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October 03, 2023 03 octobre 2023		
Court File No. Kadara Thompson		
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Court File No.

FEDERAL COURT OF CANADA

B E T W E E N:

DAVID MUSHING

Applicant

- and -

CANADA (ATTORNEY GENERAL)

Respondent

NOTICE OF APPLICATION FOR REVIEW UNDER

Federal Courts Act R.S.C., 1985, c. F-7, *Section 18.1*

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard in Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the Federal Court Rules, 1998, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU**

Dated at Ottawa, this Second day of October 2023

Issued by:

Address of: The Registrar
Federal Court of Canada
90 Elgin Street
Ottawa, Ontario
K1A 0H9

TO : Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

APPLICATION

This is an application for judicial review in respect of a decision by the Veterans Review and Appeal Board (VRAB). The Entitlement Appeal decision is dated September 6, 2023, and finds that the Applicant's diagnosis of kidney stones is not caused or aggravated by his military service.

The applicant makes application for this Court to declare invalid or unlawful, or quash, or set aside and refer back for determination the decision of the VRAB in accordance with such directions as it considers to be appropriate.

The grounds of this application are that the VRAB:

1. Based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it pursuant to s.18.1(4)(d) of the *Federal Courts Act*; and
2. Acted in any other way that was contrary to law pursuant to s.18.1(4)(f) of the *Federal Courts Act*;

Application overview

1. The Applicant retired from the Canadian Armed Forces in 2011 after 26 years of honourable service. From April 2002 to August 2008, the Applicant was posted to Canadian Forces Base (CFB) Shearwater.
2. In December 2003, the drinking water at CFB Shearwater was brown in colour, and tested as having an elevated iron content. By May 2005, the drinking water at CFB Shearwater was deemed "unsafe for human consumption." Aside from iron, there were other known contaminants in the drinking water making it unsafe to drink.
3. As a result of the unsafe drinking water, a canteen was set up for several years where drinks were made available to those on base. Surprisingly, the canteen did not serve water. Instead, it provided sugary juice and carbonated drinks. As a result, the Applicant was in a chronic state of dehydration while at work.
4. Starting in 2005 the Applicant developed severe kidney stones. He attributes the onset of his kidney stones to the conditions of his military service, while serving at CFB Shearwater.

5. Medically, it is impossible to determine the exact cause of a kidney stone. Possible accepted causes for kidney stones include genetic predisposition, chronic dehydration, and dietary influences.
6. Once kidney stones develop, there is an increased likelihood that they will persist and return. For the Applicant, he has suffered with kidney stones consistently since 2005. Some of his larger kidney stones required medical intervention.
7. Before the VRAB Entitlement Appeal, the Applicant provided evidence of the above-noted drinking water conditions at CFB Shearwater. Furthermore, he demonstrated that he has no genetic history of kidney stones.¹ Additionally, the Applicant has been seeing a dietician who has ruled out typical dietary causes for his kidney stones.
8. When there are competing causes for a single phenomenon, if all but one have been discounted, then the remaining cause must be the correct one. Using this deductive logic, the only remaining cause for the onset of the Applicant's kidney stones is dehydration. The only cause for the Applicant's dehydration was lack of adequate drinking water while serving at CFB Shearwater – a condition of his military service.
9. The VRAB Entitlement Appeal decision does not dispute that the Applicant suffers from kidney stones and that they started in 2005. Moreover, the decision does not dispute that the drinking water at CFB Shearwater was not safe for human consumption. The Applicant's claim is denied because a May 5, 2017, medical opinion provided Dr. Jung is deemed "extremely vague" and "merely states a possibility of a connection, but is not conclusive."
10. The VRAB Entitlement Appeal board decision is unreasonable for the following, non-exhaustive, reasons:
 - a. The VRAB Entitlement Appeal board have failed to interpret the evidence before them pursuant to s.39 of the *Veterans Review and Appeal Board Act*. Dr. Jung is unable to conclusively state that dehydration is the cause of the Applicant's kidney stones because the morphology and composition of all kidney stones are identical, regardless of the cause.

¹ The Applicant's father had a single kidney stone that developed as a side effect from taking dyazide to treat high blood pressure.

- b. The VRAB Entitlement Appeal board have not acted in the spirit of the legislation, specifically section 3 of the *Veterans Review and Appeal Board Act* and section 2.1 of the *Veterans Well Being Act*.
- c. The VRAB Entitlement Appeal board did not provide reasons to understand how they discounted the possibility that the unpotable drinking water at CFB Shearwater aggravated the Applicant's kidney stones, pursuant to s.46 of the *Veterans Well Being Act*.

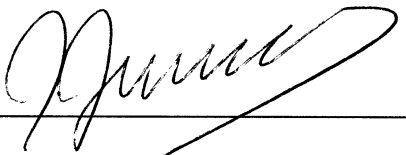
The application will be supported by the following materials:

- 1. The VRAB Entitlement Appeal decision is dated September 6, 2023; and
- 2. Supporting documentary exhibits; extracts of applicable statutory provisions; and other such materials as will be identified in the application.

Request for Certified Record

Pursuant to ss. 317-318 of the *Federal Courts Rules*, the Applicant requests the VRAB to send a certified copy of all material that is in its possession to the Applicant and to the Registry.

October 2, 2023



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