83. *Appeal to Pension Appeals Board* **— (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act*, or under subsection 84(2), may, within ninety days after the day on which that decision is communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board. (R.S.C. 1985, c. 30 (2nd Supp.), s. 45; 1991, c. 44, s. 22(1); 1995, c. 33, s. 36(1); 2000, c. 12, s. 61.)**

(2) *Decision of Chairman or Vice-Chairman* **— The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave. (R.S.C. 1985, c. 30 (2nd Supp.), s. 45.)**

(2.1) *Designation* **— The Chairman or Vice-Chairman of the Pension Appeals Board may designate any member or temporary member of the Pension Appeals Board to exercise the powers or perform the duties referred to in subsection (1) or (2). (S.C. 1997, c. 40, s. 85.1.)**

(3) *Where leave refused* **— Where leave to appeal is refused, written reasons must be given by the person who refused the leave. (S.C. 1997, c. 40, s. 85.1.)**

(4) *Where leave granted* **— Where leave to appeal is granted, the application for leave to appeal thereupon becomes the notice of appeal, and shall be deemed to have been filed at the time the application for leave to appeal was filed.**

(5) *Constitution of Board* **— The Pension Appeals Board shall consist of the following members to be appointed by the Governor in Council:**

(*a*) a Chairman and a Vice-Chairman, each of whom shall be a judge of the Federal Court of Appeal, the Federal Court or a superior court of a province; and (S.C. 2002, c. 8, s. 121(1).)

(*b*) not less than one and not more than ten other persons, each of whom shall be a judge of the Federal Court of Appeal, the Federal Court or a superior court of a province. (S.C. 2002, c. 8, s. 121(1).)

(5.1) *Temporary members of the Board* **— Subject to subsections (5.2) and (5.3), in addition to the members of the Pension Appeals Board for whom provision is made by subsection (5), any judge or former judge of the Federal Court of Canada, the Federal Court of Appeal or the Federal Court or of a superior or district court of a province may, on the request of the Chairman of the Board made with the approval of the Governor in Council, act as a temporary member of the Board. (S.C. 2002, c. 8, s. 121(2).)**

(5.2) *Consent required* **— Except in relation to a former judge, no request may be made under subsection (5.1)**

(*a*) to a judge of the Federal Court of Appeal or the Federal Court, without the consent of the Chief Justice of the Court or of the Attorney General of Canada; or (S.C. 2002, c. 8, s. 121(3).)

(*b*) to a judge of a superior or district court of a province, without the consent of the chief justice or chief judge of that court or of the attorney general of the province.

(S.C. 1995, c. 33, s. 36(2).)

(5.3) *Approval of requests by Governor in Council* **— The Governor in Council may approve the making of requests pursuant to subsection (5.1) in general terms or for**

particular periods or purposes, and may limit the number of persons who may act as temporary members of the Board under that subsection. (S.C. 1995, c. 33, s. 36(2).)

(5.4) *Remuneration of temporary members* **— Each temporary member of the Board who is a former judge shall be paid such remuneration as may be fixed by the Minister. (S.C. 1995, c. 33, s. 36(2).)**

(5.5) *Expenses of temporary members* **— Each temporary member of the Board is entitled to be paid such travel and living expenses incurred by the member in the performance of duties and functions under this Act as may be fixed by the Minister. (S.C. 1995, c. 33, s. 36(2).)**

(6) *Hearing of appeal* **— An appeal to the Pension Appeals Board shall be heard by either one, three or five members of the Board, whichever number the Chairman of the Board directs, and where the appeal is heard by three or five members of the Board, the decision of the majority is a decision of the Board.**

(7) *Presiding member* **— Where an appeal is heard by three or five members of the Pension Appeals Board, the Chairman of the Board shall preside if he is one of those members, or, if he is not, he shall designate one of those members to preside.**

(8) *Hearings of the Board* **— The Pension Appeals Board may hear appeals at any place or places in Canada, and the Chairman of the Board shall arrange for hearings accordingly.**

(9) *Powers and duties of Vice-Chairman* **— In the event of the absence or incapacity of the Chairman of the Pension Appeals Board or if the office of Chairman is vacant, the Vice-Chairman of the Board has, subject to any designation made by the Chairman under subsection (7), all the powers and duties of the Chairman.**

(10) *Addition of party to appeal* **— Where an appeal is made to the Pension Appeals Board in respect of**

(*a*) a survivor's pension payable to the survivor of a deceased contributor, (S.C. 2000, c. 12, s. 64.)

(*b*) a division of unadjusted pensionable earnings under section 55, 55.1 or 55.2, or

(*c*) an assignment of a contributor's retirement pension under section 65.1,

and in the Minister's opinion a person in addition to the appellant may be directly affected by the decision of the Pension Appeals Board, the Minister shall notify the Board of all such persons, and the Board shall add as a party to the appeal any such person who is not already a party thereto.

(11) *Powers of Pension Appeals Board* **— The Pension Appeals Board may confirm or vary a decision of a Review Tribunal under section 82 or subsection 84(2) and may take any action in relation thereto that might have been taken by the Review Tribunal under section 82 or subsection 84(2), and shall thereupon notify in writing the parties to the appeal of its decision and of its reasons therefor.**

(12) *Court of record* **— (Repealed by 1991, c. 44, s. 22(2).)**

(R.S.C. 1985, c. 41 (1st Supp.), s. 12; R.S.C. 1985, c. 27 (2nd Supp.), s. 7; R.S.C. 1985, c. 30 (2nd Supp.), s. 45; 1991, c. 44, s. 22; 1995, c. 33, s. 36; 1997, c. 40, s. 85.1; 2000, c. 12, s. 61; 2000, c. 12, s. 64; 2002, c. 8, s. 121.)

Notes

Synopsis

This section provides for an appeal of a decision of the Review Tribunal to the Pension Appeals Board (PAB). Leave for appeal must be sought within 90 days of receiving notice of the

Review Tribunal's decision, and the leave application is determined by the Chairman, the Vice-Chairman, or a member or temporary member of the PAB. If leave is refused, written reasons for the refusal must be given. Where leave is granted, the application for leave to appeal becomes the notice of appeal and is deemed to have been filed at the time the application for leave to appeal was filed. The PAB can confirm or vary a decision of the Review Tribunal, or take any action that may have been taken by the Review Tribunal.

The PAB is made of a Chairman and a Vice-Chairman, who must be a judge of the Federal Court of Canada or a superior court of a province, and one to ten other persons who must be judges of the Federal Court of Canada or a superior, district or county court of a province. Appointment to the PAB is made by the Governor in Council. In addition to the regular members, temporary judges may be appointed to the PAB for particular periods or purposes. A PAB panel will be made up of either one, three or five members, and decisions are governed by majority rule.

Note that appeal procedures in the PAB are governed by the Pension Appeals Board Rules of Procedure (Benefits).

Related Provisions

- Section 84 — Authority to determine questions of law and fact
- Section 85 — Appeals under provincial pension plans
- Section 86 — Expenses of attending PAB hearing and legal costs
- Section 86.1 — Stay of benefits pending judicial review

Related CPP Regulations

- Section 74 — Reconsideration and appeal on behalf of incapable persons
- Section 74.4 — Constitutional questions

Case Law

§1. Adjournments

Groke v. MHRD (October 29, 2001), CP 15563 (PAB)

Where the Review Tribunal failed to adjourn the hearing after stating that the evidence in the hearing was incomplete in that testing of the applicant had not been completed, the Tribunal's decision was not "final and binding" within the meaning of s. 84(1) and was not subject to *res judicata*.

Baptista v. MHRD (May 14, 1999), CP 07159 (PAB)

Due to the backlog of cases, the PAB must exercise discretion when granting adjournments.

Walters v. MHRD (November 4, 1996), CP 2639, CEB & PG (TB) ¶8655 (PAB)

The claimant's failure to comply with the requirements for raising a constitutional issue, after being granted two adjournments, was ground for dismissal of the appeal. The granting of a further adjournment in such circumstances would amount to an abuse of process.

§2. Extension of Time for Appeals

See also Rules 4 and 5 of the Pension Appeals Board Rules of Procedure (Benefits)

Canada (Minister of Human Resources Development) v. Gattelaro, 2005 FC 833. See also *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41.

The intent of Parliament as expressed in CPP s. 83(1) is to limit the time period for extending the appeal period to 90 days. While a designated member may extend the time period beyond 90 days, the authority to extend the statutory limitation should not be exercised arbitrarily or capriciously, and the following criteria must be considered and weighed:

1. A continuing intention to pursue the application or appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and

4. There is no prejudice to the other party in allowing the extension.

Allowing appeals, absent compelling reasons, long after the expiry of time leads to a lack of certainty and finality for both the Minister and all parties to the process. Where the time for appealing expired over seven years prior to the appeal being brought, prejudice on the Minister's part could be presumed.

Obiter: It is difficult to see how the PAB can reach a fair, principled decision on applications for an extension of time to appeal on an *ex parte* basis; that is, without the submissions from the Minister.

Canada (Attorney General) v. McGee, 2007 FCA 208

An extension of time granted by a designated member of the PAB that is not challenged by way of judicial review thereby becomes final and binding. The full panel of the PAB does not have jurisdiction to hear an appeal from the extension granted.

Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41. See also *Kabatoff v. Canada (Human Resources Development)*, 2007 FC 820.

It is not appropriate to grant an extension for leave to appeal a Review Tribunal decision seven years after it was made. Such an appeal constituted a collateral attack on a subsequent Tribunal decision refusing a second application by the same applicant on the ground of no new facts. The decision to grant leave to appeal could have given rise to inconsistent decisions, and did not recognize and give effect to the principle of finality. The granting, without any explanation or justification whatsoever, of an extension of time and leave to challenge a final decision more than seven years after it was rendered can only give rise to a reasonable inference that the discretion was, if not arbitrarily, at least improperly exercised, especially when two more binding and final decisions to the same effect on the same issue, between the same litigants, remain effective and unchallenged. Such circumstances imposed upon the judge sitting in judicial review the duty to scrupulously review the member's decision and provide adequate reasons. Whether the appellant has, at law, an arguable case may be otherwise expressed as whether the appellant, legally, has a reasonable chance of success. This is not purely a question of fact, but is at best a mixed question of fact and law.

Canada (Attorney General) v. Handa, 2006 FC 1148

In order for the doctrine of *functus officio* to apply, there must have been a final decision made by the PAB. The PAB's assumption that the applicant was no longer interested in pursuing the leave application did not constitute a final decision on the application for leave.

Canada v. Small, 2007 FC 678. See also *Canada (Minister of Human Resources Development) v. Roy*, 2005 FC 1456

An arguable issue cannot simply be assumed. Granting leave to appeal in the absence of proper reasons, especially where the designated PAB member questions whether a case is arguable, is an error of law, whatever standard of review is applied.

Canada (Minister of Human Resources Development) v. Penna, 2005 FC 469

It is an error of law to grant leave to appeal to the PAB where no application for an extension of time to seek leave, fully complying with the appropriate Rules, had been filed by the self-represented claimant, and no extension of time to file the application for leave had been granted.

Canada (Minister of Human Resources Development) v. Dawdy, 2006 FC 429 (CanLII)

It is clear from the wording of s. 83(1) that a claimant who does not apply for leave to appeal a decision to the PAB within the 90-day period must first be granted a discretionary extension of time to seek leave. Rules 4 and 5 of the Pension Appeals Board Rules of Procedure (Benefits) outline the required information that must be present in an application for leave and require that the applicant state grounds on which an extension is sought. A delay of approximately 10 months could arguably be considered prejudice to the Minister.

Canada (Minister of Human Resources Development) v. Roy, 2005 FC 1456 (CanLII)

An extension of time where there has been an 18-month delay would arguably result in prejudice to the Minister, given that hearings before the PAB are generally *de novo*.

Canada (Minister of Human Resources Development) v. De Tommaso, 2005 FC 1531 (CanLII)

Evidence that the claimant has initiated another application for a disability pension which has not yet been decided, indicated a lack of continuing intention to pursue an appeal on the original application.

Canada (Minister of Human Resources Development) v. Eason, 2005 FC 1698 (CanLII)

An application for an extension of time is not granted automatically or as of right. The decision is discretionary and such discretion should be exercised using a principled approach with a view to the four criteria listed in *Gattelaro*. In the absence of any reasons for decision, it is an error in law to fail to properly apply the correct criteria to the application for an extension of time. The granting of an extension of time cannot be inferred from the PAB's decision. Even if the party seeking leave makes a request for an extension of time, the PAB commits a reviewable error by granting leave without explicitly considering and granting the request for an extension of time.

Halcro v. MNHW (April 26, 1988), CP 1057 (PAB)

The PAB may, in a proper case, exercise the powers of the Minister to extend the time for appealing an initial decision.

§3. Language of Proceedings

Beaudoin v. Canada (MNHW), [1993] 3 F.C. 518 (C.A.)

Section 14 of the *Official Languages Act* entitles any person to use his or her official language of choice before a federal tribunal, and by s. 15 obligates the tribunal to ensure that such evidence is heard as requested. An unrepresented party's *bona fide* request, on notice, for a hearing in the other official language must always be respected in full, and its denial amounts to a denial of natural justice, since it fetters the requesting party's ability to present a case in his or her own way. The PAB is required to take such a request at face value and not attempt to persuade the claimant to accept a hearing in English.

Garcia v. Canada (A.G.), [2001] FCA 200

Courts are not required, as a matter of course, to inform a party of his or her right to an interpreter or to inquire as to whether a party is having trouble understanding the proceedings. Where a self-represented party has presented his or her case in previous proceedings with success, and never asked for an interpreter and it was not evidence that assistance was required, the PAB did not lose jurisdiction by determining the case without providing an interpreter.

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

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.

§4. Leave to Appeal from Review Tribunal Decision

- See also cases under s. 84, **§8(*d*)(ii) Judicial review of PAB's Refusal to Grant Leave**

Martin v. Canada (MHRD), [1999] F.C.J. No. 1972 (Fed. C.A.)

On an application for leave to appeal the decision of the Review Tribunal, it is an error for the Vice-Chairman to consider whether the applicant for leave could succeed on the merits of the application. It is sufficient for the applicant to raise an arguable case or question of law or jurisdiction.

Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41

While Rule 7 of the *Pension Appeals Board Rules of Procedure (Benefits)* expressly states that an application for leave to appeal "shall be disposed of *ex parte* unless the Chairman or Vice-Chairman directs otherwise", the process should be guided by some common sense. Where

more than seven years and a multitude of proceedings had elapsed since the rendering of the decision sought to be appealed, and the Minister was at all times a party to all the proceedings, the member of the PAB to whom the application for leave to appeal was brought should have sought a direction from either the Chairman or the Vice-Chairman as to the appropriateness of seeking submissions from the Minister in response to the application. This would ensure fairness to the Minister and increase the likelihood of a more enlightened decision as well as promote the credibility of the PAB itself.

Canada (Attorney General) v. Deschamp, 2007 FC 610

On a leave application, the PAB has jurisdiction to grant leave to appeal where it is alleged that the Review Tribunal erred in conducting a reconsideration hearing in the absence of a specific request by the claimant and that it erred in finding new facts.

Davies v. Canada (MHRD) (1999), FC T-1789-98

Subsections 83(1) and 83(2) clearly provide the statutory authority for the Chairman, Vice-Chairman or member designate to make the decision of whether to grant or deny leave to appeal. The wording of these sections, combined with that of the final and binding clause in subsection 84(1), give the PAB a clear mandate to assess applications for leave to appeal.

Kerth v. Canada (MHRD), [1999] F.C.J. No. 1252 (T.D.). See also *Kurniewicz v. Canada (MMI)* (1974), 6 N.R. 225 (F.C.A.).

A leave to appeal proceeding is a preliminary step to a hearing on the merits, and is therefore is a first and lower hurdle for the applicant to meet than the one that must be met on the hearing of the appeal on the merits. Some *arguable ground* upon which the proposed appeal might succeed is needed in order for leave to be granted.

Callihoo v. Canada (AG) (2000), FC T-859-99 (Fed. T.D.)

The proper test on an application for leave to appeal to the PAB from the Review Tribunal is whether the application raises an arguable case, without otherwise assessing the merits of the application. In the absence of significant new or additional evidence not considered by the Review Tribunal, an application for leave may raise an arguable case where the leave decision maker finds the application raises a question of an error of law, measured by a standard of correctness, or an error of significant fact that is unreasonable or perverse in light of the evidence.

Mrak v. Canada (Minister of Human Resources Development), 2007 FC 672

The grant of leave is an interlocutory proceeding which does not decide the merits of an appeal which, itself, in the case of the Board is conducted *de novo*. The test in *Callihoo* is appropriate in the context of an application for judicial review challenging the grant of leave, with the additional requirement that the applicant must establish special circumstances to justify such a judicial review. The policy of the law is that unless there are special circumstances there should not be an appeal or immediate judicial review of an interlocutory judgment.

Kiefer v. Canada (A.G.), 2008 FC 786

Section 83(1) carves out an exception regarding the right to seek leave to appeal to the PAB with respect to appeals under s. 28(1) of the OAS Act.

Canada (Attorney General) v. Farrell, 2006 FC 636

Under section 7 of the PAB's Rules of Procedure, it is either the Chairman or Vice-Chairman of the PAB that decides whether an application for leave for appeal to the PAB should be disposed of otherwise than *ex parte.* Where an application has been long-standing, the applicant's leave to appeal motion should not be *ex parte*.

Wihksne v. Canada (AG) (2000), T-1451-99 (Fed. T.D.)

In refusing a leave application, the PAB is not restricted to using the exact words of the statute in citing the legal test of disability, as long it indicates that the Review Tribunal's decision was based on the weight of the evidence, that the laws were established, that the weight is a matter for the Tribunal hearing the case, and that the case before it was not an arguable case in which one can say that the weight should have been otherwise.

O'Leary v. MHRD, (February 24, 2003) CP 19041 (PAB)

The granting of leave by a lone judge of the PAB cured any defect in an appeal from a redetermination by the Review Tribunal under s. 84(2) based on new facts, because the judge must have realized, on reading the materials filed with the PAB, that leave should be granted from the original decision of the Review Tribunal and did so.

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

Where 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?", the PAB was entitled to grant the claimant a disability pension automatically upon finding that the claimant had met the contributory requirements. 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.

§4.1. Practice, Procedure and Evidence

Canada (Minister of Human Resources Development) v. Milton, 2004 FCA 235

The PAB is master of its own procedure. Where, on an application to terminate benefits under s. 70, counsel for the Minister had had an opportunity to call the recipient as a witness, and to cross-examine him, in the course of presenting the evidence on behalf of the Minister, it cannot be said that the PAB's refusal to permit cross-examination, after the evidence of both parties was in, deprived the Minister of a reasonable opportunity of effectively participating at the hearing before the PAB. The PAB may well have concluded that, given the important part played by the medical reports in this case, and their content, any evidence that the recipient might have given was likely to be of relatively little significance to the PAB's determination.

Kent v. Canada (Attorney General), 2006 FCA 375

An allegation of procedural unfairness by the PAB must be made in the notice of application for judicial review, or memorandum of fact and law. It is too late to raise the allegation that the applicant had been denied a fair hearing by the PAB for the first time at the judicial review hearing.

Gorgiev v. Canada (Minister of Human Resources Development), 2005 FCA 55

The rejection by the claimant of the Minister's settlement offer is not capable of being construed as an admission by the claimant.

Obiter: Where the claimant has disclosed the fact that the Minister made a settlement offer which was rejected by the claimant, the PAB could act on its own motion to have the disclosure struck from the record, simply on the basis that it was not relevant.

Weir (Estate of) v. HRSD (October 17, 2007), CP 24882 (PAB)

Where the deceased claimant's estate had no official estate trustee or administrator and the spouse of the deceased was separated from her husband at the time of death, the spouse was permitted to prosecute the appeal on behalf of her late husband's estate after filing a statutory declaration with the PAB confirming that she was the deceased's widow and with the written consent of his two children witnessed by a commissioner of oaths.

§4.2. Reasonable Apprehension of Bias

Gorgiev v. Canada (Minister of Human Resources Development), 2005 FCA 55

The disclosure to the PAB during the hearing of a previous settlement offer made by the Minister and its rejection by the claimant did not give rise to a reasonable apprehension of bias on the part of the PAB against the claimant in the circumstances. The members of the PAB, all of whom are judges or retired judges, must be taken to know that the reasonableness of a settlement cannot be assessed properly except by the parties themselves, because only the parties have all of the relevant information. The only information available to the PAB at the time of the disclosure of the rejected settlement offer was the material in the appeal record.

The members of the PAB must also be taken to know that it was quite proper for the claimant to choose to have the matter heard and decided by the Board. In any case, the disclosure was more likely to reflect negatively on the position of the Minister than the position of the claimant.

§5. Reasons for Decision

(a) General Principles

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.

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*) of the *Criminal Code*. 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.

Garcia v. Canada (A.G.), [2001] FCA 200

Section 83(11) expressly imposes upon the PAB the obligation to notify in writing the parties to the appeal of its decision and of its reasons therefor. The PAB's failure to provide a full written explanation for its decision breaches the Board's duty of procedural fairness owed to the applicant and constitutes a reviewable error. It is not sufficient for the PAB to merely quote from or cite some of the medical reports and other evidence without accepting, rejecting, or analyzing it, and then simply conclude that in its opinion the applicant does not meet the strict requirements of the CPP with no explanation for the conclusion expressly stated.

(b) PAB Decisions

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

A double standard as to the adequacy of a tribunal's reasons depending on which way it decides a dispute should not be applied. 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. 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 a finding that the claimant and a treating physician to be credible despite a great amount of evidence that the claimant's disability was not severe. 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 workload can be shared among the three members who comprise a panel of the PAB.

Doucette v. MHRD, 2004 FCA 292

The Supreme Court of Canada's decision in *Sheppard* provides one basis upon which to assess the adequacy of the PAB's reasons in a particular case — i.e., do the reasons provide a sufficient basis for the Federal Court of Appeal to exercise its review function? The reasons under review should be fairly considered and in performing that exercise, the Court should examine the record on which the decision under review is based. The court could exercise its review function where the PAB refers to "serious concerns" regarding the claimant's disability expressed in a medical report without identifying what those concerns are, as long as the report itself was clear about the nature of the concerns. While the PAB could have explained its reasoning more thoroughly, its reasoning could still be discerned from the language used.

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

The PAB need not make express reference in its reasons to all the oral and documentary evidence presented. However, judicial review is available where it was apparent on the face of the reasons that the PAB in denying the claim actually ignored evidence of a 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.

Marrone v. Canada (Attorney General), 2008 FCA 216

The PAB's decision must contain meaningful analysis of the applicable law and of the evidence.

Atri v. Canada (Attorney General), 2007 FCA 178

Where the applicant is seeking to establish that his age is as set out in documents issued by his native country rather than his Canadian immigration documents, he is entitled as a matter of fairness to be told by the PAB why it did not accept his national documents as proof of his age, especially where the applicant alleged that his Identification Booklet is a birth certificate. The PAB failed to discharge its statutory duty to provide adequate reasons for its decision where it did not refer specifically to the national documents, nor explain why it preferred the immigration documents as proof of the applicant's age.

Giannaros v. Canada (Minister of Social Development), 2005 FCA 187

The Court should not intervene because it is of the opinion that the PAB failed to express themselves in a way acceptable to the Court. The reasons under review should be fairly considered and in performing that exercise, the Court should examine the record on which the decision under review is based. Judicial review should not be granted on this basis where the Court can discern the PAB's reasoning from the language it has used, although it is obvious that the PAB could have explained its reasoning more fully.

Giordano v. Canada (Attorney General), 2005 FCA 71

It is not necessary that the PAB's reasons contain an extensive analysis of the claimant's personal circumstances and the various medical reports that were before it, where the PAB's focus was on the claimant's failure to seek work otherwise than at her previous employer's factory and where no sedentary work was available. The PAB was entitled to focus on the relevant date for determining the claimant's disability and discount evidence of evaluations subsequent to that date.

Palumbo v. Canada 2005 FCA 117

The PAB is not required to refer to every one of what may be a considerable number of reports before it. Expert reports on which the claimant relies may be omitted from discussion in the PAB's reasons where they were not of sufficient probative significance to warrant treatment.

Dossa v. Canada (Pension Appeal Board), 2005 FCA 387

The PAB is not required or expected to refer to every report. Furthermore, it is entitled to prefer some evidence over other evidence, as long as that evidence is not of such probative significance that doing so would amount to a failure to discharge its elementary duty to engage in a meaningful analysis of the evidence. It is not the function of the Federal Court of Appeal to reweigh the evidence and retry the case. There is no bar to the PAB relying on hearsay evidence as long as it is not unfairly used.

Osborne v. Canada (Attorney General), 2005 FCA 412

Although the PAB did not expressly deal with the side effects caused by the claimant's medication, it could easily be inferred from the PAB's overall consideration of the medical and therapeutic reports before it, that it was fully aware of the treatment modalities being used by the claimant, including his use of medication.

Whiteley v. Canada (Minister of Social Development), 2006 FCA 72

In rendering a decision, the PAB is required to analyse the law and the evidence in a meaningful way. It is not enough to relate the evidence and then immediately conclude that the onus on the claimant had not been met.

Canada (Attorney General) v. Fink, 2006 FCA 354

In awarding a disability pension, it is not sufficient for the PAB to merely state that it took into account the totality of the evidence and then to conclude that applicant had met her burden of proof. Analysis is required.

Johnson v. Canada (Attorney General), 2007 FCA 66

Where none of the evidence directly addressed the applicant's condition during his MQP, but there was some evidence that could have been interpreted to favour the applicant's claim, it is incumbent upon the PAB to explain why they chose not to interpret the evidence that way, particularly where it is not clear from the record why they made that choice.

Thornton v. Canada (Social Development), 2007 FCA 65

The PAB was not obliged to refer to post-MQP reports which did not bear on the applicant's condition before the expiry of the MQP.

Minister of Human Resources Development v. Uzoni, 2005 FCA 313

The PAB is entitled to decline to draw an adverse inference from the claimant's absence from the hearing where the absence was adequately explained by a physician. In such circumstances, the PAB is not required to elaborate its reasons why it did not draw the adverse inference requested by the Minister.

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

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". 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, as well as whether a 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.

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

The PAB's failure to consider all of the medical evidence before it meant that the decision denying the applicant's appeal could not stand, where the medical opinions corroborated the information supplied by the applicant in the questionnaire attached to his application for the disability pension. The phrase "semi-sedentary work" referred to in the medical evidence and the PAB's decision is incapable of conveying clear meaning for the purposes of assessing disability under the CPP.

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

Judicial review was granted where the PAB erroneously stated (i) that none of the medical reports indicated the existence of an inability or of a functional deficiency, although one doctor had concluded that the claimant was incapable of even light office duties as a result of her neck and shoulder injuries sustained in a car accident, (ii) 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, and (iii) that the injuries were soft tissue, while the evidence showed multidirectional instability in the shoulder.

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.

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. 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.

Canada (Attorney General) v. Dale, 2006 FC 1364

The CPP does not require that written reasons be provided where leave to appeal to the PAB is granted.

§6. Record of Proceedings

Burton v. Pension Appeals Board, 2008 FCA 140

There appears to be no statutory duty to record a PAB proceeding. But while the Pension Appeals Board Rules of Procedure (Benefits) are silent on the recording of hearings before the PAB, s. 10.1(1) of the Rules allows a party to submit, by motion in writing, to the Chairman or Vice-Chairman "any matter that arises, in the course of an appeal or seeking leave to appeal, that can be considered in advance of the hearing of the appeal without the personal appearance of the parties". In the absence of a transcript or sworn probative evidence as to what transpired at the PAB hearing with respect to an alleged instance of bias, it is impossible for the reviewing court to either verify the allegation or assess the credibility of that allegation.

Canada (AG) v. Matheson, 2007 FCA 383

Where the PAB approves a settlement between the parties by way of consent judgment, the PAB is *functus officio* and lacked jurisdiction to subsequently amend the settlement on a subsequent motion by one of the parties. The correct procedure is for the party seeking to set aside the settlement to apply to a court to annul the agreement. Before the parties can start afresh, the impugned agreement must be invalidated. There cannot be a valid agreement if the consent of one or both parties is vitiated.

Garcia v. Canada (A.G.), [2001] FCA 200

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 are 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 provides 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.

Bagri v. Canada (Attorney General), 2006 FCA 134

The fact that the PAB made no reference to the applicant's oral testimony did not mean that the reviewing court could not determine if the PAB thereby erred without a transcript of the hearing, where the principal substantive issues in the case concerned the adequacy of the medical evidence relevant to the claim that she qualified for long term disability benefit as of a particular date.

Sudnik v. MHRD (January 23, 2004) CP 19633 (PAB)

There is no statutory requirement that Review Tribunal hearings be recorded. 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. A claimant is 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, the claimant could put forward all the facts by way of affidavit evidence. The deponents could be cross-examined on their affidavits.

§7. Powers of Pension Appeals Board

- See also s. 84, **§1 Powers of PAB and Review Tribunal**

Spiece v. MHRD (April 7, 2003) CP 19047 (PAB)

Section 83(11) gave the PAB the power to conduct a full hearing of the claimant's case, including new evidence the claimant was seeking to introduce before the Review Tribunal under s. 84(2).

Mazzotta v. Canada (Attorney General), 2007 FCA 297

On an appeal of a reconsideration decision rendered by a Review Tribunal pursuant to s. 84(2), the PAB possesses the power under s. 83(11) to review the Tribunal's decision relating to the issue of new evidence, whether the Tribunal's decision in this regard is a positive or a negative one. If the Review Tribunal erroneously found that the new facts submitted constituted new evidence, the PAB is, on an appeal from a Review Tribunal's decision rendered pursuant to subsection 84(2), given the authority by subsection 83(11) to take the proper action that the Review Tribunal might have taken and find that the evidence is not new evidence.

Canada (Attorney General) v. McGee, 2007 FCA 208

The PAB's jurisdiction is over decisions of a Review Tribunal. Nowhere in the CPP can it be found that the PAB possesses the statutory power to sit on appeal or to review a final and binding decision rendered by one of its members.

Canada (Attorney General) v. Dale, 2006 FC 1364

Neither the Review Tribunal nor the PAB has jurisdiction to entertain an appeal of a decision of the Minister under s. 66(4).

Sudnik v. MHRD (January 23, 2004) CP 19633 (PAB)

The PAB has no jurisdiction to conduct a judicial review of the Review Tribunal's decision.

Meseyton v. MHRD (June 4, 2004) CP 21108 (PAB)

The PAB is a statutory board and it therefore derived all of its powers, solely, from the statute that created it, namely, the CPP. While the members of the PAB 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 had no such expanded jurisdiction when sittings as members of the PAB and were bound strictly by the express provisions and wording of the CPP.

Robsob-Belfrey v. MHRD (January 8, 2004) CP 15822 (PAB)

Where the Minister had never, on the record, considered and given a decision in writing on the issue of capacity, no appeal could be heard. Such a step was a necessary basis for the appeal procedure, and the consent of all parties could not confer jurisdiction on the PAB to continue.