse ($1221.85 monthly/$14,662.20 yearly)
- 35% of $4,118 with spouse and two children ($1,441.30 monthly/$17,295.60 yearly)

We would underline that this analysis demonstrates the extremely significant financial disparity which results for this type of moderately disabled veteran. It is essential to recognize that it is expected, as of April 1, 2019, that over 80% of disabled veterans under the New Veterans Charter/Veterans Well-being Act will fall into this category of compensation. Unfortunately, the perpetuation of these two distinct classes of veteran pensioner is self-evident and remains unacceptable to the overall veterans' community.