HIGHLIGHTS OF IMPORTANT JUDICIAL AND PENSION APPEALS BOARD DEVELOPMENTS JULY 2003 – JUNE 2004

Prepared by:

ANDREW JAMES

Oak Island Resort
Western Shore, Nova Scotia
July 19 – 22, 2004

I. STANDARD OF REVIEW

Into 2004, the Supreme Court of Canada continues to be active in the administrative law field. Every new appeal presents an opportunity to make clarifications and extensions to the test, and the Supremes avail themselves of it every time.

A. Which standard?

On judicial review applications from a tribunal decision, there are three recognized standards of review: correctness, patent unreasonableness and unreasonableness *simpliciter*. Four factors – privative clause, expertise of panel members, purpose of tribunal (i.e. policy formulation or dispute resolution), and nature of issue (law, fact or mixed) – determine which standard is to be used by the reviewing court. Where the balancing of the four factors above suggests considerable deference, the patent unreasonableness standard will be appropriate. Where little or no deference is called for, a correctness standard will suffice. If the balancing of factors suggests a standard of deference somewhere in the middle, the reasonableness *simpliciter* standard will apply: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19

However, LeBel and Deschamps JJ. concurring judgment in (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 poetically expresses the current situation thusly:

> "In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all." [*Toronto (City) v. C.U.P.E., Local 79* at para 63]

B. When will the "Patent Unreasonableness" standard apply?

In *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, Major J. states the following:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare."[para. 18]

C. What Does "Patent Unreasonableness" Mean?

From the number of judicial attempts to explain what patent unreasonableness means and how it applies in practice, this seems to be the most problematic of the three levels of review. Ironically, the Supreme Court has stated (in *Ryan*, *infra*) in that "a

patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective". The different formulations by the Supreme Court include [emphasis added]:

- A decision will only be patently unreasonable if it **cannot be rationally supported by the relevant legislation**: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227 at 237.
- Patent unreasonableness is a very strict test, which will only be met where a decision is **clearly irrational**, that is to say evidently not in accordance with reason: *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64.
- "The difference between "unreasonable" and "patently unreasonable" lies in the **immediacy or obviousness of the defect**. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable": *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (para. 57)
- A decision that is patently unreasonable is so flawed that **no amount of curial deference can justify letting it stand**: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 [para. 52].
- A patently unreasonable appointment is one whose defect is immediate or obvious, and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand. Applying the more deferential patent unreasonableness standard, a judge should intervene if persuaded that there is no room for reasonable disagreement as to the decision maker's failure to comply with the legislative intent. In a sense, like the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one means that **there could have been many appropriate answers, but not the one reached by the decision maker**": *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.) [see paras. 164-165]
- "A definition of patently unreasonable is difficult, but it may be said that **the result must almost border on the absurd**. Between correctness and patent unreasonableness, where the legislature intends some deference to be given to the tribunal's decision, the appropriate standard will be reasonableness": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* 2004 SCC 23 [para. 18] *per* Major J for the majority.

The difficulty in defining "patent unreasonableness" alluded to by Major J. in *Voice Construction* is what has prompted LeBel and Deschamps JJ. to call for the abolition of the standard in concurring judgments in two decisions. In (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, they state:

> [T]he patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed. [para. 66].

They go on to offer a thorough examination of the issue [paras 77-133], pointing out that the logical result of adhering to the test would be that some unreasonable tribunal decisions (i.e. not patently unreasonable ones) could not be subject to review, and this would likely run contrary to legislative intent. They conclude with the following statement:

> Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review. [para. 134 – emphasis added]

Arbour J's. judgment on behalf of the majority in *Toronto (City) v. C.U.P.E., Local 79* sidesteps LeBel and Deschamps JJ.'s approach, stating that:

> "Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis." [para. 12]

A few months later, in *Voice Construction* (supra), LeBel and Deschamps JJ. hearkens back to the "rationally supported by the relevant legislation" standard articulated by Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (*supra*), stating that it is:

> one that not only signals that great deference is merited where discretion has been exercised, but also makes clear that a reviewing court cannot let an irrational decision stand … this approach should apply to judicial review on any reasonableness standard." [para. 41]

In this way, LeBel and Deschamps JJ. strip away the "metaphysical obviousness of the defect" [para. 41] aspects of some of the later definitions of the standard, and fold

what remains into the reasonableness *simpliciter* standard, resulting in a two-pronged test.

D. Judicial review of PAB decisions

Ostensibly, the judicial review of PAB decisions have been governed by two standards: correctness for interpretation of the statues, and patent unreasonableness for fact and mixed law and fact – application of the CPP to the situation at hand – issues. The Federal Court of Appeal in *Spears v. Canada (Attorney General)*, 2004 FCA 193, after first observing that the determination of the meaning of "severe" disability under s. 42(2)(a)(i) was a question of law to be reviewed on a standard of correctness, put it this way:

> [W]hether [the claimant's] disability is "severe" for the purpose of subparagraph 42(2)(a)(i) of the *Plan* is a question of mixed law and fact. Since the determination of this question has a high factual component, the jurisprudence of this Court establishes that it is reviewable on a standard of patent unreasonableness …" [para. 10]

One of the cases relied on in the *Spears* decision was *Canada (Attorney General) v. Hutchison*, 2004 FCA 105, where the Federal Court of Appeal dismissed the Minister's judicial review application against the PAB's award of a disability pension to the claimant. Perhaps in response to above-mentioned judicial debate, the court supplemented its reliance on the patent unreasonableness standard with the statutory test under s. 18.1(4)(*d*) or the *Federal Courts Act*, R.S.C. 1985, c. F-7 – i.e. whether the decision was made "in a perverse or capricious manner or without regard to the material before it."

In light of the Supreme Court's decision in *Voice Construction* that application of the patent unreasonableness test should be "rare", and only where the result would be "absurd", it may be an open question whether judicial review of mixed law and fact determinations by the PAB are still subject to the "patent unreasonableness" standard. But as Justice Killeen's paper points out, while the Federal Court of Appeal continue to pay lip service to the patent unreasonableness standard on proceedings to review PAB decisions, it is not clear that they have been applying it practice.

E. Examples of successful judicial reviews of PAB decisions in the last year:

- *Canada (Attorney General) v. Lemoine*, 2003 FCA 330 - PAB using wrong test, asking whether "the employment in which the applicant is now engaged cannot be described as something at which the applicant is regularly engaged", instead of whether the applicant is "incapable regularly of pursuing any substantially gainful occupation".

- *Cochran v. Canada (Attorney General)*, 2003 FCA 343 – MQP was six years before the hearing date; PAB putting too much emphasis on improvement in claimant's

condition before hearing, and not giving enough weight to medical reports contemporaneous with MQP which indicated permanent disability

F. Examples of possible judicial review cases in the future

- "What the legislation contemplates is total workplace incapacity": *Williams* (January 29, 2004) CP 18713 [at para. 3]

II. THE MINISTER'S EXPERT MEDICAL WITNESS

The status of the Minister's medical expert was a key issue in *Spears v. Canada (Attorney General)*, 2004 FCA 193. On judicial review to the Federal Court of Appeal, the claimant's counsel alleged that the PAB had neglected the requirement contained in s. 42(2)(b) of the *Plan* that a pension disability be determined in the "prescribed manner" by relying essentially on the testimony of the Minister's medical expert, who had never examined or treated the applicant and who had no expertise in audiology or otolaryngology. Section 68(2) of the CPP Regulations enables the Minister to require an applicant to "undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability". The argument was therefore that such evidence could not be lawfully received by the PAB at the hearing of the appeal unless it was given in compliance with s. 68(2). This argument was rejected, the court stating:

> This suggestion misunderstands the stated purpose of subsection 68(2), which is to enable the Minister to require a pension applicant to submit to a special examination and to supply such reports as the Minister deems necessary for the purpose of determining the disability of that person. The subsection is not a barrier to the adducing of expert evidence by the Crown at the appeal from a witness such as Dr. O'Brien. Indeed, subsection 16(1) of *The Pension Appeals Board Rules of Procedure* (*Benefits*), C.R.C., c. 390 (1978) expressly authorizes the Board to "summon before it by subpoena any person and require him to give evidence on oath and to produce such documents as it deems requisite". That rule provides the Board with ample authority to require the testimony of a witness such as Dr. O'Brien at the hearing of an appeal. [para. 16]

A second argument raised by the claimant's counsel in this regard was that the PAB should not have used the testimony of the Minister's medical expert to determine that the applicant was not severely disabled. The claimant alleged that some Board members had stated at the hearing that the only purpose of the testimony was to assist the Board in the interpretation of the medical record, and that she was thereby denied an opportunity to effectively challenge the opinion. The Federal Court of Appeal rejected this argument as well, noting that:

> [T]he applicant was made aware as early as March 7, 2003 that Dr. O'Brien would appear at the hearing as an expert witness for the Crown. Moreover, counsel acknowledged that at least two days prior to the hearing of the appeal he was

> provided with a copy of Dr. O'Brien's "Testimonial Summary". The lines of Dr. O'Brien's testimony, made apparent in that document, were surely not limited in the way suggested by the applicant. In any event, the stated purpose of assisting the Board in "the interpretation of the medical record", although perhaps ambiguous, would not necessarily signify that Dr. O'Brien would be confining his testimony to that of interpreting the reports of the applicant's medical advisors or that he would not suggest for the Board's consideration possible alternative employment for the applicant in the labour market. He had already telescoped his views in this regard in his "Testimonial Summary". [para. 17]

Although some might prefer that the Minister's medical expert played a detached, objective role in the proceedings, *Spears* would appear to remove any obstacles to the witness acting (and being treated as) as a typically partisan player in an adversarial setting.

III. NEW FACTS

A. The *Peplinski* principle

Peplinski v. Canada (October 28, 1992), Doc. T–1173-92 (Fed. T.D.) states that if the Minister, in the exercise of his or her discretion under ss. 84(2), concludes that there is an absence of any new facts which would warrant a reconsideration of the original decision, then no fresh decision can be said to have been rendered and no right of appeal lies under ss. 82(1). The right of appeal under s. 82(1) can only be exercised if the Minister decides to reconsider his original decision in light of new facts. Where the Minister decides that the new facts warrant a reconsideration of the original decision, a fresh decision will result under ss. 84(2) as it will be based on facts different from those under consideration when the original decision was rendered, and a right of appeal lies under ss. 82(1).

This principle has been extended to include the reconsideration of an earlier decision of the Review Tribunal under s. 84(2): see for example *O`Leary v. MHRD*, (February 24, 2003) CP 19041. Therefore, an appeal to the PAB cannot be taken from a dismissal by the Review Tribunal of a motion to reconsider an earlier Review Tribunal decision based on alleged new facts.

The waters were muddied by *Minister of Human Resources Development) v. MacDonald*, 2002 FCA 48, in which the PAB had allowed a direct appeal from a Review Tribunal ruling that the additional evidence presented by the claimant did not constitute new facts for the purposes of s. 84(2). The Federal Court of Appeal found that it was open to the PAB to find that the new facts did in fact justify a disability pension award. The Court noted that there had been procedural errors by all sides, but did not refer to *Peplinski.*

Despite *MacDonald,* the Federal Court of Appeal in *Oliveira v. Canada (Minister of Human Resources Development)*, 2004 FCA 136 reaffirmed the *Peplinski* principle.

The claimant's remedy is to make an application to the Federal Court for judicial review of the Tribunal's refusal to reopen its decision because there were no "new facts". The court indicated that while the opposite position may have merit, it was not about to reverse the weight of case law in favour of *Peplinski*.

B. The effect of granting leave to appeal

As mentioned above, the PAB in *O`Leary* found that *Peplinski* was binding. However, the PAB held that the granting of leave by a PAB judge to appeal the Review Tribunal decision cured any defect in the appeal. This was because the PAB judge who granted leave:

> "… must have realized, on reading the materials filed with the Board, that leave should be granted from the original decision of the Review Tribunal and did so.
>
> I do not believe that this Panel of the Board now has the power or jurisdiction to go behind the leave decision and somehow declare it to be void or a nullity." [paras. 56-57]

This approached was challenged in *Dominelli v. MHRD* (August 19, 2003) CP19496, where the PAB stated that:

> I do not agree that a procedural action of granting leave to appeal can grant jurisdiction in a substantive matter which it does not have under the Act. I find support for this position in the words of the Honourable Meredith in *Oliveria v. Minister of Human Resources Development* (CP20621, 2003, unreported), at paragraph 7 where he states: "The fact that leave was purported to have been granted did not confer on the Pension Appeals Board any jurisdiction that the Board did not otherwise have." [para. 5]

C. The "window" cases

The date of expiry of a claimant's Minimum Qualifying Period ("MQP") is the last date for measuring whether the claimant is disabled within the meaning of the CPP. A "window" arises when a decision has been rendered in a case before the MQP expires. The claimant is entitled to commence an entirely new application for benefits based on his or her condition during the window period.

The question is, to what extent does the original decision continue to serve as a reference point for the claimant's status as at that time? There appears to be a conflict in the cases.

In *Esposto v. MHRD* (February 26, 2004) CP20924**,** the claimant applied for disability benefits in 1994, which application was the subject to an appeal to another panel of a Review Tribunal which held a hearing in April, 1997. That panel dismissed

her appeal and an application for leave to appeal of that decision to the PAB was denied. The PAB ruled that the determination as to her ineligibility to disability benefits under the *Canada Pension Plan* as at April, 1997 was final and binding. However, the claimant's MQP expired on December 31, 1997. In May 2000, the claimant filed a new application for disability benefits under the *Plan*. The PAB ruled that it was incumbent upon the claimant to show a **marked deterioration** in her condition during the period commencing April 1997 to December 1997. Since her condition deteriorated slowly between April 1997 and the February 2004 hearing date, she did not establish her entitlement to a disability pension.

It should be pointed out that the PAB in *Esposto* do not review the age or education of the applicant . The *Villani* decision is not acknowledged.

Esposto was distinguished by a subsequent decision by a different panel of the PAB in *Poitras v. MHRD* (April 29, 2004) CP22022. In *Poitras*, the Review Tribunal's hearing in the claimant's first application was on December 3, 1998, and the Tribunal dismissed the claim on February 18, 1999. Meanwhile, the claimant's MQP expired on December 31, 1998. At the PAB on the claimant's second application, the Minister relied on *Esposto* in submitting that since the claimant was found by the first Review Tribunal not to be disabled on or before December 3, 1998 and that finding is *res judicata*, it was now incumbent upon the claimant to establish that his condition underwent a deterioration or change between December 3, 1998 and December 31, 1998 to qualify him for a disability pension under the Plan. The PAB stated:

> In my view, the decision in *Esposto* does not stand for that proposition; rather it was a case decided on its particular facts. What we have to decide is whether the Appellant is disabled within the meaning of Section 42(2) as defined by the principles set out in the *Villani* case and subsequent decision of the *Federal Court of Appeal*. [para. 18 – emphasis added]

The PAB went on to find that the claimant was entitled to a CPP disability pension, stating:

> Applying the test in *Villani*, what has to be determined is whether, having regard to the Appellant's age at the date of his MQP (50), his education level (Grade 4 and inability to read or write), his language proficiency and his past work (as a manual labourer), it was realistic to expect him to be capable of finding sedentary employment in a meaningful and competitive economic environment. On all of the evidence, I am convinced that he would be unable to do so. [para. 20]

So *Villani* is a useful hook to hang "window cases" first decided before August 2001, but what will be the test when all determinations are under *Villani*? Why did the PAB in *Poitras* say that *Esposto* was decided "on its particular facts"?

D. Example cases

- Claimant, whose MQP ended in December 1992, unsuccessfully applied for disability benefits in 1990 and 1996, appealing up to the PAB level both times. Claimant reapplied in 2000, using a report from Dr. B who was his physician from 1991 to 1993. Dr. B had not filed a report in the earlier proceedings, because the claimant thought his report from another physician would be sufficient. PAB dismissed the appeal because Dr. B's report could have be available in the earlier hearings and it was simply a rehash of all the evidence already considered previously: *Taylor v. MHRD* (April 20, 2004) CP20684 (Note: judicial review being sought)
- Claimant commenced applied three times for disability benefits, twice prior to MQP expiry and once after. First two were denied by Review Tribunal with leave to appeal to PAB denied both times. On his third application, the Review Tribunal ruled in favour of claimant, and stated (wrongly) that its decision was based partly on evidence not available on the first Tribunal hearing. On the Minister's appeal to PAB of the third Tribunal decision, the PAB dismissed claim on grounds of *res judicata*. If there were truly new facts, the proper procedure would have been for claimant to reapply to the Tribunal under s. 84(2). The Tribunal had no jurisdiction to hear new application after MQP: *Adamo v. MHRD* (January 16, 2004) CP20427

IV. CONSTITUTIONAL ISSUES

A. Right of PAB to Determine Charter Issues

The extent to which tribunals can consider the constitutional validity of a provision of their enabling statute articulated in a trilogy of SCC cases: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.

In a nutshell, the Trilogy determined that if a government official is endowed with the power to consider questions of law relating to a provision, that power will normally extend to assessing the constitutional validity of that provision. Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts: *Douglas College* at pp. 603-4

The waters were muddied by *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. Some of the passages in La Forest J.'s majority judgment, and indeed of the Trilogy itself suggested that there must be found an express or implied legislative intention to confer the power to interpret the Charter on the tribunal, or that the grant of jurisdiction to consider questions of law must be broad. On a related point, La Forest J. held that it was relevant whether the tribunal was empowered to consider "general" as opposed to "limited" questions of law.

This is important for the Pension Appeals Board because s. 84(1) is not phrased in the broadest terms. It reads:

> **84. (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to**
>
> > **(*a*) whether any benefit is payable to a person,**
> >
> > **(*b*) the amount of any such benefit,**
> >
> > **(*c*) whether any person is eligible for a division of unadjusted pensionable earnings,**
> >
> > **(*d*) the amount of that division,**
> >
> > **(*e*) whether any person is eligible for an assignment of a contributor's retirement pension, or**
> >
> > **(*f*) the amount of that assignment,**
>
> **and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.**

So arguably, under the Justice La Forest's approach in *Cooper*, the PAB might not have had the jurisdiction to determine the constitutionality of CPP provisions.

In any case, the PAB continued to assert jurisdiction on constitutional points, and its power to do so was never to my knowledge severely challenged. But any remote possibility of a future challenge was prematurely snuffed out by the Supreme Court of Canada's decision in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 was handed down by the Supreme Court of Canada on December 9, 2003.

It's interesting to review what the substantive issue was in *Martin*. The Province of Nova Scotia had issued regulations excluding chronic pain from the purview of the regular workers' compensation system and providing, in lieu of the benefits normally available to injured workers, a four-week Functional Restoration Program after which no further benefits were available. The Workers' Compensation Appeals Tribunal held that the regulations violated the equality provisions of s. 15 of the Charter by discriminating against disabled workers with chronic pain. On appeal by the WCB, the Nova Scotia Court of Appeal ruled that the Appeals Tribunal did not have jurisdiction to make that determination, and in any case the Regulations did not violate the Charter. On further

appeal to the Supreme Court of Canada, the Appeals Tribunal decision, and its right to make it, were upheld.

The lesson for CPP purposes may be that any attempt by the Ministry or even the PAB to deal arbitrarily with the difficult issue of chronic pain risks a Charter challenge. *Quaere* whether requiring "objective evidence" to make a finding of disability is an arbitrary and discriminatory approach for such the more nebulous conditions.

Returning to the jurisdictional issue, Gonthier J. for the court identified three rationales for allowing tribunals to rule on Charter issues:

1. There was nothing special about the Charter such that only an exclusive club were qualified to interpret and apply it. As expressed by McLachlin J. in her dissent in *Cooper*, the Charter was not a "Holy Grail".
2. It was useful for the first instance tribunal to make findings of fact and rulings of law, to assist the reviewing court on judicial review.
3. An error of law by an administrative tribunal with respect to the Charter is reviewed using the low threshold correctness standard, so the role of the courts is not undermined.

Gonthier J. went to reformulate the principles set out in Trilogy and other cases, stating:

> The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follows:
>
> (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision.
>
> (2) (a) Explicit jurisdiction must be found in the terms of the statutory grant of authority.
>
> (2) (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself.
>
> (3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*.

> (4) The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. [para. 48]

The Supreme Court clearly distanced itself from the earlier decisions in the following passages:

- "The question is not whether Parliament or the legislature intended the tribunal to apply the *Charter*. As has often been pointed out, such an attribution of intent would be artificial, given that many of the relevant enabling provisions pre-date the *Charter* … to the extent that passages in the trilogy and *Cooper*, *supra*, suggest that the relevant legislative intention to be sought is one that the tribunal apply the *Charter* itself, those passages should be disregarded." (para. 35)
- [A] broad grant of jurisdiction is not necessary to confer on an administrative tribunal the power to apply the *Charter*. It suffices that the legislator endow the tribunal with power to decide questions of law arising under the challenged provision, and that the constitutional question relate to that provision." (para. 37)
- "[T]here is in my view no need to draw any distinction between "general" and "limited" questions of law, as was admittedly done in *Cooper*, *supra*. An administrative body will normally either have or not have the power to decide questions of law. As stated above, administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard: see, e.g., *McLeod v. Egan*, [1975] 1 S.C.R. 517; *David Taylor & Son, Ltd. v. Barnett*, [1953] 1 All E.R. 843 (C.A.); *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. Absent a clear expression or implication of contrary intent, such administrative bodies will also have jurisdiction to subject the statutory provisions over which they have jurisdiction to *Charter* scrutiny, while those tribunals without power to decide questions of law will not." (para. 45)

Martin was applied by the PAB in *Sudnik* v. *HRDC* (January 23, 2004) CP19633. The panel quoted from *Martin*, and went on to state the following (at para. 14):

> "We are satisfied as a Tribunal that we have the jurisdiction to hear a *Charter* application regarding the legislation. This has been clearly established in *Martin* …."

Under the *Martin* formulation of the test, the PAB is empowered to rule on constitutional challenges to CPP provisions as an adjunct to its power to rule on questions of law regarding the CPP. To the extent the grant of authority conferred by s. 84 on the PAB to deal with questions of law can be said to be "limited", it is still adequate for this purpose.

B. Section 7 of the Charter – Fair Trial

In addition to the jurisdictional point mentioned above, the PAB in *Sudnik* v. *HRDC* (January 23, 2004) CP19633 addressed the following issues:

1. Judicial review of Review Tribunal decision

Since the appellant was claiming that the Review Tribunal failed to comply with the Charter in failing to record the proceedings, the Minister argued that the proceeding was in fact an application for judicial review, over which the PAB had no jurisdiction. For example in *Leskiw v. Canada (Attorney General)*, 2004 FC 100, where the court said:

> "In ordinary circumstances, established unfairness of process is considered grounds for the Court to intervene on judicial review, at least where the decision in question might have been affected by the process" (para 16).

The panel accepted (at para. 11) that it no jurisdiction to conduct a judicial review of the Review Tribunal's decision: see CPP ss. 83(11) and 84(1). This point seems obvious. The PAB, like the Review Tribunal, is a creature of statute and not capable of imposing extraordinary remedies or referring the matter back to the Review Tribunal. By appealing a denial of natural justice issue to the PAB rather than seeking judicial review, a claimant may be giving up one level of appeal on the substantive issue of entitlement.

2. Application of s. 7 of Charter

Section 7 of the *Canadian Charter of Rights and Freedoms* states:

> **"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."**

Court decisions have generally confined s. 7 to threats to the physical or mental well-being of the individual and not to purely economic matters. The panel doubted whether s. 7 applied in this case, as there was no risk that the applicant would be deprived of life, liberty or security of the person. Entitlement to a disability pension was a property right (para. 22). To support its position, the panel referred to *A&L Investments Ltd. v. Ontario* [1997] 152 D.L.R. (4th) 692 (Ont. C.A.), a case involving landlords who were suing the provincial government for retroactively voiding orders for rent increases. The action was held not to violate the s. 7 rights of the landlords.

3. Requirement of a transcript at the Review Tribunal or PAB level

The panel noted that there was never a statutory requirement that Review Tribunal hearings be recorded, and went on to state:

> As the appeal from the Review Tribunal to the Pension Appeals Board is by way of trial *de novo*, a transcript would not be necessary or required, except in exceptional cases. [para. 17]

In determining whether tribunal hearings should be recorded for purposes of judicial review, a key case is *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, where the Supreme Court of Canada held that the absence of a transcript constituted a breach of natural justice, as a court was prevented from determining whether the applicant has established any grounds for review.

However, the Federal Court of Appeal in *Garcia v. Canada (Attorney General)*, 2001 FCA 200 at para. 4 noted that the Supreme Court in *CUPE Local 301* went on to observe that where affidavits were offered to establish facts underlying the issues on review, the opposing party must establish some basis on which such affidavits can be rejected or ignored. The Court of Appeal held that since the claimant had not sought to cross-examine on the affidavit introduced by the Minister or provide in his own affidavit any description of evidence rejected or ignored by the PAB, the affidavit evidence in conjunction with the application for judicial review provided an adequate record for the court to review factual findings in order to determine whether a ground of review was well-founded.

The panel in *Sudnick* cited *Garcia* before holding:

> In the Appellant's case he was not denied a fair hearing at the Review Tribunal level because there was no transcript. On an Application for Leave to Appeal or Judicial Review he could put forward all the facts by way of affidavit evidence. The deponents could be cross-examined on their affidavits. [para. 21]

Of course, *Garcia* is also authority for the use of affidavits on judicial review proceedings from unrecorded PAB decisions.

Two other points which bear on all of this are that (a) disability proceedings by and large revolve around the expert reports submitted by the parties, and (b) professionally-prepared transcripts are very costly, especially when compared to the amounts generally in issue in CPP or OAS proceedings. The benefit to be gained from having transcripts would not outweigh the additional expense involved.

5. Application of s. 2(e) of the *Canadian Bill of Rights*

Section 2(e) of the *Bill of Rights* provides for a:

> **"right to a fair hearing in accordance with the principles of fundamental justice."**

The panel ruled that the lack of a transcript or recording device did not deprive the claimant of his right to a fair hearing (para. 24).

B. Discrimination against persons in isolated communities, and against children

***Johnson v. HRDC* (February 17, 2004) CP19002**

The claimant widow lived in a remote aboriginal community on the B.C. coast. Her common law spouse and father of her two children was lost at sea in 1986. His body was never recovered, and his death was certified in 1994. Soon after her husband went missing, the claimant was called to the band office to discuss his estate with a lawyer from the Department of Indian Affairs. She claims she was told that because she was not legally married to the deceased, she was not entitled to a "widow's pension" under the CPP. The claimant did not apply for survivor's and orphan's benefits until 1999, when she was awarded the statutory one year's retroactive benefits for each. The claimant sought entitlement to full retroactive benefits, on the basis that CPP ss. 72(1) and 74 violated her equality rights under s. 15 of the Charter of Rights to the extent that they discriminated against persons in isolated communities where accurate information was hard to come by, and against orphans who are dependent on adults to apply for benefits.

The PAB ruled that the appellant had been informed about survivor's (if not orphans') benefits in 1986, but that she had been misinformed as to whether she qualified. In *obiter*, the PAB went on to declare that even she had not been aware of any such program, ss. 72(1) and 74 did not violate s. 15 of the Charter of Rights. The appellant had not established that the impugned provisions had a disproportionate impact on persons living in isolated aboriginal communities as compared with beneficiaries living in urban areas or as compared to non-aboriginal beneficiaries living in rural areas. Nor did the reduction of retroactive benefits due to the late application demean the appellant's essential human dignity such that s. 15(1) would be infringed.

The PAB gave an interesting policy justification for the limited retroactivity provisions, beyond simply saving the government money:

> Without some limitation on retroactivity, it would be impossible to manage the *Plan* in an efficient way. One would never be able to know the amount of unrealized retroactive payments that might be accumulating and the result could well be chaotic. As the Ministerial expert Evelyn McDonald made clear, the *Plan*

> could not function for the benefit of the greater good absent some limitation being placed on retroactivity. [para. 22]

Finally, the PAB held that s. 74 did not unlawfully discriminate against orphaned minors. The CPP created no distinction among different classes of children, and they are all treated similarly under ss. 74 and 75. The impugned sections did not impose a distinction among orphans on the basis of age.

V. WHEN IS AN APPLICATION "MADE"?

Different provisions of the CPP use different language to indicate the relevant date of application. This can prove confusing when the claimant's rights are on the line.

In *Galay v. MSD* (June 3, 2004) CP21768, the claimant, who had been suffering serious health problems, turned 60 in April 2000 and immediately applied for CPP retirement pension. He began receiving the pension in May, 2000. The claimant was not aware of his possible entitlement to a disability pension until August 2001, The PAB found:

> Therefore on August 9, 2001, the Respondent completed an application for a disability benefit payment which was received by the Appellant Minister on September 25, 2001. [para. 6]

The PAB did not indicate when the application was actually mailed or otherwise sent to the Minister. The two governing provisions are CPP ss. 42(2)(b) and 66(1.1) :

> (2) For the purposes of this Act,
>
> > (b) a person shall be deemed to have become or to have ceased to be disabled at such time as is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person be deemed to have become disabled earlier than fifteen months before the time of the **making** of any application in respect of which the determination is made.
>
> **66.** (1.1) Subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension first became payable.
>
> (emphasis added)

The Review Tribunal found from the medical evidence that applicant was "actually disabled" as of April, 2000, and therefore was entitled to cancel the retirement pension in favour of a disability pension. The PAB allowed the Minister's appeal, and found that the earliest date the applicant could be deemed to be disabled was late June, 2000, 15 months prior to his application for disability benefit being received. This was over a month after he began receiving his retirement pension, and therefore he could not cancel it in favour of disability benefits under CPP s. 66.1(1.1).

The PAB seemed to have implicitly assumed that the words "before the time of the making of any application" in s. 42(2)(b) refer to the time that the application was received by the Minister. If the 15 months had been calculated from the August 2001 sending date, then the earliest the claimant could have been deemed to have become disabled was May 2000, the month he started to receive benefits. Perhaps it wouldn't have mattered in this case, but there could easily be a situation where the difference between the application sending and receiving dates does matter.

It's interesting to look at the wording of other CPP provisions. (emphasis added):

- s. 44(1)(b)(ii) – "if an application for a disability pension had been **received** before the contributor's application for a disability pension was actually received"
- s. 55(7) – "the adjusted benefit shall be paid effective the month following the month the application referred to in subsection (1) is **received**."
- s. 55.1(1)(a)(ii) – "in the event of the death of one of the spouses after they have been living separate and apart for a period of one year or more, the application is **made** within three years after the death"
- s. 55.1(1)(c) – "application is **made** within four years after the day on which the former common-law partners commenced to live separate and apart.
- **s.** 55.3 (1) – "Where an application for a division of unadjusted pensionable earnings is **made** under subsection 55(1) or paragraph 55.1(1)(*b*) or (*c*) or the Minister **receives** the prescribed information"
- s. 60(1) – "No benefit is payable to any person under this Act unless an application therefor has been **made** by him or on his behalf and payment of the benefit has been approved under this Act."
- s. 60(2.1) An application referred to in subsection (2) in respect of a disability benefit may not be approved if the application is **received** after December 31, 1997.

It is noted that the words "made" and "received" are used almost alternately, but not necessarily alternatively. But in s. 67(4), the legislation reads as follows:

(4) Where a disability pension is no longer payable because a decision that the person was disabled has been reversed or because the person has ceased to be disabled, and on or before the day that is 90 days after the day on which the person is notified that the disability pension has ceased, or within any longer period that the Minister may either before or after the expiration of those 90 days

allow, the person applies for a retirement pension, that application is deemed to have been received in the latest of

(*a*) the month in which the disability pension application was made,

(*b*) the last month for which the disability pension was payable, and

(*c*) the month before the month in which the contributor reached the age of 60 years. (emphasis added)

Here, the CPP is clearly distinguishing between when an application is "made" and "received". It would seem to follow that when the CPP refers to an application being "made", it is referring to the date of mailing, not the date of receipt by the Minister.

For another attempted withdrawal case, see Boulard v. MSD (May 20, 2004) CP22011. In that case, the claimant had been receiving a retirement pension since July 2000. Since the claimant's application for a disability pension was received in April 2002, the PAB ruled that he could not have been deemed disabled prior to January 2001, and the application to withdraw the retirement pension was dismissed.

V. REPORTS OF FAMILY DOCTORS

In Letourneau J.A.'s concurring judgment in *Canada (Minister of Human Resources Development) v. Angheloni,* 2003 FCA 140, he notes that the PAB must be vigilant in assessing the documentary evidence of a family doctor, especially one who did not testify at the hearing, where there are indicia that his required and expected neutrality has been lost.

This principle was applied by the PAB in *Williams v. MHRD* (January 29, 2004) CP 18713. The claimant's MQP was 1997. He had retired in 1995 after 32 years as a construction worker because he was bothered by arthritis, and began operating a family-owned woodlot. He claimed he was able to work only three or four days a week for about three hours a day and that this was not enough to realize any profit. He kept at it because until a severe accident in 1999 he enjoyed trying to do something. His family doctor claimed in a report that the claimant's arthritis made him unable to work, stating "It is my estimation that this man will never be able to be gainfully employed again, because of his significant arthritic problems." However, there was no clinical evidence of advanced arthritis from pre-1997 tests to support this claim. The only notes made by the family doctor were from 1999. In rejecting this evidence, the PAB stated:

> The judgment of the Federal Court of Appeal in *Minister of Human Resources Development v. Angheloni*, 2003 FCA 140, includes a caution concerning the assessment of a family doctor's documentary evidence in the absence of supporting objective medical evidence. This is because the family physician in attempting to assist a patient

> who is seeking a disability pension may go beyond the role of a medical advisor and become an advocate for the claim and, in so doing, diminish the credibility of the evidence. On the facts of the present case, I think one must be especially cognizant of the admonition." [para. 14]

VI. OTHER EXAMPLE CASES

A. Severity

"Prior Board decisions as well as those of the Federal Court of Appeal, have consistently held that the term "severe" is expressed in terms of capacity to work. A finding of severity is not based on a medical diagnosis alone, or a disease description. Nor is it based upon the Appellant's ability to perform his or her usual occupation, rather than any substantially gainful employment. Capacity to perform regular part-time work, modified activities or sedentary occupations has been held to preclude a finding of severity": *Kotsopoulos v. MHRD* (May 27, 2004) CP #21310 [para. 19]

B. "Substantially gainful occupation"

In *Sudnik* v. *HRDC* (January 23, 2004) CP19633, the panel found that a former welder and heavy duty mechanic who could now only eke out a subsistence living on his farm with the help of neighbours and family members, had met the test of having a substantial gainful occupation. The panel stated the following:

> "Mr. Sudnik has a $150,000.00 mortgage at 12¾% on his farm. He pays $1,350.00 per month on the mortgage. For the last five years the farm operation has not been profitable. He is making his best effort to make the farm operation financially viable. However crisis like Mad Cow Disease has not helped.
>
> He is able to live off the farm. As is common in many rural areas of Canada, he barters with his neighbours and friends. The farm is of real importance to Mr. Sudnik. It may not meet the test of "lucrative," in that he does not earn substantially money, but he does earn a living from the farm operation. The farm operation is a seven-day a week "occupation." [paras. 49, 50]

This approach seems pretty harsh if applied generally, although the panel may be implicitly assuming that the claimant's circumstances will improve if the US-Canadian border is completely reopened for beef exports, and perhaps if the claimant could refinance his mortgage at a lower rate.

C. Comparison with other private and public disability plans

In *Heller-Pereira v. MHRD* (May 26, 2004) CP18522, the claimant was a former nurse's aid with advanced scoliosis was receiving $1,400 in long term disability benefits from her private plan. The Claims Review Committee Report stated that the claimant was

totally disabled and unable by reason of education, training or experience to perform the duties of any gainful occupation as defined under the Plan ...". In denying her claim for CPP benefits, the PAB quoted *Bowman v. Minister of Social Development* (CP21429, 2004, unreported):

> The provisions of other public and private plans for disability pensions or other similar periodic payments vary from those involved here. The legislation rules that determine eligibility for a disability pension under the Plan are strict and inflexible. This Board, as differently constituted, has emphasized in several cases, for example *Dorion v Minister of Human Resources Development* CP10672, 2000, that the threshold for a disability pension under the Plan is a high and stringent one, perhaps one of the highest, if not the highest, in any such legislation in North America. [para. 30]

D. Jurisdiction

PAB not a court of equity: In *Meseyton v. MHRD* (June 4, 2004) CP 21108, the claimant's initial application for disability benefits in 1997 was denied by the Minister. The claimant didn't appeal, but reapplied in 2000, and was ultimately successful at in the Review Tribunal, receiving 15 months retroactive benefits. The claimant further appealed to PAB seeking benefits retroactive to the first application in 1997. The appeal was refused, the PAB stating:

> The Chairman explained that the Pension Appeals Board was a statutory Board and that it therefore derived all of its powers, solely, from the statute that created it, namely, the *Canada Pension Plan*. He further explained that while the members of the Board were all judges or former judges of a superior court of a province and thus as members of those Courts enjoyed a broad equitable jurisdiction; they, however, when sittings as members of the Pension Appeals Board had no such expanded jurisdiction and were bound strictly by the express provisions and wording of the *Canada Pension Plan*. [para. 10]

Ministerial determination: In Robsob-Belfrey (January 8, 2004) CP15822, the Minister had never, on the record, considered and gave a decision in writing on the issue of capacity. The PAB ruled that such a step was a necessary basis for the appeal procedure, and neither the Review Tribunal nor the PAB had jurisdiction to determine matter without a formal decision. Even though all parties were prepared to proceed on the issues, their consent could not confer jurisdiction on the PAB.

E. Post-MQP events

Subsequent employment: In *Morgan v. Minister of Social Development* (June 24, 2004) CP21375, the claimant left his part-time janitorial job and applied for a CPP disability pension on December 31, 1996 at the age of 50, claiming debilitating muscle pain. Expert medical reports mostly suggested that the claimant's pain was temporary. The claimant

unemployed until 2002, when he worked as full-time security guard for six month, earning more than he had been making as part-time janitor years before. Claimant quitting this job when his request for time off to attend to his motor vehicle was denied. The PAB considered that the claimant's 2002 job indicated that he was not disabled within meaning of CPP.

Other forms of benefits: In MacLaurin (May 7, 2004) CP21732, a widow was not severely disabled prior to her MQP in 1997, but she became severely disabled in 2004 which entitled her to enhanced survivor benefits under CPP s. 58.

F. Division of CPP Credits

In *Christensen v. MSD* (May 4, 2004) CP 21785, a couple had separated prior to January 1, 1987, and had never obtained a final divorce order. After the husband died suddenly in 2001, the wife was not entitled to apply for a division of CPP credits under s. 55.1. The parties' 1986 separation agreement, under which they agreed that contributions made by them to the date of the agreement to the *Plan* should be distributed evenly between them, did not give the Minister discretion to make a division of unadjusted pensionable earnings otherwise than in accordance with the *Plan*.

G. Depression

Major depression: In Raisi (February 12, 2004) CP21607, the claimant was 51 at the time of the hearing, and had not worked since a 1995 motor vehicle accident in which her 11-year-old son was killed. She was diagnosed with major depression, and was unable to work or function normally ever since. The claimant undoubtedly severely disabled in 1997, had psychotherapy until 2000, was still on Xanax. In allowing her claim, the PAB stated:

> The Board notes that as early as December 1997 the North York Rehabilitation Centre in assessing Mrs. Raisi concluded that she had plateaued with respect to rehabilitation. Other evidence is supportive of the fact extensive psychotherapy likely modified the Appellant's mental condition but not to the degree that she became gained the capacity to pursue regular gainful employment. In such circumstances it is this Board's opinion it would be unrealistic to expect Mrs. Raisi to seek or attempt regular, even part-time gainful employment. She follows a sort of obsessive-compulsive lifestyle that no normal person would choose. In our view, she obviously suffers from a severe mental disorder which renders her incapable of pursuing any gainful employment. [para. 21]

Duty to take anti-depressants: In *Roberts v. MHRD* (November 6, 2003) CP 20598, the claimant medical reports essentially indicated no organic pathologies were identified to explain the claimant's main complaints of fatigue, aches and pains. Two specialists diagnosed depression, but claimant refused their advice to take anti-depressants. He tried to take one once, but ceased taking it before the six-week trial ended because he thought

the drug made him feel "weird." The claimant never sought an alternative drug because he did not like the idea of taking such medications. In dismissing the appeal, the PAB stated:

> "It seems rather ludicrous that the Appellant has shown no enthusiasm or intention of following the advice of Drs. Edwards and Magnus in spite of his long continuing complaints of fatigue, aches and pain as well as the fact extensive medical examinations have been unable to identify any physical cause for his problems. In fact, Mr. Roberts' conduct in this regard runs contrary to the Board's consistent rulings that applicants for disability benefits have an obligation to comply and follow programs of treatment recommended by the medical experts who examine them." [para. 13]

H. Functional overlay

In Klasen (May 17, 2004) CP 20518, the PAB rejected the appeal of the now 39-year-old claimant, whose MQP ended Dec. 31, 2001. The claimant had been a cashier, with Grade 12 plus one year community college, who reported severe back pain after a workplace accident. Expert medical reports indicated functional overlay, and the claimant was receiving $1400/mo from Ontario disability. She refused to attend the recommended "Function Restoration Program" because of child-care concerns. The PAB stated:

> The board is of the view that even though the Appellant considers herself to be disabled, it is obvious from the many medical reports that there is a large component of psychological overlay in her pain. She is too young and too intelligent to be written off as permanently disabled at this time. She has computer skills. She requires insight into her problem, and notwithstanding the practical difficulties of childcare and travelling long distances in a large busy city, she should have registered in and should now register and commit herself to the Toronto Western Hospital Functional Restoration Program. She has not taken the recommended steps to help herself. [para. 14]