VETERANS REVIEW AND APPEAL BOARD
INTERPRETATION DECISION

HEARING DATE: November 23, 2004

DECISION RELEASED: February 1, 2005

Re: **Interpretation of subsection 32(1) and section 111 of the *Veterans Review and Appeal Board Act,* S.C. 1995, c. 18**.

PANEL MEMBERS: Victor Marchand, Presiding Member
Françoise Dufour
Raymond Fournier
Linda MacInnis
Don Wilson

APPEARING: Pierre Allard, Royal Canadian Legion, Dominion Command
Evan Elkin, Bureau of Pensions Advocates
Harold Leduc, Canadian Peacekeeping Veterans Association
Thomas Brooks, The Company of Master Mariners of Canada

QUESTION: What criteria should be applied by the Veterans Review and Appeal Board (the Board) when determining whether to reconsider a decision based on the presentation of new evidence, under subsection 32(1) or section 111 of the *Veterans Review and Appeal Board Act*?

EVIDENCE:

Exhibits: Ex. I-1 Document entitled "Approval Rates For 'Conditions' Favorable Vs. Unfavourable" **(**author unknown)
- presented to Panel by Pierre Allard

Attachments:
Att. I-1 *Amadeo Garrammone et Procureur Général du Canada* [2004] CF 1553
Att. I-2 Paper entitled "Tribunal Management: In Search of Nimbleness" presented at Council of Canadian Administrative Tribunals meeting of June 3, 2002 (written and presented by P. Showler and L. Disenhouse)

Introduction

This request for an interpretation decision was made by the Acting Chief Pensions Advocate pursuant to section 37 of the *Veterans Review and Appeal Board Act*. This decision will deal with the interpretation of sections 32 and 111, as well as with section 31 of the *Veterans Review and Appeal Board Act.* The specific question to be determined concerns the test or criteria which should be applied by the Board in determining whether to reconsider a decision, where that reconsideration is requested based on the presentation of new evidence.

Background

The question being determined by this interpretation panel of the Board has its roots in the judgment of the Federal Court of Canada in *MacKay v. Attorney General of Canada* [1997] (F. C. T.D.),[1] Reported at 129 F.T.R. 286.

In the *MacKay* judgment, Mr. Justice Teitelbaum noted that there was an established and accepted legal test for determining whether to reopen a decision, where "new" or fresh evidence had been produced after the decision in question had been rendered. Although the test originated in the Supreme Court of Canada decision in a criminal law case: *Palmer and Palmer v. The Queen*, [1980] 1 S.C.R. 759, Mr. Justice Teitelbaum concluded in the *MacKay* decision that the *Palmer* fresh evidence test was also applicable to reconsideration applications based on new evidence under the *Veterans Review and Appeal Board Act*. Mr. Justice Teitelbaum cited the four principles of the new or fresh evidence test, and then went on to analyse the new evidence presented by Mr. MacKay in light of the four principles of the test. The principles are:

1 evidence should generally not be admitted if, through the exercise of *due diligence*, it could have been adduced [in the previous hearing], provided that this principle will not be applied as strictly in a criminal case as in a civil case;

2 the evidence must be relevant in the sense that it bears upon a decisive or a potentially decisive issue in the adjudication;

3 the evidence should be credible, in the sense that it is reasonably capable of belief;

4 the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced before, be expected to have affected the result.

Based on Mr. Justice Teitelbaum's endorsement of the *Palmer* test for the Board's use in reconsideration applications based on new evidence, the Board has been applying the test to determine whether or not to reconsider decisions.

Precis of Interpretation Decision

After consideration of all of the submissions made to the Panel in this matter, the Panel concludes that all components of the *Palmer-MacKay* fresh evidence test are applicable in the determination of whether to reconsider a Board decision based on new evidence.

The Board has concluded that the diligence principle of the test is applicable to reconsideration applications because it is consistent with the intent and spirit of the legislation and ultimately is in the best interests of appellants. The application of the principle of diligence recognizes that the proper time for gathering all relevant evidence and preparing an applicant's case in a complete and thorough manner is before a review hearing (termed a "review" at the first stage of appeal before the Board) takes place. The application of the diligence principle allows for the reasonable assumption that any evidentiary gaps or shortcomings at that "review" stage will have been addressed by the final hearing before the Board, which is termed the "appeal" stage.

The application of the diligence principle by the Board ultimately works to the

[1]In the MacKay decision, the Federal court reviewed the Board's decision on a reconsideration application made pursuant to section 111 of the *Veterans Review And Appeal Board Act*.

advantage of the appellant and failures to obtain evidence necessary to establish a case are neither in the interests of the appellant nor of the administrative system as a whole. The Board recognizes that any pension or benefit to which the appellant is entitled should be awarded as early in the appeal process as possible, therefore it is incumbent upon the system to ensure the appellant's best possible case is put forward at the earliest possible time.

The application of the principle of diligence with respect to applications for reconsideration respects the intent of section 31 of the *Veterans Review and Appeal Board Act* which states that decisions of an appeal panel are final and binding. However, the principle of due diligence also leaves the Board with discretion to re-open and reconsider a decision where an appeal panel determines that the circumstances of a particular case may merit a reconsideration, based on the presentation of new evidence.

Therefore, the Board concludes that in any application for reconsideration of a decision based on new evidence pursuant to subsection 32(1) or section 111 of the *Veterans Review and Appeal Board Act*, the Board will determine whether to reconsider a decision using several criteria including the principle of due diligence.

In applying the due diligence principle, the Board will decide whether to admit the new evidence after considering whether such evidence could have been placed before the Board's final appeal hearing was held and the final decision rendered. In any reconsideration application based on the presentation of new evidence, the Board will expect to receive submissions from the appellant (or his or her legal representative) addressing the reason the evidence was not presented by or at the time of the final appeal hearing.

The Board will also analyze new evidence presented on any reconsideration application pursuant to subsection 32(1) or section 111 of the *Veterans Review and Appeal Board Act* using several other criteria. These will include whether or not the submitted evidence is relevant and credible, and whether or not it is of sufficient significance to alter the final appeal decision.

ARGUMENTS

[1] The main thrust of the submissions made to the Panel on the issue of the test or criteria to be applied in reconsideration applications pursuant to subsection 32(1) or section 111 of the *Veterans Review and Appeal Board Act* was that the diligence principle - the question of whether the evidence could have been made available at the appeal stage of the process with the exercise of diligence in preparing the case - should not be used by the Board in assessing new evidence.

[2] The hearing opened with arguments from acting Chief Pensions Advocate, Mr. Evan Elkin, on behalf of the Bureau of Pensions Advocates (BPA). Mr. Elkin argued that the application of the due diligence criterion was inconsistent with the spirit and the intent of the legislation and with the Veterans Affairs redress process overall.

[3] He pointed out that a requirement to establish due diligence is not cited specifically in the legislation as a pre-condition to obtaining a reconsideration, and contended that such a requirement is not consistent with the generous spirit and intent of the Veterans Affairs legislation and system. The Chief Pensions Advocate did agree that although the same legislation

does not explicitly refer to credibility or relevance, these are acceptable criteria as they are implied elements of any adjudication or administrative decision-making based on the evaluation of evidence. However, he also suggested that the Veterans Affairs system places a much greater emphasis on generosity than it does on finality.

[4] Mr. Elkin observed that subsection 82 (1) of the *Pension Act* uses the same wording as found in sections 32 and 111 of the *Veterans Review and Appeal Board Act*. He contended that, as rules of legislative interpretation argue for consistency as between related statutes, therefore both sections of the legislation should be interpreted consistently. He argued that it is inconsistent for the Board to impose a due diligence requirement in determining whether to reconsider an appeal decision, when the Minister does not impose the same requirement in determining whether to conduct a Ministerial review based on new evidence.

[5] Mr. Elkin noted that while due diligence and finality are legitimate concerns in other adjudication systems, they are less so in the Veterans Affairs system which is designed to be non-adversarial. He contended that because there is no other party affected by a decision of the Board, the concept of finality should not play a major role in the determination of applications for reconsideration contending that, under the legislation, finality is subordinate to generosity.

[6] Mr. Elkin suggested that Mr. Justice Teitelbaum may have erred in the *MacKay* decision in making an "uncritical assumption" that the fresh or new evidence test which was taken from a criminal case should be applied to the assessment of new evidence in reconsideration applications before the Veterans Review and Appeal Board. He suggested that since the time this alleged error was made by the Federal Court in the *MacKay* decision, it has been repeated in several subsequent decisions of the same court. He contended that the situation should be reassessed by the Board because the Federal Court may not have fully understood the extremely generous and non-adversarial nature of the Veterans Affairs pension process.

[7] It was also suggested that the application of the due diligence criterion would have an adverse or “chilling effect” on the system as a result of delays created at the review and appeal levels because Advocates and other representatives would feel a requirement to await medical reports and other documentation before proceeding to a hearing.

[8] On behalf of the Royal Canadian Legion (RCL), Dominion Command, Mr. Pierre Allard, Director of the Service Bureau, argued that the implications of the requirement of due diligence are extremely serious. Mr. Allard submitted that due diligence has a place in criminal law but no place in the adjudication of veterans’ pensions before a quasi- judicial tribunal. He contended that requirement of the due diligence principle could even affect decision reviews at the Ministerial level, and suggested that by focussing on due diligence, the Board would be allowing “mission creep” to occur.

[9] Mr. Allard referred to the paper written and presented by P. Showler and L. Disenhouse at the Council of Canadian Administrative Tribunals in 2003, “Tribunal Management: In Search of Nimbleness.” He noted that the main mandate and rationale behind administrative tribunals is the speedy resolution of claims. Mr. Allard submitted that the" benefit of the doubt" provisions in the legislation as well as other provisions in the *Veterans Review and Appeal*

Board Act do not require diligence. What is required, he noted, is efficiency in that clients have a right to timely decisions. He went on to say that fairness is also required and that the best evidence should be placed before the tribunal for fair decision-making. Quality decision-making is required, with accurate and relevant information before the panel. Cost-effectiveness is another benefit of tribunals. He suggested that the Veterans Review and Appeal Board must be quick, informal, and nimble.

[10] The RCL representative contended that the Board should take the position that a due diligence requirement has no application to the Board's process on reconsideration. In his view, even the jurisprudence indicates that it has no place. Other than the decision in *Caswell* ([2004] F.C.J. No. 1559), Mr. Allard submitted that there are no decisions of the Federal Court which have said that due diligence is applicable to the Veterans Review and Appeal Board's proceedings. It was also submitted that a tribunal is not supposed to look at evidence which is not before it, but only at the evidence which is before it. He pointed out that with respect to the Veterans Review and Appeal Board, section 39 of the *Veterans Review and Appeal Board Act* does not relieve the applicant of the onus of proving causal connection, but it does impose an obligation on the Board to draw favourable inferences where there is a doubt. He suggested it is the duty of a tribunal to keep receiving evidence without putting an end to the process and that an administrative tribunal must apply the law as it is written. He argued that requiring due diligence will work against the Board's mandate because it will slow the process down and also show undesirable qualities of "mission creep."

[11] Mr. Harold Leduc presented submissions to the interpretation panel on behalf of the Canadian Peacekeepers Association. He submitted that there is a social contract which must be kept in mind when the Board determines the test to be applied in screening new evidence in reconsideration applications. Mr. Leduc pointed to the "benefit of the doubt" provisions in the legislation and asked whether veterans, in particular, fully understand the system. He questioned who is responsible for and asked who owns the process; veterans or Veterans Affairs? He contended that it is Veterans Affairs which bears the onus of due diligence. And, in referring to the Federal Court decision in *Caswell*, he argued that due diligence has no place in the Veterans Affairs pension system.

[12] Mr. LeDuc observed that when applicants are not granted a pension based on their evidence, they believe that it is because *they* have not been believed. He told the panel that when he looks through cases, he sees a conflict of cultures. Mr. Leduc queried whether the justices who have rendered decisions stating that the Board should apply due diligence in reconsideration applications, understood the implications of the social contract? In his view, this is the fundamental issue that has become lost over the past 50 years.

[13] On behalf of the Merchant Navy Coalition for Equality, Mr. Thomas Brooks stated that in some cases service records have been destroyed and cannot be made available as evidence. He informed the panel that Merchant Navy records were destroyed in 1946. On behalf of ANAVETS, Mr. Brooks noted that there will also be some cases where evidence may have technically been in a veteran's possession, but that the veteran himself may not have been aware of its location. He recounted a situation that was recently brought to his attention in which a Merchant Navy Veteran had been unable for many years to find evidence to substantiate his pension claim because the records had been destroyed, but subsequently discovered a letter amongst

some older documents in his attic. This was a letter he wrote while incarcerated in a POW camp during World War II, and provided the evidence he had required all along. Mr. Brooks submitted that the Board should take special situations such as this into account in applying the due diligence principle.

REASONS

[14] It is clear from the written and oral submissions received from the groups who participated in this interpretation hearing that no group or association takes issue with the majority of the criteria contained in the “new evidence” test as it was set out by the Federal Court in the *MacKay* decision. In particular, the submissions of the BPA and RCL indicate their agreement that relevance, credibility, and the ability of new evidence to potentially change the outcome of a decision are relevant factors in determining whether the Board should proceed with a reconsideration based on the presentation of new evidence. However, the parties making submissions to the Panel contended that the Board should not apply the "due diligence" criterion when dealing with reconsideration applications based on new evidence.

[15] The primary issue arising out of the submissions presented to the Panel is whether the Board should use or apply the criteria of "due diligence", when determining whether to reconsider an appeal decision based on the presentation of new evidence. The next issue is what test or criteria should be applied by the Board in determining whether to reconsider a decision based on the presentation of new evidence pursuant to subsection 32(1) or section 111 of the *Veterans Review and Appeal Board Act*.

[16] Application of the diligence criterion does not remove or restrict the Board’s discretion. The diligence criterion - as stated in the new evidence test from *Mackay* and *Palmer* - is a general statement. It states quite precisely that, “....*generally* the evidence should not be admitted... .”, leaving the panel the discretion to admit the submitted evidence in the particular and special circumstances of a given case. The diligence principle does not go so far as to prohibit a reconsideration in any circumstance. It does not exclude the possibility that in some cases there may be a reasonable explanation for late production of evidence or there may be compassionate reasons to be taken into account.

[17] Neither does the Board consider an insistence upon due diligence antithetical to the non-adversarial nature of the Veterans Affairs pension adjudication system. Absence of adversary does not relieve the Appellant from the need to substantiate their case with evidence.

[18] With reference to the Bureau of Pensions Advocates’ position that the legislation does not expressly refer to the need for due diligence as a precondition to reconsideration, the Panel noted that same argument also applies to the other parts of the new evidence test - the criteria of credibility, relevance and significance or ability to change the outcome of the previous decision, all of which are not mentioned in the legislation. However, BPA’s representative agreed these latter criteria are nevertheless relevant as an implied part of the process involved in assessing evidence by any tribunal, but that the diligence criteria is not relevant in this system, because it is not

consistent with the intent or spirit of generosity of the Veterans Affairs pension system.

[19] The Panel finds, however, that due diligence is an applicable and relevant consideration in every reconsideration application within the context of the legislation and in light of the manner in which the entire Veterans Affairs pension adjudication system functions. Section 31 of the *Veterans Review and Appeal Board Act* directs that the Board's appeal level decisions are intended to result in a final disposition of the issues involved in the appeal. It is clear that under section 31, once an appeal panel of the Board has rendered an appeal decision, there will no further appeals.

[20] There is, however, an exception to this principle, under subsection 32(1), and section 111 of the *Veterans Review and Appeal Board Act*. The legislation gives the Board a discretionary power to reopen and reconsider its final appeal decision where certain grounds exist. The reconsideration process, however, is not an appeal process. It is not as 'of right': it is a discretionary remedy and it requires a precise set of grounds on which the Board's discretion may be exercised. Given that the appeal decision is intended to be final and binding, and that a reconsideration of an appeal decision is discretionary, this leads to the conclusion that Parliament contemplated that a reconsideration would be an exceptional process to be undertaken only where the Board in its discretion is able to determine exceptional circumstance.

[21] Given that under section 31 of the *Veterans Review and Appeal Board Act*, an appeal decision is intended to be final, the legislation obviously contemplates that relevant evidence will be produced prior to the appeal hearing and the final and binding decision. In a case where the Board is asked to re-open a decision based on the production of new evidence which is alleged to be relevant and significant, but yet was not provided until after the final decision has been rendered, this inevitably gives rise to the question of why it was not produced earlier. The answer is implied by a common sense reading of the legislative scheme. The Panel concludes that although neither the word "diligence" nor the term "due diligence" appears in the legislation, it is nevertheless contemplated and implied in the appeal scheme.

[22] While it cannot be ignored that subsection 32(1) and section 111 of the *Veterans Review and Appeal Board Act* contemplate reconsideration of a decision, even though that decision was intended to be "final", at the same time it must also be recognized that every reconsideration application involves a balancing of the need for finality against reasons which may weigh in favour of potentially re-opening a decision.

[23] It was argued that it would be inconsistent for the Board to impose a due diligence requirement as a condition of any reconsideration under the *Veterans Review and Appeal Board Act* when the Minister of Veterans Affairs does not impose the same requirement in determining whether to conduct a Ministerial review based on new evidence pursuant to subsection 82(1) of the *Pension Act*. Rules of legislative interpretation argue for consistency between related statutes, so it was contended that, because subsection 82 (1) of the *Pension Act* uses similar wording as that found in sections 32 and 111 of the *Veterans Review and Appeal Board Act*, these sections of the legislation should all be interpreted consistently. However, the Panel notes that the key distinction between the two provisions is that the Board's statutory reconsideration power must be interpreted in light of the

finality clause in section 31 of the *Veterans Review and Appeal Board Act.* The intended finality of the Board's appeal decisions under section 31 of the *Veterans Review and Appeal Board Act* stands in clear distinction to the fact that the Minister's decisions are not final, and may be overturned by the Board or even by the Minister on review where grounds exist. (This Panel received no submissions at this hearing from the Department of Veterans Affairs on the interpretation of subsection 82(1) of the *Pension Act.*)

[24] The Bureau of Pensions Advocates submitted that Mr. Justice Teitelbaum made an "uncritical assumption" in the *MacKay* decision, by assuming that reconsiderations before the Veterans Review and Appeal Board were the same as those found in other redress systems. It was submitted that this is not the case as the Veterans Affairs system was intended to be non-adversarial and more generous than other systems. As the panel understands it, the BPA takes the position that it should not matter as much *when or at what stage in the process* the evidence was brought forward; the Board should admit it whenever it is made available because generosity, rather than finality is the prevailing interest in this pension system.

[25] After considering all of the submissions, the Panel cannot find support for the argument that Mr. Justice Teitelbaum inadvertently imported the principle of diligence into the new evidence test in the *Mackay* decision because he did not understand the Veterans Affairs pension system. Nor does the Panel accept that Mr. Justice Teitelbaum did not intend that the Board apply the diligence criteria in its screening of new evidence reconsideration applications under sections 32 or 111 of the *Veterans Review and Appeal Board Act*. The fresh evidence test is well-established. There is no debate that the four criteria cited in the Palmer fresh evidence test are applied in civil law cases as well as in criminal law cases. Moreover, the Panel fully accepts that the Veterans Affairs pension system is generous and there is no doubt that the legislation is to be liberally construed in favour of the Veteran under section 2 of the *Pension Act* and section 3 of the *Veterans Review and Appeal Board Act*. However, this is not different from other areas of civil law and other administrative tribunals which function in a non-adversarial manner.

[26] Many other non-adversarial social benefits systems are governed by the same or similar legislative directives which require that a fair, remedial, large (or generous) and liberal construction be placed on their legislation. This includes legislation governing workers compensation, human rights, federal disability pensions, and the federal Employment Insurance appeal system. These systems also allow for reconsiderations at the discretion of the decision-maker. Even in these other non-adversarial social benefit systems, it is commonplace to investigate whether the reason for the reconsideration request is a failure on the part of the applicant to be diligent in preparing a case when it was previously heard. Decision-makers in other non-adversarial social benefit systems also apply a diligence test by asking whether new evidence could have been made available at an earlier stage in the process. As well, they ask a series of other questions which are very similar to the four part "new evidence test" currently being applied by the Veterans Review and Appeal Board. Thus, it cannot be said that enquiring into diligence - or lack thereof , where a reconsideration is requested based on production of new evidence - is antithetical to a non-adversarial system.

[27] In fairness, the Panel must also note that reference to Mr. Justice Teitelbaum's lengthy decision in the *MacKay* judgment indicates a full

examination and appreciation of the nature and workings of the legislation, particularly sections 3, 39, 32, and 111 of the *Veterans Review and Appeal Board Act*. The Panel therefore concludes that Mr. Justice Teitelbaum fully and deliberately intended that the Veterans Review and Appeal Board should consider the issue of diligence in determining whether to admit new evidence, and reopen a decision pursuant to section 111 or subsection 32(1) of the *Veterans Review and Appeal Board Act*.

[28] Furthermore, the Federal Court has more recently affirmed that diligence is a valid issue in the Veterans Affairs system. In its judgments in; *Percy* v. *Canada (Attorney General)*[2004] F.C.J. No. 888; *Caswell* v. *Canada(Attorney General)* [2004] F.C.J. 1655; and in *Martel v. Canada (Attorney General)* [2004] F.C.J. No. 1559, the Federal Court affirmed that where production of new evidence occurs *after* the Veterans Review and Appeal Board appeal decision has been rendered, this does in fact give rise to the issue of why the evidence was not produced earlier.

[29] In *Caswell*, the Federal Court concluded that the Veterans Review and Appeal Board is not obliged to admit new evidence unless the Appellant adequately explains to the Board why new evidence was not produced at the earlier stages of proceedings . At paragraph 22 of the decision the Court stated:

> There is no clear and convincing evidence on the record adequately explaining why Mr. Caswell was unable to obtain the letter from Mr. Wesch at an earlier date. ... Not only could Mr. Caswell have introduced his letter at an earlier point in the proceedings (an obvious point would have been as an accompaniment to Mr. Wesch's letter), but he *should* have done so. What Mr. Caswell is trying to get is the proverbial "second kick at the can" by submitting evidence that purports to adequately explain why the letter from Wesch is admissible as new evidence. The time for this explanation was at the reconsideration hearing before the panel in September 2002.

[30] The Federal Court went on to conclude, in paragraph 23 of the *Caswell* judgment, that if no explanation for the Appellant's delay in producing the new evidence is forthcoming, <u>then the Board is under no duty to admit the new evidence</u>, or to further consider the Appellant's reconsideration application.

[31] In *Percy* v. *Canada (Attorney General)*, the Federal Court upheld the Board's application of the diligence criteria in the applicant's new evidence reconsideration. The Federal Court also agreed with the Board's finding that the applicant could have - and therefore *should have* - produced his evidence at the appeal hearing, stating [at paragraph 11] that:

> I agree that the evidence was not new, was not relevant, and could not have changed the result on any issue and that the Veterans Review and Appeal Board made no error in so finding. Moreover, in view of the contents in the March 27, 2003 correspondence [the new evidence] <u>there is no indication that the information contained therein could not had been made available at the time of Mr. Percy's initial appeal to the Appeal Panel of the Veterans Review and Appeal Board</u>. Thus the Veterans Review and Appeal Board was correct in concluding that the new evidence was not relevant, could not have lead to a different conclusion.

[32] The recent judgment of Mr. Justice Russell in *Martel v. Canada (Attorney General)* [2004] F.C.J. No. 1559, dealt in a comprehensive manner with the Board's jurisdiction on a reconsideration. Mr. Justice Russell's decision contains a very thorough analysis of the *Veterans Review and Appeal Board Act* provisions pertaining to reconsiderations, and is helpful to understanding the balance which must be struck between the Board's finality clause in section 31 and the Board's reconsideration powers in subsection 32(1) and section 111 of the *Veterans Review and Appeal Board Act*. As Mr. Justice Russell noted in paragraphs 29 and 30 of his judgment, under section 31 a decision of an appeal panel is final and binding, nevertheless, an appeal panel is permitted to re-open and reconsider its decision pursuant to subsection 32(1) of the *Act*. However, as Mr. Justice Russell also commented, subsection 32(1) of the *Act* sets up an extraordinary remedy, and is not simply another level of appeal.

[33] As to when the Board's discretionary power to reconsider a decision should be exercised when new evidence in presented, paragraph 90 of Mr. Justice Russell's judgment in *Martel* states as follows:

> [90] It is in the nature of a reconsideration of a decision that is final and binding by statute that the original decision can be overturned only on the strongest of evidence and only if the decision-maker comes to the conclusion that the original decision might well have been different had it had the benefit of that evidence before it when the original decision was rendered. This must particularly be the case where an applicant has professional assistance, and can be presumed to have put up the best and highest case that can be mustered on the evidence. As Mansfield C.J. explained in *Blatch* v. *Archer* (1774), 1 Cowp. 63 at p. 64, 98 E.R. 969 (K.B.) "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to produce and in the power of the other side to have contradicted." This aphorism is not a rule of law in the strict sense, but lays down the practical precept that an applicant must look not just at the proof that an applicant happens to have, but also to the proof that is in an applicant's power to gather, and which ought, therefore, to have been produced. No amount of statutory direction can overcome the common sense requirement that a finder in fact must be persuaded as to the reality of the fact that is asserted. To say otherwise is to say that there is a right to a pension the moment there is a scintilla of evidence in support.

[34] At paragraph 93 of the *Martel* decision, Mr. Justice Russell commented unfavourably on the Applicant's failure to produce all of his evidence and to put his best and highest case forward at the proper time to do so - on appeal - stating in part :

> ...There was also the fact that Dr. Petit's report was produced so late in the day. .... Why did the Applicant not put his highest and best case forward from the beginning? These questions have never been answered by the Applicant.
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> [emphasis added]

[35] The foregoing decisions of the Federal Court clearly support the conclusion that diligence in the preparation of a case prior to reconsideration is both a

relevant and a significant factor to be considered when determining whether to admit new evidence and conduct a reconsideration of an appeal decision.

[36] The conclusion that the criterion of diligence is an appropriate part of the criteria in "new evidence" reconsideration applications, is further reinforced by a consideration of the issue in the context of how the Veterans Affairs pension adjudication and appeal system works and is intended to work.

[37] The system contains within it, several procedural and substantive safeguards to ensure that the appellant is given an opportunity to establish entitlement to the benefit being sought. By the time an appellant has reached the stage at which he or she seeks a reconsideration, there have been three or four opportunities to prove the case. First, the application and evidence are reviewed and a decision rendered by the Minister of Veterans Affairs. The applicant may then apply for a departmental review of that decision under subsection 82(1) of the *Pension Act*, on provision of new evidence to the Minister. Thus, even before an appellant comes before the Veterans Review and Appeal Board, he or she has had more than one opportunity to attempt to prove the case to the Minister.

[38] After the Minister has issued a decision (or decisions) on the claim, that decision may be appealed to the first of two levels of the Veterans Review and Appeal Board under section 84 of the *Pension Act*. This first level (termed "review") is as "of right" as the appellant does not require any grounds. At the review hearing, appellants are given an opportunity to provide personal testimony and the testimony of any witnesses. Travelling and living expenses of the appellant and witnesses incurred in attending the review hearing are paid under section 24 of the *Veterans Review and Appeal Board Act*. The appellant has the right to a full rehearing where the record from the prior proceeding can be supplemented by new written and oral evidence and any relevant issue raised. The review hearing is scheduled to proceed at a location convenient to the appellant and at a time which is good for him and his or her representative. There is no time limitation on seeking a review and no qualifying restriction on proceeding to a review hearing before all evidence is amassed and all argument prepared. At the hearing, testimony is received under oath or affirmation. Oral argument is provided by the appellant, or on his or her behalf by a lawyer or representative.

[39] If the appellant is dissatisfied with the review decision, he or she has a right to the second and final level "appeal" hearing. The appeal process provides an appellant with a full opportunity to adduce new evidence - in documentary form - and to make oral arguments on the case. The appeal hearing proceeds as a rehearing of the case. Any relevant issues or new arguments can be raised and new documentary evidence can be presented.

[40] In addition to having many opportunities to prove their case, the legislation ensures that other assistance and safeguards are provided to appellants at every stage in the process. The legislation (including the *Pension Act*, the *Award Regulations*, and the *Veterans Review and Appeal Board Act)* places the onus on the applicant to substantiate their claim by proving the facts of his or her case on a balance of probabilities. However, there are beneficial evidentiary provisions under section 5 of the *Pension Act* and section 39 of the *Veterans Review and Appeal Board Act* which assist the appellant in making the case. Once the facts are proven to the proper standard, then it becomes contingent on the decision-maker within Veterans

Affairs to consider the facts in the best light possible[2]. Section 39 of the *Veterans Review and Appeal Board Act* requires that the Board draw every favourable inference which may reasonably be raised from the evidence and the circumstances of the case, to accept uncontradicted evidence which it considers credible and to resolve in the appellant's favour any doubt in weighing the evidence and determining whether the appellant has established a case. The obligation to draw a favourable inference under section 39 of the *Veterans Review and Appeal Board Act* arises where the evidence suggests that the favourable inference is more than a mere possibility.[3]

[41] At each proceeding before the Board, the appellant is entitled to legal advice and representation free of charge from lawyers employed by the Bureau of Pensions Advocates, or by representatives from the Royal Canadian Legion. Although employed by the Department of Veterans Affairs, applicable legislation in subsection 6.2(2) *of the Department of Veterans Affairs Act* confirms that BPA lawyers are in a solicitor and client relationship with their clients and are not required to disclose certain information or material[4]. Other safeguards and rights include the fact that the appellant is also entitled to counselling and assistance from the Department of Veterans Affairs when making pension claims under subsection 81(3) of the *Pension Act*. The entire process is non-adversarial. Only the applicant or representative is involved in making and arguing the claim. There is no person or party to oppose the claim at any level of the process.

[42] It was asserted at this hearing that the Board's rules for reconsideration should be flexible and very liberal so that the appellant always has the opportunity to adduce more evidence. In support, it was suggested in submissions by the BPA and RCL that it is often difficult for a representative to determine what issues may arise at an appeal hearing, which causes difficulty for the representative in determining what evidence would be required to prove the case at the appeal level.

[43] However, the Board notes that by the time an appellant is ready to proceed with an appeal hearing, generally the issues on appeal should be reasonably clear. Certainly an advocate or representative who is experienced in dealing with Veterans Affairs legislation and process, and with the medical and legal issues that commonly arise in this system, would foreseeably be in a position to anticipate any issues that will arise at both the review and appeal levels and obtain whatever evidence which can be obtained, in order to prove the elements of a case. It should also be clear that an appellant, the appellant's lawyer or representative must be prepared to use the appeal hearing as the last opportunity to raise any potential arguments and avenues of appeal.

[44] In light of the three tiered decision-making scheme established under the

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[2] *Cundell* v. *Canada (Attorney General)*, [2000] F.C.J. No .38 (F.C. T.D.); *Hall* v. v.*Canada (Attorney General)*, [1998] F.C.J. No 890, affirmed on appeal [1999] F.C.J. 1800; *King* v.*Canada (Veterans Review and Appeal Board)*, [2001] FCT 535; *Schut* v.*Canada (Attorney General)*, [2003] F.C.J. No 1672; Tonner v. *Canada (Minister of Veterans Affairs)*, [1995] F.C.J. No 550; affirmed on appeal [1996] F.C.J. No 825.

[3] *Elliott v Canada (Attorney General)*, [2003] FCA 298, F.C.J. 1060.

[4]. Subsection 6.2(2) states that:

> The relationship between the Bureau and a person requesting its assistance is that of solicitor and client, and the Bureau shall not be required in any proceedings before the Veterans Review and Appeal Board to disclose any information or material in its possession relating to any such person.

relevant legislation, the many and various process safeguards that accompany a quasi-judicial hearing process before the Board, and the additional features and benefits provided to parties coming before the Board (such as the provision of free legal representation and the reimbursement of certain hearing- related expenses), this Panel finds that it is quite reasonable to conclude that when Parliament took the step of characterizing a Veterans Review and Appeal Board appeal decision as "final" that it intended that the characterization be taken seriously.

[45] The Board has a right to expect that all relevant evidence which could be obtained through the exercise of due diligence will be placed before the Board *before* the appeal decision is rendered, preferably at the review stage. The principle of diligence flows directly from the legislated directive that the Board's appeal decision represents the final level of decision-making by the Board, and from the fact that the Board's reconsideration power is intended to be an extraordinary and exceptional remedy, not another level of appeal. The Board cannot legitimately adopt a new evidence test which fails to require some reasonable explanation as to why new evidence was not produced before the final appeal decision was rendered. To hold otherwise would be to ignore the principle of finality of appeal decisions, as embodied in subsection 31 of the *Veterans Review and Appeal Board Act*.

[46] Accordingly the Panel concludes that the application of the diligence principle on reconsideration is consistent with the legislation, and is necessary in order to ensure the pension appeals system functions as it was intended. The Board's reconsideration power is not intended to function as a never-ending avenue for continuing appeal. The application of the diligence principle on reconsideration works to ensure that the reconsideration power is reserved for those cases which truly merit a reconsideration.

[47] The principle of diligence recognizes that the proper time for gathering all relevant evidence and preparing a Veteran's case in a complete and thorough manner is as early as possible in the pension adjudication process. The application of the diligence principle by the Board ultimately works to the advantage of appellants, given that in cases where disability pension entitlement is awarded, the benefit or pension is made available sooner, rather than later. Delays in obtaining evidence necessary to establish a case work to the disadvantage of the claimant and reduce the efficiency of the adjudication process and appeal system.

[48] This Panel concludes that the application of the due diligence principle in assessing new evidence on a reconsideration application is a legitimate and necessary criterion to be considered as one of the factors in the overall determination of whether to re-open an appeal decision.