PENSION APPEALS BOARD
Canada Pension Plan

COMMISSION D'APPEL DES PENSIONS
Régime de pensions du Canada

JUDICIAL REVIEW OF PENSION APPEALS BOARD DECISIONS

Prepared by:

The Honourable Mr. Justice Killeen
Andrew James

The Grand Okanagan
Kelowna, British Columbia
July 2003

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A Summary of the Cases

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I. Standard of review

(a) General Principles

Hammurabi Code: If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgment.

***Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19**

The pragmatic and functional approach applies whenever a court reviews the decision of an administrative body. Under this approach, the standard of review is determined by considering four contextual factors:

1. The presence or absence of a privative clause or statutory right of appeal

A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review. A statute may be silent on the question of review; silence is neutral, and does not imply a high standard of scrutiny. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due.

2. The expertise of the tribunal relative to that of the reviewing court on the issue in question

This factor recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when

conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise. Thus, the analysis under this heading has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone. The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor. For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development. Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise. Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference

3. The purposes of the legislation and the provision in particular

If the question before the administrative body is one of law or engages a particular aspect of the legislation, the analysis under this factor must also consider the specific legislative purpose of the provision(s) implicated in the review. As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies – i.e. the legislation is “polycentric". A statutory purpose that requires a tribunal to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations will demand greater deference from a reviewing court. The express language of a statute may help to identify such a purpose. For example, provisions that require the decision-maker to "have regard to all such circumstances as it considers relevant" or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review. Reviewing courts should also consider the breadth, specialization, and technical or scientific nature of the issues that the legislation asks the administrative tribunal to consider. In this respect, the principles animating the factors of relative expertise and legislative purpose tend to overlap. A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference. In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. The more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show.

4. The nature of the question -- law, fact, or mixed law and fact

When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

The above four factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. Consideration of the four factors should enable the reviewing judge to address the core issues in determining the degree of deference. It should not be viewed as an empty ritual, or applied mechanically. The virtue of the pragmatic and functional approach lies in its capacity to draw out the information that may be relevant to the issue of curial deference.

Having considered each of these factors, a reviewing court must settle upon one of three currently recognized standards of review. 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.

***Law Society of New Brunswick v. Ryan*, 2003 SCC 20**

Only three standards of review have been defined by the Supreme Court of Canada for judicial review of administrative action. Thus a reviewing court must not interfere unless it can explain how the administrative action is incorrect, unreasonable, or patently unreasonable, depending on the appropriate standard. The pragmatic and functional approach will determine, in each case, which of these three standards is appropriate. Additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited.

The content of a standard of review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter. Of course, the answer to the question must bear careful relation to the context of the decision, but the question itself remains constant. The suggestion that reasonableness is an "area" allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard. I now turn to a closer examination of what a

reviewing court should do when engaging in its somewhat probing examination of an administrative decision.

Where the pragmatic and functional approach leads to the conclusion that the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision was unreasonable. The reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission to, those reasons

When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. The difference between an unreasonable decision and a patently unreasonable one is rooted in the immediacy or obviousness of the defect. Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after significant searching or testing. Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal. A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the

evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling. This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

***Starson v. Swayze,* 2003 SCC 32**. See also ***R. v. Owen*, 2003 SCC 33**

Where the standard of review is on based reasonableness *simpliciter*, there is no basis for judicial interference with findings of fact or the inferences drawn from the facts absent demonstrated unreasonableness. This means that the tribunal's conclusion must be upheld provided it was among the range of conclusions that could reasonably have been reached on the law and evidence. If the tribunal's decision is such that it could reasonably be the subject of disagreement among tribunal members properly informed of the facts and instructed on the applicable law, the court should in general decline to intervene. The fact that the reviewing court would have come to a different conclusion does not suffice to set aside the tribunal 's conclusion.

(b) Standard of Review of PAB decisions

***Canada (Minister of Human Resources Development) v. Angheloni,* 2003 FCA 140**. See also ***Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211**

The standard of review to be applied by the FCA on an application for judicial review of a decision of the PAB stands at the correctness end of the spectrum on matters of law. On matters of fact, the standard of review is that of patent reasonableness.

***Canada (Minister of Human Resources Development) v. Rafuse*, [2002] FCA 31**

On an application for judicial review, the role of the Federal Court with respect to the PAB's findings of fact is strictly circumscribed. In the absence of an error of law in a tribunal's fact-finding process, or a breach of the duty of fairness, the court may only quash a decision of the PAB for factual error if the finding was perverse or capricious or made without regard to the material before the PAB. If, as a result of an error of law, the PAB has omitted to make a relevant finding of fact, including a factual inference, the matter should normally be returned to the tribunal to enable it to complete its work.

Obiter: While the directions that the court may issue when setting aside a PAB decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances. Such will rarely be the case when the issue in dispute is essentially factual in nature, particularly when the PAB has not made the relevant finding.

***Vogt v. Canada (Minister of Human Resources Development)*, [2002] FCA 52**

The conclusion of the PAB after a review of the substantive evidence that there was no reliable objective evidence to support a finding that the claimant suffered from a disability such as to prevent him from regularly pursuing a substantially gainful will not be interfered with if the decision is not patently unreasonable.

***Villani v. Canada (A.G.)* [2001] FCA 248**

The standard of review of a PAB decision involving the interpretation and application of the definition of a "severe" disability within the meaning of CPP s. 42(2)(a)(i) is correctness, at the least deferential end of the spectrum. However, as long as the PAB applies the correct legal test for severity, it will be in a position to judge on the facts whether, in practical terms, an claimant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the claimant's circumstances is a question of judgment with which the Federal Court of Appeal will be reluctant to interfere.

***Canada (Minister of Human Resources Development) v. Skoric*, [2000] 3 F.C. 265 (C.A.)**

The PAB has no broad regulatory responsibilities, but performs only the adjudicative function of hearing appeals from the Review Tribunal. The effect of the finality clause is to restrict the jurisdiction that the PAB would otherwise have had to reconsider its decisions, subject to its power to reconsider its decisions "on new facts" under s. 84(2). The standard of review of a decision of the PAB interpreting the CPP is towards the correctness end of the spectrum. Little deference should be shown to the PAB’s interpretation of its constitutive legislation, especially in the absence of evidence indicating that PAB members acquire considerable expertise in the CPP as a result of the volume of appeals that they hear and decide.

***Lutzer v. Canada (Minister of Human Resources Development)*, [2002] FCA 190**

Judicial review would not be granted where the PAB’s application of the relevant statutory provision to the facts before it was not unreasonable.

(c) Reasons for decision

***R. v. Sheppard*, [2002] 1 S.C.R. 869**

The duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict *properly* scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

In the context of appellate intervention in a criminal case, the following propositions are intended to be helpful rather than exhaustive:

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.

***R. v. Burns*, [1994] 1 S.C.R. 656**

Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(*a*). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.

***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817**

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 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.

***Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92**

While the importance of the interests at stake, and the seriousness of the adverse effect on a party of a negative decision, may be relevant to determining the content of the duty of fairness and the adequacy of a tribunal's reasons, this does not justify applying a double standard to the adequacy of a tribunal's reasons depending on which way it decides a dispute. The Minister represents the public interest in the financial integrity of the CPP and its due administration according to law, and there is a public interest in ensuring that claimants are not paid benefits to which they are not entitled. Both parties are entitled to a fair hearing before the PAB 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.

It does not impose an undue burden on the PAB to provide more by way of reasons than was provided in this case. For one thing, if the PAB's decision had been adverse to her client, the work involved in giving more extensive reasons would not have excused their inadequacy. And, when it comes to determining the adequacy of a tribunal's reasons, what is sauce for the goose is sauce for the gander as well.

The fact that the PAB comprises serving and former federally appointed judges (s. 83(5)-(5.5)) is an indication that Parliament expected more by way of reasons than the PAB provided in this case. Unlike many of those serving on administrative tribunals, the members and temporary members of the PAB are not unfamiliar with the writing of reasons for decision in matters where a careful analysis of the law and conflicting evidence is required. While members of the PAB may be called upon to hear a relatively large number of appeals, many of the cases that they hear are fairly straightforward and the work load can be shared among the three members who comprise a panel of the PAB.

***Vogt v. Canada (Minister of Human Resources Development)*, [2002] FCA 52**

It was not necessary for the PAB to have given reasons for not believing the claimant where its reasons were sufficiently comprehensive to demonstrate the reasoning on which its conclusions were based.

***Lutzer v. Canada (Minister of Human Resources Development)*, [2002] FCA 190**

After stating the correct test and such factors as the claimant’s age and education, the PAB was not required to explain the reasoning leading to its conclusion that the claimant was not entitled to a disability pension.

***Doyle v. Canada (Minister of Human Resources Development)*, [2002] FCA 280**

Where the PAB stated in its decision that there was no medical evidence, although there was in fact some medical evidence in the record, the court could infer that this evidence was ignored and grant judicial review.

***Kellar v. Canada (Minister of Human Resources Development)*, [2002] FCA 204**

The PAB is not required to refer to every piece of evidence before it, but only to those that have significant probative value. Reports based on false assumptions need not be referred to.

II. Summaries of FCA Judicial Review Decisions (on the Facts)

***Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92** (see also digest under Standard of Review)

Overview: The PAB reversed the Review Tribunal's decision and found that 33-year-old junior CAD (computer-assisted design) draftsperson suffering from fibromyalgia was disabled. FCA granted Minister's application for judicial review.

Evidence: The preponderance of the evidence contained in 30 medical reports was that disability did not prevent claimant from working, although it was conceded that she could not return to her previous job. Seven doctors (including an orthopedist, physiatrists, an internist and a psychiatrist) stated that in their opinion claimant could work again. A report from a rehabilitation clinic identified nine jobs that a person of claimant's age, education, skills and medical condition could realistically be expected to be able to perform. Some reports suggested that she could obtain part-time employment or work from home. Her former employer offered to re-hire her and to provide her with work that would accommodate her physical difficulties. On the other hand, a rheumatologist and the claimant's family physician, were of the opinion that her disability was severe and that she could undertake no kind of work. Another doctor thought that she could work for no more than two hours a day. Others expressed no opinion on the functional severity of her disability.

PAB's reasoning: PAB briefly described the conclusions of six doctors who had submitted reports or given oral testimony expressing a variety of views. The PAB also referred to the testimony of the claimant respecting her attempts to resume work, her symptoms and her strategies for reducing pain. It noted that there was strong evidence on both sides and that cases of fibromyalgia present difficulties for the PAB, although it has the responsibility of deciding whether the claimant suffers from fibromyalgia which is debilitating to the point where she can no longer work at a job which will provide an appropriate livelihood. After stating that it had considered all the evidence, the PAB allowed the appeal, because it found the testimony of the claimant and the rheumatologist to be credible.

FCA's reasons:

That the only justification provided by the PAB for its decision was that it found the testimony of the claimant and the rheumatologist to be credible does not pass muster as "reasons" on any standard of adequacy. 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 PAB 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 PAB reached its decision despite the mound of apparently credible evidence pointing to the opposite conclusion.

By stating stated that the question that it had to decide was 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 appropriate livelihood*", the PAB may not have erred in law, but it is generally unwise for the PAB to formulate in words other than those contained in the statute the legal test that it is applying.

***Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34**

Overview: PAB reversed Review Tribunal decision and found that that claimant was disabled by virtue of her recurring bouts of depression. FCA granted Minister's application for judicial review.

Evidence: Claimant took early retirement in 1995. In 1997, claimant's family doctor noted that she had a long history of depression but that she "appears euthymic at present". He noted that she was currently not taking any medication and "her mood appears normal now but prognosis for recurrence is guarded". The PAB also heard the evidence of a medical advisor to the claimant. He testified that having reviewed the file including the medical opinions he could find no medical information that would lead him to conclude that, as of the relevant date, December 31, 1997, the claimant suffered from a mental condition that prevented her from working. The claimant has become engaged in looking after the rental of apartments in an apartment building. In return for the work she does in respect of the apartments she is provided with a rent-free apartment in the building.

PAB's reasoning: The claimant was incapable of regular employment by virtue of her disability.

FCA's reasons:
#1 - It is the incapacity, not the employment, which must be "regular" and the employment can be "any substantially gainful occupation". The standard of review on this error of law issue is correctness.

#2 - The PAB did not have regard to uncontradicted evidence from three physicians, none of whom could confirm that she was incapable of any substantially gainful occupation as of December, 1997. Further, the PAB ignored evidence that, consistently with the opinions of the doctors, she has been able to work in the renting of apartments and

obtains part of her livelihood, that is her accommodation, in return, a form of "substantially gainful occupation".

***Inclima v. Canada (Attorney General)*, 2003 FCA 117**

Overview: The PAB found that the claimant's fibromyalgia and chronic pain disorder did not render him disabled. The FCA dismissed the claimant's application for judicial review.

Evidence: The claimant retained the capacity to work at light to moderate levels, despite his fibromyalgia and chronic pain.

PAB's reasoning: The claimant had not attempted to find light duty employment or to take advantage of retraining opportunities.

FCA's reasons:
#1 – A claimant 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 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.

#2 - The medical evidence, as is usually the case, was not all to the same effect. It was for the PAB to assess that evidence and its conclusion was not unreasonable.

***Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140**
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Overview: The PAB reversed the Review Tribunal's decision and found that the claimant, a 51-year-old female machine operator with Grade 8 education, was disabled by reason of her knee-locking and a right hand disability which prevented her from using that hand. The FCA allowed the Minister's application for judicial review.

FCA's reasons:

#1 - The PAB erred in law in adding economic conditions as a relevant consideration. The FCA in *Minister of Human Resources Development v. Rice*, 2002 F.C.A. 47 made it clear that s. 42(2)(a)(i) refers to the capability of the individual to regularly pursue any substantially gainful occupation and not to labour market conditions. The PAB knew or ought to have known that it was bound by *Rice* and should not have engaged on a frolic of its own. [Note: this may be *obiter* since the FCA was unclear on the extent to which economic conditions played a role in the PAB decision. The FCA's decision in this case was dictated by its finding that the PAB had failed to properly assess the evidence (see #3 below)]

#2 - The suffering of the claimant is not an element on which the test of "disability" rests. The PAB must be satisfied that the claimant suffers from disabilities which, in a

"real world" sense, render her incapable regularly of pursuing any substantially gainful occupation

#3 - The PAB never determined in what manner its findings regarding the existence of the claimant's condition affected her ability to work. Throughout its summary of the medical evidence, the PAB discarded elements in the evidence which tended to establish a lack of effort on the part of the claimant to manage her pain or find suitable work considering her condition. The PAB did not refer to that part of the report of a physical medicine and rehabilitation consultant which indicated that the claimant, by her own admission, limited all her activities secondary to pain and that it would be in her best interest to attend a chronic pain program where cognitive and behavioural strategies are used. This report stated that the focus of these types of programs was to increase functional activities despite persisting discomfort. Function is therefore promoted and there is an attempt to extinguish pain behaviour. In addition, that there was an extensive body of evidence to support active exercise in knee osteoarthritis and that it would be appropriate to encourage the claimant to adopt a regular walk program. The prognosis of "curing" persisting pain was low. However, the approach of a chronic pain program had been proven to increase function and decrease perceived disability. The claimant's reported abilities on sitting and standing and walking as well as ability to carry, lift and hold 2 lbs would enable her to do light sedentary work with regular change of position.

#4 - Letourneau J.A. (concurring) — 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.

***Oliveira v. Canada (Minister of Human Resources Development)*, 2003 FCA 213**

Overview: The PAB found that the claimant was not disabled by her scleroderma and musculoskeletal pain. The FCA allowed the claimant's application for judicial review.

FCA's reasons:

The PAB stated that the only relevant evidence was that of the claimant's family physician, while making no reference to the evidence of a rheumatology specialist that the claimant's condition had progressed to a point that she could no longer be gainfully employed and that her condition was permanent. While the PAB need not make express reference in its reasons to all the oral and documentary evidence presented, it was apparent on the face of the reasons that the PAB actually ignored this oral evidence.

***Canada (Minister of Human Resources Development) v. Ash*, 2002 FCA 462**

Overview: The PAB had granted the claimant leave to appeal the Review Tribunal decision denying disability benefits, stating that the appeal was restricted to the issue of whether the contributory requirements of the CPP have been met. The decision granting leave noted one of the issues as being "If the Review Tribunal was wrong in its interpretation of the effect of division of the unadjusted pensionable earnings attributed to

her, is she entitled to a disability pension by reason of her June 1989 stroke (as acknowledged by the Tribunal) by reason of the application of Section 44(1)(b)(iii) and what is the effective date of the payment of the first disability benefit?" When the PAB found that the claimant had met the CPP contributory requirements, it granted her a disability pension. The FCA dismissed the Minister's application for judicial review.

FCA's reasons:

The PAB understood that the issue of the claimant's disability had been determined by the Review Tribunal and was not the subject of the appeal. While one could read the words "as acknowledged by the Tribunal" as referring only to the 1989 stroke and not to the fact that the disability itself had been acknowledged by the Tribunal, it could not be said that the PAB's reading and understanding of that paragraph was unreasonable, let alone improper.

***Canada (Minister of Human Resources Development) v. Harmer*, 2002 FCA 321**

FCA'S Reasons:

Obiter: The words of s. 42 (2)(a)(i) refer to the capability of the individual to regularly pursue any substantially gainful occupation. They do not refer to labour market conditions. There is other legislation such as the *Employment Insurance Act* which is directed at helping individuals to cope with the fluctuations in the labour market. By contrast, the purpose of the *Canada Pension Plan* is to provide individuals who have been disabled in accordance with the words of that Act with a disability pension because they are incapable of regularly pursuing any substantially gainful employment. The disability provisions are not a supplementary employment insurance scheme. There is no suggestion in *Villani* that socio-economic considerations such as labour market conditions are relevant in a disability assessment. While Isaac J.A. referred to the necessity of "evidence of employment efforts and possibilities", these words simply refer 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. [Note: the FCA determined that the Minister's application for judicial review in this case was moot, but went on to express its opinion on this matter.]

***Mitcham v. Canada (Attorney General)*, 2003 FCA 70**

Overview: The claimant did not apply for judicial review of the PAB decision denying his claim for a CPP disability pension until 6 months after the 30-day time limit for doing so expired. Initially, he had contacted his Member of Parliament, who in turn contacted the Minister, but neither one informed the claimant of his right to apply for judicial review. The FCA permitted the claimant to proceed with his judicial review application.

FCA's reasons: The claimant had not been well served by either the PAB, his Member of Parliament, or ministerial or departmental staff. When sending out the decision, the PAB failed to inform him of the right to judicial review in the FCA or of the time limit

for making application. While his resort to an MP was misconceived, he had done so before the 30-day limit expired, and no-one set him straight.

***Meyer v. Canada (Attorney General)*, 2003 FCA 107**

FCA's reasons: Section 67(3) of the CPP applies to applications by estates, and therefore the limitation to 12 months' retroactivity of benefits also applies whether it is the living contributor, or his or her estate, that is applying. To read the legislation as conferring on survivors or beneficiaries of an estate access to greater benefits than living contributors would be patently absurd.

***Cormier v. Canada (Minister of Human Resources Development)*, 2002 FCA 514**

FCA's reasons: The only statutory liability of the Minister to pay a death benefit is owed to the estate. If the estate fails to apply within 60 days of the death, the only effect of this failure is to trigger the discretion exercisable by the Minister under s. 71(2) to pay the benefit to statutorily prescribed persons, who do not include the estate of the contributor. The Minister's obligation to pay to the estate under s. 71(1) continues, even if representatives of the estate do not apply for death benefit within the 60 days. However, if the estate does not apply within 60 days and the Minister makes a discretionary payment under s. 71(2), s. 71(3) expressly provides that the Minister is no longer liable to pay the estate if it subsequently applies under s. 71(1).

***Casasanta v. Canada (Minister of Human Resources Development)*, 2002 FCA 495**

FCA's reasons: On the date of the claimant's hearing before the PAB on a disability pension claim, he was affected by pain medications to the extent that he was unable to follow the proceedings. He also has difficulty with English, his first language being Italian, was self represented and thus was unfamiliar with the procedures. The claim was denied by the PAB. Although there was no reason to believe that the PAB was aware of any the claimant's difficulties, and he did not advise the PAB of these problems or ask for an adjournment, the claimant cannot be said to have had a fair hearing in such highly unusual circumstances. No fault was to be ascribed to the PAB.

***Canada (Minister of Human Resources Development) v. Doyle*, 2002 FCA 280**

FCA's reasons: The Minister's application for judicial review of the PAB's decision to grant a disability pension to the claimant was allowed on the basis that the PAB had failed to consider all the evidence. Although the PAB said in its reasons that there was no medical evidence, there was in fact some medical evidence in the record which the PAB did not refer to in its reasons. It could therefore be inferred that this evidence was ignored.

***Wilganowski v. Canada (Attorney General)*, 2002 FCA 373**

Overview: The claimant applied for judicial review of the PAB's decision that he was not disabled by his back pain. The FCA dismissed the application.

FCA's reasons: The medical evidence before the PAB indicated that the claimant had for some time experienced severe back pain and had been on constant medication for some years. However, there was also medical evidence to the effect that although the claimant could not engage in heavy lifting, twisting, or turning or stand or walk for prolonged periods of time, he would nevertheless be suitable for light work not involving these activities. The claimant had given up seeking work, and none of the medical reports filed provided objective opinions to support the claimant's evidence that he was unable to perform other employment. It could not be said that the PAB decision was patently unreasonable.

***Canada (Minister of Human Resources Development) v. Woodcock*, 2002 FCA 296**

Overview: The Minister applied for judicial review of the PAB decision that the claimant met the contributory requirements for receiving a CPP disability pension for a 1993 disability by virtue of having pension credits attributable to 1991 and 1992, although she did not apply for such attribution until 1997. The FCA dismissed the application for judicial review.

FCA's reasons: The former s. 44(1)(b)(iv) [now s. 44(1)(b)(ii)] requires the Minister to determine whether an claimant would have qualified for a disability pension if the application had been submitted earlier than it was. Under s. 55.1, the only right that arises automatically upon divorce is the right to apply for an attribution of pension credits, and the attribution itself depends upon an application being made. While nothing in the CPP states that the effective date of a s. 55.1 attribution can predate the application for attribution (except in the situations contemplated by s. 55.3, involving an claimant who suffers from mental incapacity), there is nothing in the CPP that would preclude the Minister from recognizing a retrospective s. 55.1 attribution in certain circumstances. A s. 55.1 attribution may be given retrospective effect only where s. 44(1)*(b)*(iv) applied because of a late disability pension application, and even then it would apply only if the facts of the case make it reasonable to presume, that the application for the disability pension and the s. 55.1 application would have been submitted at or about the same time, and there is no reason to conclude that the s. 55.1 application would not have been accepted if it had been made at that time.

If the claimant had known in 1993 that she might qualify for a disability pension, and had applied for it at that time, she would also have applied at that time for an attribution of pension credits under s. 55.1. The conditions for attribution were met at that time and therefore the attribution would have been authorized.

***Peters c. Canada (Minister of Human Resources Development)*, (May 11, 2000) Doc. A-865-97 (Fed. C.A.)**

Overview: (Decision in French) The claimant applied for judicial review of the PAB decision that she was not disabled by her neck and shoulder injuries sustained in a car accident. The FCA allowed the claimant's application.

FCA's reasons: The PAB erroneously stated that none of the medical reports indicated the existence of an inability or of a functional deficiency. One of doctors had concluded that the claimant was incapable of even light office duties. Secondly, the PAB wrongly stated that it had not been established that she had undergone surgery to the shoulder, when in fact the evidence indicated that several procedures, including arthroscopic surgery, had been performed. Finally, the PAB stated that the injuries were soft tissue, while the evidence showed multidirectional instability in the shoulder.

***Villani v. Canada (A.G.)* [2001] FCA 248**

Overview: The PAB found that the claimant, a 56-year-old immigrant factory worker with Grade 5 education, did not have a severe disability despite his knee and shoulder and back pain. The FCA allowed the claimant's application for judicial review.

FCA's reasons: The CPP is benefits-conferring legislation. It must be interpreted in a large and liberal manner, and any ambiguity in the language of provisions conferring benefits should be resolved in favour of the claimant for such benefits. Each word in s. 42(2)(a)(i) must be given meaning, and when so read indicates that Parliament views as "severe" any disability that renders an claimant incapable of pursuing with consistent frequency any truly remunerative occupation. The test is not whether the claimant is incapable *at all times* of pursuing *any conceivable* occupation. The hypothetical occupations that must be considered cannot be divorced from the particular circumstances of the claimant, such as age, education level, language proficiency and past work and life experience. The mandatory requirement under s. 68 of the CPP Regulations that claimants supply the Minister with information related to their education level, employment background and daily activities means that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in s. 42(2)(a)(i). "Employability" is not a concept that easily lends itself to abstraction, and occurs in the context of commercial realities and the particular circumstances of an claimant. The statutory test for severity requires an air of reality in assessing whether an claimant is incapable regularly of pursuing any substantially gainful occupation. This does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. 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 will evidence of employment efforts and possibilities. Cross-examination will be available to test the veracity and credibility of the evidence of claimants and others.

***Canada (Minister of Human Resources Development) v. Rice,* [2002] FCA 47**

Overview: The PAB determined that the claimant's disability was severe, taking into account the fact that he lived in a small community where the primary industry was fishing and that his possibility of obtaining employment in that community was remote if not impossible. The FCA refused the Minister's application for judicial review.

FCA's reasons: The reference to "the hypothetical occupation" in *Villani* makes it clear that what is relevant is any substantially gainful occupation having regard to the individual's personal circumstances, but not whether real jobs are available in the labour market. "Evidence of employment efforts and possibilities" refers 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.

Wirachowsky v. Canada, (December 20, 2000) Doc. A-72-97 (Fed. C.A.)

Overview: The PAB found that the claimant's disability (fibromyalgia after slipping on ice) was not severe, since the medical reports contained nothing that would prevent him from pursuing gainful employment in a "semi-sedentary occupation". The FCA granted the claimant's application for judicial review.

FCA's reasons: The medical opinions corroborated the information supplied by the claimant in the questionnaire attached to his application for the disability pension. The phrase "semi-sedentary work" is incapable of conveying clear meaning for the purposes of assessing disability under the *CPP*.

***Garcia v. Canada (AG)* (June 16, 2001), Doc. A-218-00 (Fed. C.A.)**

Overview: The PAB found that the claimant was not disabled. After citing three medical reports, the PAB simply concluded that in its opinion the claimant does not meet the strict requirements of the CPP, without expressly accepting, rejecting, or analyzing any of the evidence or stating an explanation for its conclusion. The FCA allowed the claimant's application for judicial review with costs.

FCA's reasons: The 1991 repeal of the statutory right to a hearing record did not allow the PAB to immunize itself from meaningful judicial review. In the absence of a statutory right to a recording of PAB proceedings under the CPP, a reviewing court must determine whether the record provided allows it to properly dispose of the application for appeal or review. 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. Uncontradicted affidavit evidence in conjunction with the application for judicial review provided an adequate record for the court to review factual findings made by the PAB in order to determine whether a ground of review was well-founded. The PAB's reasoning leading to its final disposition must be fully explained. It is not sufficient to simply recite the evidence without expressly accepting, rejecting, or analyzing it, and then conclude that in its opinion the claimant does not meet the strict

requirements of the CPP. The PAB's failure in this case to provide a full written explanation for its decision breached the PAB's duty of procedural fairness owed to the claimant and constituted a reviewable error.

***Canada (Minister of Human Resources Development) v. Skoric*, [2000] 3 F.C. 265 (C.A.)** (see also summary under "Standard of Review", above)

Overview: The PAB granted survivor's benefits to the claimant on the basis of a CPP contribution made by him before his death but after he was deemed to have become disabled under s. s. 44(2)(b)(ii). The FCA dismissed the Minister's application for judicial review.

FCA's reasons: A contribution made after the expiry of the contributory period counts towards meeting the minimum qualifying period. The words "within his contributory period" in s. 44(3)(a) serve only to define the number of years for which contributions must be made, and not also to prescribe when they must be made. There is no requirement that only contributions made within the contributory period count towards the ten-year period referred to s. 44(3)(b). To deprive a person of the benefit of a contribution that he or she has in fact made, simply because it was made outside the contributory period, would be unfair and inconsistent with a statutory scheme in which eligibility is based on the contributions made. The CPP does not permit a part of a year of a minimum qualifying period to be "rounded down" to the nearest whole number if that would result in a period that was less than the statutorily required one third of the contributory period.

***Canada (Minister of Human Resources Development) v. MacDonald*, [2002] FCA 48**

Overview: The PAB found that the claimant's disability was severe on the basis of two reports prepared by a neurosurgeon following four operations on the claimant for a rare condition. The reports were both dated after the date of the first Review Tribunal proceedings which dismissed the claim. The FCA dismissed the Minister's application for judicial review.

FCA's reasons: The doctrine of *res judicata* applies to decisions of the Minister, Review Tribunal and PAB under the *Canada Pension Plan* subject to statutory provisions to the contrary, including s. 84(2) providing for reconsideration based on new facts. The new facts must not have been previously discoverable with reasonable diligence, and must be material.

***Hodge v. Canada (Minister of Human Resources Development)*, [2002] FCA 243**

Overview: The PAB refused to grant a survivor's pension to the claimant, because she had left her common law relationship with the contributor four months prior to his death. The FCA allowed the claimant's application for judicial review.

FCA's reasons: By discriminating against common law spouses who do not reside with the contributor at the time of the contributor's death, s. 2(1)"spouse"(*a*)(ii) [now s. 2(1)"common law partner"] is unconstitutional and of no force or effect. The declaration is suspended for a period of twelve months from June 14, 2002 so that, in consultation with the provinces, the federal government may decide how best to remedy the constitutional defect. The statutory definition of "spouse" [now "common law partner"] in CPP s. 2(1) violates s. 15 of the Charter of Rights because it distinguishes between common-law spouses and married spouses who do not cohabit with the contributor at the time of the contributor's death, and that common law spouses who no longer cohabitate with contributors at the time of death are treated in a manner which constitutes an affront to their human dignity, self worth, and ability to make important life-decisions. With respect to the analysis under s. 1 of the Charter, the task of defining the parameters of a common-law spouse's rights, so as to prevent multiple claims and to set out the priorities by which claims would be judged was, in itself, a pressing and substantial objective. However, it could not be said that the equality right had been impaired in a reasonable manner and did not meet the minimal impairment test. Nor was the effect of the discrimination proportional to such objectives.

***Vogt v. Canada (Minister of Human Resources Development)*, [2002] FCA 52**

Overview: The PAB dismissed the appeal of the claimant, a well-educated 46-year-old male who had held many managerial positions but was laid off three years before and was now claiming to have health problems that prevented him from working. The FCA dismissed the claimant's application for judicial review.

FCA's reasons: The conclusion of the PAB after a review of the substantive evidence that there was no reliable objective evidence to support a finding that the claimant suffered from a disability such as to prevent him from regularly pursuing a substantially gainful will not be interfered with if the decision is not patently reasonable. It was not necessary for the PAB to have given reasons for not believing the claimant where its reasons were sufficiently comprehensive to demonstrate the reasoning on which its conclusions were based.

***Lutzer v. Canada (Minister of Human Resources Development)*, [2002] FCA 190**

Overview: The PAB found that the claimant, a 14-year real estate agent with osteoarthritis of the knee and fibromyalgia, was not disabled. The PAB adopted the opinion of the rheumatologist who stated that the claimant could undertake sedentary work. As well, the PAB noted that the claimant had made no efforts to explore what employment opportunities might be available to her, given her particular circumstances. The FCA dismissed the claimant's application for judicial review.

FCA's reasons: After stating the correct test and such factors as the claimant's age and education, the PAB was not required to explain the reasoning leading to its conclusion that the claimant was not entitled to a disability pension. Judicial review would not be

granted where the PAB's application of the relevant statutory provision to the facts before it was not unreasonable.

***Kellar v. Canada (Minister of Human Resources Development)*, [2002] FCA 204**

Overview: The PAB found that the claimant was not disabled, but did not refer to two reports written by an occupational therapist and a physiotherapist who had tested the claimant's functional abilities and found them to be limited. The reports had been based on the false assumption that the claimant had been diagnosed as suffering from multiple sclerosis, which she had not. The FCA dismissed the claimant's application for judicial review.

FCA's reasons: The PAB is not required to refer to every piece of evidence before it, but only to those that have significant probative value. Where medical reports were written using false assumptions and various doctors who examined the claimant were unable to diagnose any specific cause of the symptoms of which she complained, the PAB was not obliged in law to set out its conclusions on the reports. Despite the PAB's skimpy reasons and the sloppy language in which they were expressed, the FCA was not persuaded that the PAB made a reviewable error.

***Lalonde v. Canada (Minister of Human Resources Development)*, 2002 FCA 211**

Overview: The PAB found that the claimant, a 54-year-old nurse's aid with a Grade 7 education and recurring lower back pain, was not disabled. In purporting to adopt the conclusion of the Minister's expert witness that the claimant "still had a certain capacity to work", the PAB stated that the expert had found that the claimant was not disabled within the meaning of CPP s. 42(2)(a). The FCA allowed the claimant's application for judicial review.

FCA's reasons: While to describe a person as having "a certain capacity to work" necessarily implies that that person suffers from a certain incapacity to work, the PAB could not leave it at that. Under CPP s. 83(11), the PAB must notify in writing the parties to the appeal "of its decision and of its reasons therefore". In the presence of such a provision, the reasons must be proper, adequate and intelligible, and must enable the person concerned to assess whether he has grounds of appeal or, in this case, of judicial review. Thus, at the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. The "real world" context requires that PAB consider the words "regularly", "substantially" and "gainful" found in the definition of "severe". According to the FCA's decision in *Rice*, the particular economic conditions in the area where the claimant lives cannot, however, be considered. The "real world" context presupposes that the PAB consider the particular circumstances of the claimant, her age, education level, language proficiency and past work and life experience. The PAB cited some of those elements in noting her age and education. But it did not draw any inferences from those facts by reference to the law that it was required to apply. The "real world" context also means that the PAB must consider whether the claimant's refusal to undergo physiotherapy treatment is unreasonable and

what impact that refusal might have on the claimant's disability status should the refusal be considered unreasonable.

***Powell v. Canada (Minister of Human Resources Development)*, (June 23, 2000) Doc. A-472-98 (Fed. C.A.)**

Overview: The PAB found that the claimant, a sales clerk ultimately diagnosed with reflex sympathetic dystrophy (RSD) in her knee, was not disabled, and that she would be able to return to her work. The PAB stated in its conclusion that "having considered all the evidence, we come to the conclusion supported by the bulk of the medical opinions that with proper exercises and improvement of her general fitness she should be able to return to work similar to what she was doing.". The FCA allowed the claimant's application for judicial review.

FCA's reasons: The PAB's finding with regard to the claimant's ability to return to work similar to what she was doing was not confirmed by the medical evidence. Further, the PAB did not address the most recent diagnosis of RSD. The PAB's decision was patently unreasonable.

***Canada (Minister of Human Resources Development) v. Wade*, 2001 FCA 286**

FCA's reasons: While the PAB might have stretched to its permissible maximum the exercise of its discretion under CPP s. 84(2) to order a new hearing, it fell short of acting in a patently unreasonable manner.

***Halvorsen v. Canada (Attorney General)*, 2001 FCA 214**

FCA's reasons: It was not established that the PAB based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it, or that it committed any error of law in its formulation or application of the relevant statutory provision.

***Holloway v. Canada (Minister of Human Resources Development)*, 2001 FCA 351**

FCA's reasons: The claimant's application for judicial review of a determination of a PAB decision dated December 14, 1999 was allowed because the PAB did not have the benefit of the FCA's reasons in *Villani* and therefore did not apply the proper test.

***Hosein v. Canada (Minister of Human Resources Development)*, 2001 FCA 278**

Overview: The PAB found that while the claimant was now in all probability disabled, she had not established, on a balance of probabilities, that she was disabled as of December 31, 1994, which was the end of her qualifying period. The FCA dismissed the claimant's application for judicial review.

FCA's reasons: It was not established that the PAB erred. There was insufficient evidence, even on the basis of the test set out in the FCA's decision in *Villani*, upon which the PAB could have found her to have been disabled as of December 31, 1994.

III. FCA Endorsements and Consent Orders

***Larkin c. Canada (Procureur Général)*, (2000-05-12) CAF A-506-98** (French)

FCA's reasons: There was no reason to interfere with the PAB's determination.

***Lughas v. Canada (Minister of Human Resources Development)*, 2002 FCA 375**

Overview: The claimant's application for judicial review was dismissed in a two line endorsement.

***Laghina v. Canada (Minister of Human Resources Development)*, 2003 FCA 258**

FCA's reasons: The claimant's application for judicial review was refused, as the PAB had applied the correct test and made no patently unreasonable error in relation to its findings or conclusions of fact.

***Lauretano v. Canada (Minister of Human Resources Development)*, 2002 FCA 490**

FCA's reasons: The claimant's application for judicial review was granted because the PAB lacked the benefit of the FCA's decision in *Villani*.

***Mountney v. Canada (Minister of Human Resources Development)* (June 17, 2002), Doc. A-546-01 (Fed. C.A.)**

FCA's reasons: The claimant's application for judicial review was granted on consent.

***Sachinidis v. Canada (Attorney General)* (December 13, 2001), Doc. A-166-00 (Fed. C.A.)**

FCA's reasons: The claimant's application for judicial review was granted on consent, with the applicant awarded costs of $1,000.

***Giunta v. Canada (Minister of Human Resources Development)* (October 6, 2000), Doc. A-238-98 (Fed. C.A.)**

FCA's reasons: The claimant's application for judicial review was granted on consent.

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Summary of Recent Decisions of the Supreme Court of Canada on Administrative Law Issues

Prepared by:

The Honourable Mr. Justice Gordon P. Killeen

The Grand Okanagan
Kelowna, British Columbia
July 2003

JUDICIAL REVIEW IN ADMINISTRATIVE LAW

The Supreme Court of Canada has issued two more important decisions on the concept of judicial review in its seemingly endless quest to get it right. The jury remains out on whether they have succeeded.

In what follows I attempt to summarize what they have said.

(1) *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 S.C.C. 19.

Facts: In 1998, an Inquiry Committee found that Dr. Q. took advantage of a female patient and was guilty of infamous conduct. The Committee believed the patient and found that sexual relations occurred. The doctor was suspended from practice for 18 months.

On appeal, the reviewing judge set aside the Committee's decision, disagreeing with their credibility findings.

The Court of Appeal dismissed the College's appeal because they could not conclude that the reviewing judge was "clearly wrong".

The S.C.C. reversed and the decision of the Committee was restored by a unanimous judgment written by Chief Justice McLachlin.

Holdings:

(1) Section 73 of the *Medical Practitioners Act* of B.C. provides for a statutory appeal to the courts "on the merits". (p. 3).

(2) The Committee had "three tasks" before it – (a) to make findings of fact, including credibility assessments, (b) to select the appropriate standard of proof and (c) to apply the standard of proof to the facts found to determine whether the alleged impropriety was proved. (p. 4).

(3) The Committee correctly applied the intermediate standard of "clear and cogent evidence" which is routinely used in professional conduct cases. (p. 5).

(4) The "key question" in the case was whether the reviewing judge should have interfered with the findings of credibility of the Committee. (p. 7).

(5) The Act permits an appeal to the court but "the reviewing judge's task is not to substitute his or her views of the evidence for those of the tribunal,

but to review the decision with the appropriate degree of curial deference." (para. 16, p. 7).

(6) The reviewing judge – Koenigsberg J. – "substituted her views on the credibility of the witnesses for those of the Committee." She made 2 erroneous assumptions – first, that she "was required to review the evidence and make her own evaluation of whether it reached this standard" ["clear and cogent evidence"], and, second, that "because the Act expressly confers a right of appeal, the review was not to be treated like the usual review of the decision of an administrative tribunal…". (paras. 16-17, p. 7).

(7) "The standard of clear and cogent evidence does not permit the reviewing judge to enter into a re-evaluation of the evidence." This standard is for the Committee to apply and "does not instruct a reviewing court on how to scrutinize the decision of the administrative decision-maker". (para. 19, p. 8).

(8) In a case of judicial review, the court applies the standard of review known as "the pragmatic and functional approach", established in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and confirmed in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] 1 S.C.R. 982. (para. 21, p. 9).

(9) "The term 'judicial review' embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach… Bastarache J. [in *Pushpanathan*] affirmed that the "central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed." (para. 21, p. 9). [Emphasis added.]

(10) "…the pragmatic and functional approach inquires into the legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law." (para. 21, p. 10).

(11) "…the pragmatic and functional approach calls upon the court to weigh a series of factors to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo 'significant searching or testing' (*Southam*, *supra*, at para. 57) or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness simpliciter, and patent unreasonableness". [Emphasis added.] (para. 22, p. 10).

(12) "…it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court's interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review…" (para. 25, p. 11).

(13) "In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors – the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particulars; and, the nature of the question – law, fact, or mixed law and fact." [Emphasis added.] (para. 26, p. 12).

(14) "The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review… A statute may be silent on the question of review; silence is neutral, and does not imply a high standard of scrutiny: *Pushpanathan*, *supra*, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due." [Emphasis added.] (para. 27, p. 13).

(15) "The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues… Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the decision under consideration is one that falls within the scope of this greater expertise… The composition of an administrative tribunal might endow it with knowledge uniquely suited to the questions put before it … Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise. [Emphasis added.] (para. 29, pp. 13-14).

(16) "The third factor is the purpose of the statute… As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies…". [Emphasis added.] (para. 30, p. 14).

(17) "…provisions that require the decision-maker to 'have regard to all such circumstances as it considers relevant' or confer a broad discretionary power upon a decision-maker will generally suggest policy-laden purposes and, consequently, a less searching standard of review… A legislative purpose that deviates substantially from the normal role of the courts suggests that the legislature intended to leave the issue to the discretion of the administrative decision-maker and, therefore, militates in favour of greater deference… In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference. [Emphasis added.] (paras. 31-32, p. 15).

(18) "The final factor is the nature of the problem… as the *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, and *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, (1994) 1 S.C.R. 114, line of cases has made clear judicial decisions of first instance on factual issues will only be interfered with where the appellate court can identify a 'palpable and overriding error' or where the finding was 'clearly wrong'…

When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision.. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value… Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive." (paras. 33-34, p. 16).

(19) "Having considered each of these factors, a court must settle upon one of <u>three correctly recognized standards of review</u>… 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 *simplicter* standard will apply." [Emphasis added.] (para. 35, pp. 16-17).

(20) The S.C.C. concluded here that the reasonableness standard should apply, after considering the four factors above outlined.

The Court noted first, that the statute provided a broad right of appeal and that the Committee was no more expert than the Court on the issue in question – thus suggesting a "low degree of deference".

On the second fact of the statute's purpose, the Court noted its multiple policy objectives, suggesting considerable deference. However, it also noted here that the claim of professional misconduct was "quasi-judicial" in nature so that the purpose analysis suggested neither great deference nor exacting scrutiny.

The Court thought that the nature of the problem was "a finding of credibility", which suggested heightened deference because the Committee heard the evidence.

The Court ruled that the reasonableness standard required the reviewing judge to ask herself "whether the Committee's assessment of credibility and application of the standard of proof to the evidence was reasonable, in the

sense of <u>not being supported by any reasons that can bear somewhat probing examination</u>… Specifically, she failed to address the need for deference in view of the purpose of the Act and the nature of the problem, credibility." (para. 39-40, p. 18).

(21) "…when the standard of review is reasonableness, the review judge's role is not to posit alternate interpretations of the evidence; rather, it is to determine whether <u>the Committee's</u> interpretation is unreasonable… when applying a standard of reasonableness *simpliciter, <u>the</u>* <u>reviewing judge's view of the evidence is beside the point; rather, the reviewing judge should have asked whether the Committee's conclusion on this point had some basis in the evidence</u>… Judged on the proper standard of reasonableness, there was ample evidence to support the Committee's conclusions on credibility, burden of proof and the application of the burden of proof to the factual findings." [Emphasis added.] (para. 41, pp.19-20).

In the result, the S.C.C. overturned the decisions of the reviewing judge and the Court of Appeal and restored the decision of the Committee.

(2) *Law Society of New Brunswick v. Ryan*, 2003 S.C.C. 20

<u>Facts:</u> This judgment was released on the same day as the *Dr. Q* judgment and was also unanimous. It was written by Iacobucci J.

The respondent lawyer was retained by two people in 1993 about their dismissal by their employer and for several years he lied to them about how he was handling their cases, including saying that he had started an action and was prosecuting it diligently. In 1999, they complained to the Law Society and, at a discipline hearing, the Committee recommended disbarment. The respondent appealed to the Court of Appeal and asked for leave to call medical evidence showing he was mentally disabled. The Court of Appeal re-opened the case and ordered the Committee to consider the medical evidence. The Committee heard the new evidence and confirmed its earlier decision on disbarment.

The respondent then appealed again and the Court of Appeal allowed the appeal, substituting a sanction of indefinite suspension with conditions for possible reinstatement.

The S.C.C. held that the appeal should be allowed and restored the Committee's decision on disbarment.

Holdings:

(1) The S.C.C. started by repeating that a court reviewing an administrative tribunal's decision must use the pragmatic and functional formula to determine the appropriate level of deference. The Court noted that the only issue before the Committee was the appropriate sanction in light of the serious misconduct and two prior incidents where Mr. Ryan had been reprimanded.

(2) The N.B. Court of Appeal had settled on a standard of reasonableness but added that "on the spectrum this standard is closer to correctness than patently unreasonable. This is particularly so, as here, when you have the most serious sanctions being considered." [Emphasis added.]

Iacobucci J. held that the Court of Appeal erred in implying that there was a "floating" standard of reasonableness. As he said at para. 20, p. 9:

> "The standard of reasonableness *simpliciter* does not "float"according to the circumstances but always basically involves asking the same question about the challenged decision."

He went on to reemphasize here that the court must always select and employ the proper level of deference and that there is "no shortcut" past the components of the pragmatic and functional approach. (para. 21, p. 10).

(3) Iacobucci J. then went on to apply the four contextual factors which he described as follows:

(1) the presence or absence of a privative clause or statutory right of appeal;

(2) the expertise of the tribunal relative to that of the reviewing court

on the issue in question;

(3) the purposes of the legislation and the provision in particular;

(4) the nature of the question – law, fact, or mixed law and fact. (para. 27, p. 12).

(4) He noted, first, that the *Law Society Act, 1996* provided for a broad right of appeal "on a question of law or fact" and gave the Court of Appeal a broad choice of remedies.

He emphasized here, however, quoting Basterache J. in *Pushpanathan*, that "The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard." He added that the specialization of duties intended by the legislature may warrant deference notwithstanding the absence of a privative clause. (para. 29, p. 13).

(5) As to the factor of expertise, he said, at para 30, that

> "This expertise may be derived from specialized knowledge about a topic or from experience and skill in determination of particular issues."

Here, he concluded that the Discipline Committee, comprised of practising lawyers and lay people, has superior expertise to the courts.

(6) He noted that a major objective of the *Act* was to create a self-regulating profession with the power to set and maintain professional standards of practice for the protection of the public. Following *Dr. Q.*, he emphasized that where a tribunal had a broad range of remedial choices and deals with policy issues, greater deference is demanded. (para. 39, p. 17).

(7) Iacobucci J. identifies the question in dispute of what sanction to impose as "a question of mixed fact and law" because it involves "the application of general principles of the *Act* to specific circumstances." Here, he also emphasizes that the decision arises out of factual findings and inferences about the misconduct of Mr. Ryan, suggesting a higher degree of deference to the Committee decision. He concludes that the appropriate standard is reasonableness and says that "<u>the Court of Appeal should not</u>

substitute its own view of the correct answer but may intervene only if the decision is shown to be unreasonable." [Emphasis added.] (paras. 41-42, pp. 18-19).

(8) Iacobucci J. next emphatically rejects the submission of the respondent that "the standard of reasonableness is 'an area on the spectrum or continuum' between patent unreasonableness and correctness." He says this would have the effect of creating an unnecessary fourth standard which allows reasonableness to "float" along a range of deference from correctness to patent unreasonableness.

As he explains the use of the term "spectrum" in prior cases, he quotes from the decision of Major J. in *Mattel*, at para. 24:

> [T]he various standards of review are properly viewed as points occurring on a spectrum of curial deference. They range from patent unreasonableness at the more deferential end of the spectrum, through reasonableness *simpliciter*, to correctness at the more exacting end of the spectrum."

He adds here that the standard of reasonableness requires the court to act with "differential self-discipline" because "a court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did. (para. 43-46, pp. 19-20).

(9) Iacobucci J. says that the standard of reasonableness involves asking "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" He says there is no room for the court to engage *de novo* in its own reasoning on the matter but rather, to see if the reasoning of the tribunal supports the decision. (para. 47, p. 21).

(10) He defines "an unreasonable decision" by quoting from the Court's earlier decision in *Southam*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. [Emphasis in original.] (para. 48, p. 21).

(11) He then moves on to explain the "correctness standard" by contrast to the reasonableness standard:

> "When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons." (para. 50, p. 22).

(12) His last concern is to explain the third standard of "patent unreasonableness" and distinguish it from the reasonableness standard:

> "In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted 'in the immediacy or obviousness of the defect'. Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as 'clearly irrational' or evidently not in accordance with reason…"

He adds, here, that to identify an unreasonable decision, the reviewing court may have to provide "a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to make the decision it did… This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling." [Emphasis added.] (para. 52, 53 and 55, pp. 24-25).

(13) Iacobucci J. then went on to examine the decision of the Committee and concluded that it more than passed the test of reasonableness on any approach:

> "The conclusions of the Committee are supported by tenable reasons which are grounded in the evidentiary foundation." (para. 51, p. 27).

He accordingly allowed the appeal and set aside the decision of the Court of Appeal.

Final Comments:

1. The S.C.C. has dug its heels in in these decisions and warned all courts, whether appellate or trial, that no deviation from the four-factor "pragmatic and functional" test will be tolerated in deciding upon the appropriate standard of review for statutory tribunals.
2. The second major point from these cases is that there is no "floating" quality to the standard of reasonableness, allowing a court to "ratchet down" or even "ratchet up" this middle standard and effectively create a fourth standard of review.
3. Another key point is that the S.C.C. has now said clearly that the pragmatic and functional approach must apply, regardless of whether the statute in question affords a full statutory right of appeal or a lesser review under some kind of privative clause. Thus, as in the *Dr. Q.* case, an "on-the-merits" appeal clause does not automatically mean that the standard of review must be correctness.

(Prepared by Justice Gordon Killeen, May, 2003)