THE FEDERAL COURT OF APPEAL: GUIDANCE ON THE MEANING OF S.42(2)(a) AND THE DO'S AND DON'TS OF JUDGMENT WRITING

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Introduction

As you all know, the Federal Court of Appeal has a power of judicial review over all substantive decisions of our Board.

That jurisdiction is found in s. 28 of the *Federal Courts Act,* reading as follows:

> 28 – (1) The Court of Appeal has jurisdiction to hear and determine applications for judicial review in respect of the following federal boards, commissions or other tribunals:
>
> ….
>
> (d) the Pension Appeals Board established by the *Canada Pension Plan*;

The precise grounds of review of the Court of Appeal are set out in s. 18.1(4) of the *Act* and read in this way:

> (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) 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;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (f) acted in any other way that was contrary to law. [Emphasis added.]

As can be seen, the grounds of review specified in s. 18.1(4) are quite broad and seem rather close to the ordinary appeal powers of an appellate court. It can correct errors of law, intervene where the Board breached principles of natural justice or procedural fairness and it can also act where it perceives that the Board played fast and loose with the facts.

I do not think it to be inaccurate to say that, in recent years at least, the Court has taken an expansive view of its powers under the combined effect of s. 28(1) and 18.1(4) and it may be that

that approach is sound because it imposed a serious duty on us all to do the very best we can in our judgments to explain and justify our decisions in a clear-cut, comprehensive and fair-minded way.

In the first part of my paper I am going to highlight some important judgments of the Court of Appeal dealing with the meaning or proper approach to the interpretation of the "severity" standard as set out in s. 42(2)(a). Later, I will deal with other judgments of the Court which address questions relating to the quality and contents of our own judgments.

1. **The Meaning of Section 42(2)(a)**

The starting point here must be the landmark judgment of Isaac J.A. in *Villani v. Canada*, [2002] 1 F.C. 130 (C.A.), released on August 3, 2001.

This wonderful, liberating judgment must be read and re-read in its entirety to get its full flavour but in my comments now I am simply going to refer to several key passages which lay down the new rules or principles which govern the application of s. 42(2)(a) to any factual solution presented in the cases we hear.

(1) THE LIBERAL INTERPRETIVE APPROACH:

> [27] In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at paragraph 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant.
>
> …
>
> [29] Accordingly, subparagraph 42(2)(a)(i) of the Plan should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the Plan is clearly a qualified one which must be contained by the actual language used in subparagraph 42((2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from those words should be resolved in favour of a claimant for disability benefits. [Emphasis added.]

(2) THE "REAL WORLD" APPROACH TO SEVERITY:

At paras. 37-39, the Court adopted a broad "real world" test for disability under the Act by following the much earlier judgment of the Board in *Leduc v. Minister of National Health and Welfare* (1988), C.E.B. & P.G.R. 8546 (P.A.B.) and the more recent case of *Barlow v. Minister of Human Resources Development,* (1999), C.E.B. & P.G.R. 8846 (P.A.B.), written by our distinguished colleague, the Hon. Gerald Kinsman:

> [37] Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the Plan. That one occasion was the Board's relatively recent decision in *Barlow v. Minister of Human Resources Development* (1999), C.E.B. & P.G.R. 8846 (P.A.B.). It is worth repeating the central passage of the Board's decision in that case [at page 6679]:
>
> > Is her disability sufficiently severe that it prevents her from **regularly pursuing** and **substantially gainful occupation?**
> >
> > To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:
> >
> > **Regular** is defined in the *Greater Oxford Dictionary* as "usual, standard or customary."
> >
> > **Regularly** – "at regular intervals or times."
> >
> > **Substantial –** "having substance, actually existing, not illusory, of real importance or value, practical."
> >
> > **Gainful –** "lucrative, remunerative paid employment."
> >
> > **Occupation –** "temporary or regular employment, security of tenure."
> >
> > Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.
>
> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable regularly of pursuing

> any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience. [Emphasis added.]
>
> [39] I agree with the conclusion in *Barlow, supra*, and the reasons therefore.. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute. [Emphasis added.]

(3) THE APPLICANT'S AGE, EDUCATION, EMPLOYMENT EXPERIENCE AND OTHER PERSONAL CHARACTERISTICS:

The Board, in almost all of its prior recent decisions, had held that the personal characteristics of a given applicant – such as his or her age, employment experience, educational background, and so on – were completely irrelevant to the issue of whether the severity standard had been met.

Now, in one fell swoop, Mr. Justice Isaac took the bite in his intellectual teeth and rejected this rather draconian approach.

As the Court said, in para. 38, in *Villani,*

> …it follows from this that the hypothetical occupations which a a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience. [Emphasis added.]

This holding to the effect that personal characteristics are, in fact,

relevant is obviously of substantial importance in the case of older workers in their fifties who are approaching the end of their working lives but it can be of significance in any case, depending on the applicant's peculiar circumstances. No longer can one say sweepingly that personal traits are irrelevant in a "real world" assessment of the work capacity of an applicant.

(4) THE IMPORTANCE OF EACH WORD IN S. 42(2)(a):

In its judgment, the Court was critical of the manner in which the Board Panel in *Villani* had effectively read out of the definition of severity several key words.

As Isaac J. said in the last section of para 43 (p. 154):

> …It is evident, to my mind, that the Board in this case has effectively read out of the severity definition the words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the drafters of the Plan. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test of severity.

(5) THE CONCEPT OF EMPLOYABILITY:

In paras. 44-47, Isaac J. sets out a principle or concept which he calls "employability". At para. 44 he starts his discussion of this idea by saying that "the severity test involves an aspect of employability".

In para. 45, Isaac J. acknowledges himself that "employability is not a concept that easily lends itself to abstraction".

Then, he moves on in the same paragraph to point out that the severity criterion is not satisfied by a showing only that the applicant cannot perform his or her prior job:

> …the federal Plan makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the Plan is in relation to any substantial gainful occupation. [Emphasis in original.]

Mr. Justice Isaac here ties his "employability" concept to any substantially gainful occupation and, at para. 46, seems to be trying to flesh out the concept by using an "air of reality" approach. He says:

> What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantial gainful occupation…

At para. 47, he adds to this point by emphasizing that

> …decision-makers ignore the language of the statute by concluding, for example, that since an applicant is capable of doing certain household chores or is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2)(a)(i) of the Plan. [Emphasis added.]

Again at para. 48, he emphasizes that decision-makers should avoid the use of "vague categories of labour" such as "semi-sedentary work" to justify the dismissal of a worthy application.

(6) THE NEED FOR MEDICAL EVIDENCE AND EVIDENCE OF EMPLOYMENT EFFORTS AND POSSIBILITIES

Under all of the five principles or guidelines already identified, Justice Isaac was highlighting the need for a principled and realistic interpretive approach to the severity criterion for disability entitlement. He emphasized that many decision-makers in the past had (1) failed to give effect to the liberal interpretative principle applicable to benefits-conferring legislation and (2) had failed to give effect to the actual words of s. 42(2)(a)(i) itself, thereby skewing the meaning of the subparagraph to the detriment of some applicants.

In the last paragraphs of his judgment, however, Isaac J. took pains to emphasize that, at bottom, the decision-maker's task is fact driven and based on his or her sound judgment.

At para. 49, he notes that if the decision-maker applies the "ordinary meaning of every word in the statutory definition of severity in s. 42(2)(a)(i) he or

she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation." He completes this though by adding this point:

> The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

In paragraph 50 – the last paragraph of the judgment – Isaac J. also helpfully points out that his interpretive approach has not thrown out the traditional proof requirements of a disability case. As he says:

> Claimants still must be able to demonstrate that they suffer from "a serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation." Medical evidence will still be needed as well as evidence of employment efforts and possibilities. Cross examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others. [Emphasis added.]

2. **Other Judgments and Judgment Writing Issues**

I now move on to discuss some judgments of the Court of Appeal which either add clarification to the *Villani* holdings or address some other issues not directly dealt with in *Villani.*

(1) *Minister of Human Resources Development v Rice*, 2002 FCA 47 (Socio-Economic Factors)

In this case, the Board had ruled that the applicant's physical condition was "severe" but went on to add that he lived in a small community where the primary industry was fishing and that his possibility of obtaining other employment in this community was remote, if not impossible.

While the Court of Appeal could have dismissed the review application of the Ministry on the basis of the Board's factual finding on severity, it took the opportunity of delivering an *obiter* opinion on whether the Board could consider the question of employment possibilities in deciding a case under the severity standard.

During the argument of this appeal, counsel for the applicant must have argued that, based on Isaac J.'s reference at para. 50 of *Villani* to "evidence of employment efforts and possibilities", the local employment environment was a relevant factor in the severity equation.

At para. 12 of *Rice* the Court of Appeal held that Isaac J.'s words in *Villani* were "referring to the capacity of an individual to be employed in any substantially gainful occupation, and not to whether, in the context of the labour market, it is possible to get a job." [Emphasis added.]

At para. 11 of the judgment, Rothstein J.A. lays down a rather sweeping ruling on this point:

> While the generous interpretation afforded to subparagraph 42(2)(a)(i) and the necessity to take into account the "real world" context is a more liberal approach than may have been previously taken by some Boards, there is no suggestion in *Villani* that socio-economic considerations such as labour market conditions are relevant in a disability assessment.

While the *Rice* decision was, technically, an *obiter* holding on the relevance of labour market conditions, the Court of Appeal, in its later judgment in *Minister of Human Resources Development v. Angheloni*, 2003 FCA 140 seems to have "closed the door" on this issue.

In this case, the Board, in its decision, expressly stated that "economic conditions in the area in which the respondent has been employed must also be a factor to be taken into consideration."

Madam Justice Desjardins, for the Court, held emphatically that the Board was wrong to ignore *Rice* and accused the Board panel of engaging in a frolic of its own. She said this at para. 14 of the judgment:

> The Board erred in law in adding economic conditions as a relevant consideration. In *Minister of Human Resources Development v. Rice*, 2002 F.C.A. 47, [2002] F.C.J. No. 170 (F.C.A.)(Q.L.), this Court made it clear, in paragraph 13 of the decision, that subparagraph 42(2)(a)(i) refers to the capacity of the individual to regularly pursue any substantially gainful occupation and not to labour market conditions.

One might say that, based on these decisions, the Court of Appeal has ruled that, for the purposes of the *CPP* disability claims, there is a national labour market and the applicant must move, regardless of where he lives, if he has capacity for alternative gainful employment and no such alternative employment is available locally.

I feel bound to say, personally, that I have some reservations about the correctness of these decisions based not only by Justice Isaac's comments about the concept of "employability" and his further observation about "employment possibilities" but, also, because the "personal characteristics" principle, along with the broad "real world" test, both seem to invite assessment of local economic conditions. I would like to see this issue addressed in the Supreme Court of Canada some day.

(2) *Minister of Human Resources Development v. Scott*, 2003 FCA 34:
(The Danger of Departing from the statutory language)

This decision of a strong panel of the Court of Appeal (Strayer, Sexton and Evans J.J.) shows the dangers in failing to use the language of s. 42(2)(a)(i) in one's judgment.

In this case, the Board stated the test as being whether the appellant is "incapable of regular employment". [Emphasis added.]

In his judgment for the Court of Appeal, Strayer, J.A. seized on the Board's language and stated that it constituted an error in law. As he said at para. 7:

> As noted above, the test of whether a disability is "severe", the issue here, is stated by the statute to be whether the person "is incapable regularly of pursuing any substantially gainful occupation…". It is the incapacity, not the employment, which must be "regular" and the employment can be "any substantially gainful occupation". In my view, the words employed by the Board set the test for a qualifying disability at too low a threshold and were an incorrect interpretation of the statutory requirements. [Emphasis added.]

Some might say that, perhaps, the Court of Appeal here was indulging in an exercise of semantic nit-picking. However, on judicial review, the Court of Appeal must be satisfied that the Board applied the statutory standard to the assessment of the claim and we on the Board must be vigilant in our decisions to either use the exact words of the severity standard or paraphrase it accurately; otherwise, the Court of Appeal may have no option but to send the case back for a new hearing.

(3) *Inclima v. The Attorney General*, 2003 FCA 117:
(Need for Evidence on Retraining and Re-employment)

In this case, the Court of Appeal took the opportunity to expand upon the comments of Isaac J. in *Villani*, at para. 50, where he said that "[m]edical evidence will still be needed as will evidence of employment efforts and possibilities."

In *Inclima*, Pelletier J.A. followed Isaac J.'s statement in *Villani,* saying this at para. 3:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

I have found over the years of my own experience on the Board that applicants and their counsel and agents tend to ignore, downplay or forget about leading evidence directed to the critically important issues of retraining and efforts at reemployment. While a hearing before the Board is quasi-adversarial, it is not inappropriate for Board members to ask questions in these areas to ensure that justice is done. Very often, a few questions will serve to clarify such issues, pro or con, and, of course, follow-up questions can be permitted by both sides to make sure that these issues have been fully and fairly canvassed.

(4) *Minister of Human Resources Development v. Angheloni*, 2003 FCA 140:
(The Doctor as Advocate)

There have been several cases in recent years where the Board has commented negatively about the credibility and objectivity of doctors. Most such cases involve the family doctor who, it must be said, is in an awkward position and it is not surprising that the family doctor sometimes gives the impression of being more of a zealous advocate than a dispassionate medical advisor.

I will be coming back to the case later but, for now, note that Letourneau J.A. took the trouble to write a concurrence in which he reminded Board and Tribunal members alike that family doctors sometimes lose their objectivity in supporting their patient's cases. As he said at para. 44:

> In summary, I believe the Board must be vigilant in assessing the documentary evidence of the family doctor, especially one who did not testify at the hearing, where there are indicia that his required and expected neutrality has been lost. I am not satisfied that the Board, in the present instance, addressed its mind to the advocacy role played throughout by Dr. Sokol.

Family doctors – and their reports – usually play a central role on any hearing because, in the average case, we see more of their reports than from any other medical source, and, usually, it is the family doctor who has directly supported the claimant by providing a prescribed form of medical report at the time the application is filed.

Justice Letourneau's comments helpfully remind us that we all have an obligation to ensure that the family doctor's reports are balanced and fair and, equally importantly, are consistent with any other medical evidence from specialists and other health care providers such as physiotherapists and functional assessors.

(5) Court of Appeal Comments on the contents of our Judgments

As we all know, section 83 (11) of the *CPP* mandates that we provide written reasons for each of our decisions.

I would like to review what the Supreme Court and Court of Appeal have said generally about the subject of judgment writing and then move on to some specific cases where the Court of Appeal has found fault with some of our decisions.

The Supreme Court has been dancing around the vexed question of whether, at common law, decision-makers had to provide reasons, whether in administrative law, criminal law or civil law.

In the well-known administrative law case of *Baker v. Canada (Minister of Citizenship and Immigration* [1999], 2 S.C.R. 817, the Supreme Court effectively ruled that administrative decision-makers had to provide some form of written explanation for the decision at hand. Madam Justice L'Heureux Dubé, who wrote the lead judgment in the case, said this about the rationale for reasons at para. 39:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable

> issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review:…

Later, at para. 43, she ruled that the "duty of procedural fairness" dictated that reasons should usually be provided:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. [Emphasis added.]

The Supreme Court next addressed the question in a criminal law case, *R. v. Sheppard* (2002), 162 C.C.C. (3d) 298 where, while the Court again declined to impose a clear-cut duty to provide reasons, it provided three rationales for reasons and strongly hinted reasons should be provided.

In this case, at trial, the provincial court judge convicted the accused, using what was called "boiler-plate" language:

> Having considered all the testimony in this case, and, reminding myself of the burden on the Crown, and how this is to be assessed, I find the defendant guilty as charged.

The Newfoundland Court of Appeal criticized the trial judge's approach and ordered a new trial because he had failed to provide any "explanatory analysis" for his decision. The Supreme Court agreed.

Binnie J., for the unanimous court, started off his judgment cautiously, saying this at para. 4:

> It is true that there is no general duty, viewed in the abstract and divorced from the circumstances of the particular case, to provide reasons "when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances" (*R. v. Barrett,* [1995], 1 S.C.R. 752 at p. 753).

He then goes on to provide three basis rationales for providing well-articulated reasons along with a detailed list of his 10 Commandments for providing proper reasons.

His three rationales are, in paraphrase, these:

1) public confidence in the administration of justice system;
2) the importance of telling the losing party the reasons for having lost;
3) making the right of appeal meaningful by allowing the appellate court to understand the path taken by the trial to his basic decision.

Mr. Justice Binnie's Ten Commandments (para. 55) are not said to be exhaustive or written in stone but they will be ignored by a trial judge or other decision-maker at his or her peril:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso. [Emphasis added.]

The Federal Court of Appeal has spoken on this subject in its recent decision in *Canada (Minister of Human Resources Development) v. Quesnelle,* 2003 FCA 92.

In this case, the Review Tribunal had rejected the claim and the Board Panel reversed, concluding that the appellant was severely disabled.

The Court of Appeal was critical of the decision of the Board Panel and ordered a new hearing. The Court noted that over 30 reports from a dozen or so specialists and other rehabilitation experts had been put in evidence with the preponderance of the doctors (7 out of 12) saying the appellant could work at alternative employment.

At para. 7, Evans J, for the Court, said this about the Panel's decision:

> It [the Board] noted that there was strong evidence on both sides and that cases of fibromyalgia present difficulties for the Board, although it "has the responsibility of deciding whether the Appellant suffers from fibromyalgia which is debilitating to the point where the Appellant can no longer work at a job which will provide an adequate livelihood". After stating it had considered all

> the evidence, the Board allowed the appeal, because it "found the testimony of the Appellant and Dr. Leung [the rheumatologist] to be credible. This is the totality of the Board's explanation of the basis of its decision.

The Court went on to say, at paras. 8-9, that the Panel had failed to provide "a meaningful analysis of the evidence", to use its phrase taken from the judgment of Binnie J. in *Sheppard*:

> [8] The Board is under a statutory duty to provide the parties with reasons for its decision: Canada Pension Plan, subsection 83(11). In my opinion, in omitting to explain why it rejected the very considerable body of apparently credible evidence indicating that Ms. Quesnelle's disability was not "severe", the Board failed to discharge the elementary duty of providing adequate reasons for its decision. The size and complexity of the record before it called for an analysis of the evidence that would enable the parties and, on judicial review, the Court, to understand how the Board reached its decision despite the mound of apparently credible evidence pointing to the opposite conclusion.
>
> [9] …However, in the absence of any indication in the Board's reasons that it engaged in a meaningful analysis of the evidence, its decision cannot stand.

Later, at para. 11 it added this:

> [11] …Both parties are entitled to a fair hearing before the Board and, without reasons that adequately explain the basis of a decision, neither party can be assured that, when a decision goes against it, its submissions and evidence have been properly considered. Moreover, without adequate reasons, the losing party may be effectively deprived of the right to apply for judicial review.

With respect, I feel that the Court of Appeal went over the top in this ruling, bearing in mind its limited writ within its judicial review powers.

To me, this judgment smacks of result-oriented appellate judging. The Court clearly got into the evidence and weighed it and did not like the decision arrived at by the Panel. It even tips its hand in para. 5, by referring to the "preponderance of the evidence contained in the reports" being against disability.

However, while this *Quesnelle* may be a high-water mark of judicial review intervention, it, along with *Sheppard* and *Baker*, does make it clear that "fairness" and "natural justice"

considerations will loom large in the Court of Appeal's assessment of our decisions and we must respond with quality decision-making.

Minister of Human Resources Development v. Angheloni 2003 FCA 140

This case is very similar in result to what happened in *Quesnelle*.

The Court of Appeal sent back the case for re-hearing because, on its view, the Board Panel failed to address fairly and comprehensively all of the medical evidence.

At para. 31, Desjardins JA said this:

> The reasons given by the Board for its decision indicates that the Board failed to analyze the evidence adequately. It considered some medical reports and ignored others. It came to a conclusion on disability without explaining the factors on which it had based its conclusion. In brief, the Board failed to conduct an inquiry that was tailored to the requirements of the statutory test provided in paragraph 42(2)(c) of the Act. [Emphasis added.]

Abel Garcia v. The Attorney General Canada, 2001 FCA 200

This is yet another case where the Court of Appeal criticized the Board's decision.

Here, the Court dealt with several points of interest, including the position of a self-represented appellant who claimed he was unfairly denied an interpreter. In the Court of Appeal, the appellant argued, first, that the Board had denied him procedural fairness by failing to explain some evidentiary rulings made during his testimony. While the Court found that the affidavit evidence did not support this ground, it is clear that the Court took the point seriously and it may easily arise again in other cases. The Board must always be alert to procedural fairness issues for self-represented appellants.

The appellant's second point was that he was denied an interpreter. The Court noted that the Supreme Court's decision in *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 had made it clear that "a defendant's right to a fair hearing includes the right of a defendant to understand what is going on it court and to be understood" but concluded that the evidence fell short of showing any breach of the appellant's procedural rights.

It is important to remember in this context that appellants can file affidavit evidence in the Court of Appeal which may contain questionable allegations and which may not be challenged by Ministry counsel. This puts an added burden on Board Panels to be alert to

language and communication problems and make sure there is no question about the appellant's ability to understand the proceedings and to testify in English. If there is any doubt, a translator must be provided.

The appellant's third point was that the Board had, in its decision, "implicitly imposed, as a precondition of the award of a disability pension, a duty to submit to all possible cures, and avenues of medical intervention."

The Court allowed the appeal under this issue because it held that "[i]t is impossible to determine from the Board's reasons the extent to which it may have imposed a duty upon the applicant to pursue any and all possible treatment or therapy."
(para. 16).

Here, once again, the Court was saying that a Board Panel had denied procedural fairness to an appellant by failing to provide "a full written explanation for its decision…" (para. 18).

O'Liari v. The Attorney General of Canada, 2003 FCA 375.

This case demonstrates the dangers for a Board Panel in drawing broad inferences against an applicant from a medical report.

In this case, the MQP ended in December, 1997, and the Panel drew a rather dangerous inference from a single medical report in 1999 that the applicant was working then. The passage from the Board's judgment reads as follows:

> Dr. Igou in his report of July 16, 1999, makes reference to Mr. O'Liari "uses all of his tools using his left hand and this becoming more and more difficult for him". The only reference is that the Appellant was still working at his trade in July 1999.

Desjardins J.A. noted in para. 12 of her judgment that there was a conflict between this finding of the Panel and an earlier one where the Panel had said the applicant had not worked since November, 1997. Also, she noted that the passage in Dr. Igou's report was "hearsay evidence and there could have been more than one way of interpreting that statement."

One hopes that her negative approach to hearsay evidence was a slip because, of course, we have the right to entertain hearsay and do so routinely in our cases.

Some Concluding Comments of Judgment Writing

There is no simple tried and true formula for judgment writing – especially at the trial or hearing level.

Formulas developed by appellate courts obviously cannot be slavishly followed for first-instance decision-makers.

The fairly recent evolution of the Supreme Court format, involving fixed headings and a rather rigid overall pattern is obviously not needed or desirable in our decisions.

I suggest that a well-written decision of whatever kind must address the following points.

(1) The Relief sought

(2) Commentary on procedure, if needed

(3) Statement of issues

(4) Essential facts

(5) Findings of fact and credibility assessment based on the evidence

(6) Analysis – application of the law to the facts

(7) Conclusions and result

This suggested outline of what the decision should accomplish does not have to be slavishly followed but I suggest it enables the judge to tell the story which has to be told. It is clear from the recent judgments of the Court of Appeal that it will not countenance a slap-dash, sloppy or cut-and-paste approach which amounts to an inadequate or incomplete explanation of the result arrived at. I suggest that if we keep in mind the check-list I have outlined, and honour it, no one will be able to challenge our work successfully.

A very great law professor of the past at Yale University – Fred Rodell – once made a very pungent and accurate statement about legal writing. He said: "There are two things wrong with almost all legal writing: One is its style. The other is its content." Professor Rodell was inveighing against the jargon and prolixity which often beclouds legal and judicial writing but he was also being critical of the overall quality of judgment-writing.

I conclude by saying that we must strive in our decisions to do two things: make them clear and make them comprehensive so that the parties will understand why we have decided as we have and will believe that they have had a fair hearing regardless of the result.