Source: http://decisions.fct-cf.gc.ca/fct/2001/2001fca248.shtml

Federal Court Reports
Villani v. Canada (Attorney General) (C.A.) [2002] 1 F.C. 130

Date: 20010803

Docket: A-245-00

Neutral Citation: 2001 FCA 248

CORAM: LINDEN J.A.

ISAAC J.A.

MALONE J.A.

BETWEEN:

GIUSEPPE VILLANI

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

ISAAC J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the "Board"), dated 11 February, 2000, which concluded that the applicant was not disabled within the meaning of subsection 42(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*Plan*") and was therefore not entitled to a disability pension under paragraph 44(1)(b) of the *Plan*.

Background and Medical History

[2] The applicant was born in Italy on 3 June, 1938 and received a grade 5 education before emigrating to Canada in 1955. After finding several odd jobs, the applicant found permanent employment at Rothman's of Pall Mall, the tobacco company, on 4 July, 1963. He worked at Rothman's for the next twenty-three and a half years until the plant closed in December of 1986. During this period at the company, the applicant worked his way from general labourer to machine adjuster.

[3] In 1969 and 1974, the applicant sustained knee injuries which led to three separate operations - the first for a torn meniscus, the second for a left Baker cyst and the third to free the perineal nerve from pressure. In 1976, he sustained a shoulder and neck injury which resulted in stiffness and discomfort extending down his back. In 1979, pain from the neck injury recurred and required the applicant

to consult with a number of doctors, including those of the Workers' Compensation Board of Ontario (the "W.C.B."). He then began using a TENS machine for pain relief. In 1985, he was awarded a 10% partial disability pension by the W.C.B. In 1992, the disability was confirmed as being permanent. Since September of 1996, the W.C.B. has granted him a 20% pension for the permanent disability in his shoulder and neck.

[4] Despite his injuries, the applicant was able to continue work at Rothman's until the plant was closed in 1986. After Rothman's closed its plant, the applicant studied for and passed the Ontario Real Estate Board's examination and thereby obtained a real estate agent's licence in 1987.

[5] For one month in 1992, the applicant worked as an inside worker and van delivery man for Golden Loaf Bakery. In 1993, he renewed his real estate agent's licence and became registered with National Group Realty Services Inc. In the same year, he first applied to the W.C.B. for a pension for the injury to his knee. He was granted an 8% pension on 2 March, 1994 which was raised to a 12% pension on 14 January, 1996. Unfortunately, the applicant was unable to generate a customer base for his real estate business. His registration with National Group Realty ceased in December of 1995 at which time he felt he could not continue to work because of his deteriorating physical health. The applicant's real estate licence lapsed in 1997. It has not been renewed.

[6] Throughout the period mentioned in the preceding paragraphs, the applicant also experienced some visual and hearing impairment, the latter a product of environmental noise at the Rothman's plant. For this impairment, he has been receiving from the W.C.B. a 4.5% pension since 1983.

Procedural History

[7] On 11 March, 1994, the applicant - then nearly 56 years old - applied for a disability pension under the *Plan*, citing his main disabling condition to be pain in his right knee, his shoulders and his back. He also complained of numbness in his lower leg and hands as well as hearing loss and difficulty reading, even with glasses. In addition, the applicant reported pain and a burning sensation in his stomach. By letter dated 25 March, 1994, the respondent Minister denied the application. On reconsideration, the respondent maintained his view and communicated his decision to the applicant by letter dated 6 September, 1995.

[8] The applicant appealed the denial to the Review Tribunal ("the Tribunal"). In its decision of 14 May, 1996 (See Respondent's Application Record, Vol I at 20-21), the Tribunal affirmed the respondent's decision, stating:

...This claimant does not present with sufficient objective evidence of medical anatomical or physiological impairments which would be expected to restrict him from performing *all* physical activities and work... [Emphasis added]

[9] The applicant obtained leave to appeal the decision of the Tribunal to the Board. The appeal was heard on 3 December, 1998. On 6 January, 1999, the Board dismissed the appeal on the basis that the applicant had not adduced sufficient evidence to demonstrate his disability prior to 31 December, 1995. The Board noted that neither of the applicant's doctors had described the applicant as "totally disabled" prior to the critical date and that both of them had indicated that he was "capable of performing non-physical work with limitations" (Respondent's Record, Vol II at 426).

[10] The applicant applied to this Court for judicial review of the Board's decision. However, the application never came on for hearing, the parties having agreed to refer the application back for redetermination by another panel of the Board on the basis of the applicant's allegation that he was unable to hear the original appeal proceeding (Consent Order dated 26 October, 1999, Applicant's Record, Tab 11 at 321).

[11] A new hearing before a different panel of the Board was convened on 7 February, 2000. In a

unanimous decision dated 11 February, 2000, the new panel determined that the applicant was not, at the relevant time, disabled within the meaning of subsection 42(2) of the *Plan*. The Board placed considerable emphasis on the repeated statements of the applicant's family doctor, Dr. Soutar, that the applicant (at least prior to October of 1998) was totally disabled only from "all physical work and work involving prolonged standing or repetitive use of his hands" (Reasons of the Board, Respondent's Record, Vol. I at 9). In the opinion of the Board, this diagnosis of partial disability was consistent with the applicant's receipt of only a partial disability pension from the W.C.B. and the applicant's apparent mental and linguistic ability to undertake work in the real estate industry between 1987 and 1991 and between 1993 and 1997.

[12] At page 10 of its reasons, the Board explained the statutory definition of a "severe" disability found in subparagraph 42(2)(a)(i) of the *Plan*:

It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.

A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

[13] In support of its interpretation of the severity requirement in subparagraph 42(2)(a)(i) of the *Plan*, the Board cited the following passage from the reasons of Teitelbaum J. in *Davies v. Canada (Minister of Human Resources Development)* (1999), 177 F.T.R. 88, [1999] F.C.J. No.

1514 (QL) (F.C.T.D.):

¶ 43 The relevant inquiry in determining if an individual has a severe disability is whether they have the physical capacity to pursue some type of substantially gainful employment, irrespective of what their previous work experience has been. The legislation specifies that this employment be "substantially gainful" and subsection 42(2) articulates what factors will inform this assessment.

¶ 44 There is no ambiguity in which factors are relevant in assessing disability. The decisions of the PAB in Bains v. MHRDC, (1997) CP 4153 at pages 2 and 3, Aitkins v. MEI, (1996) CP 3408 at page 5, and Wilson v. MEI, (1996) CP 4109 at page 6 are unambiguous in stating that the applicant's inability to perform their previous job, the availability of work, their skills and education, and other personal barriers do not form part of the consideration into the severity of the disability.

[...]

¶ 46 However, the legislation does not provide for the consideration of age or education under subsection 42(2). The only issue is whether he is capable of obtaining some type of substantially gainful employment, not necessarily anything related to his previous job.

[14] Applying that definition of "severe", the Board concluded that the applicant's disability was not severe within the meaning of the *Plan*. The Board's opinion was articulated in the following terms (at pages 12-13 of its reasons):

(d) While one acknowledges immediately that suitable sedentary work with relief times to walk around is not easy to find, the test is not "Is the work available?" but rather, "If it were there, could he do it?" In my opinion the answer is yes. He is a highly intelligent man with excellent language skills who was able to carry out the ordinary skills of living - walking short distances and driving a car.

(e) In the witness stand Mr. Villani complained of the disabling pain. I can only say that up to December, 1995, in my opinion, he may well have been disabled from doing what he wanted to do - a good job earning high wages - but he was not disabled from a job he was capable of doing either mentally or physically. [emphasis in original]

[15] It is from the dismissal of his appeal by the Board that the applicant now seeks judicial review. In his oral and written arguments, the applicant attacked the decision of the Board on several grounds, including a large number of procedural arguments and arguments touching on whether the Board had applied the correct legal test for determining a severe disability under the *Plan*. The Court did not require the Crown to answer any of the grounds raised by the applicant except those relating to the issue of whether or not the Board had applied the appropriate legal test. Counsel for the Crown, in her submissions, supported the test which the Board applied in this case by referring the Court to earlier decisions of the Board.

Relevant Provisions of the *Plan*

44. (1) Subject to this Part,	44. (1) Sous réserve des autres dispositions de la présente partie_:
[...]	[...]
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui_:
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;
(iv) [Repealed, 1997, c. 40, s. 69]	(iv) [Abrogé, 1997, ch. 40, art. 69]
42(2) For the purposes of this Act,	42(2) Pour l'application de la présente loi_:
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa_:
(i) *a disability is severe only if by reason thereof the person in respect of whom the determination*	(i) *une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement*

is made is incapable regularly of pursuing any substantially gainful occupation, and	*incapable de détenir une occupation véritablement rémunératrice*,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; ... [emphasis added]	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

The Standard of Review

[16] Before considering the merits of this application, it is necessary to determine the appropriate standard of review to be applied to the decision of the Board. This undertaking has as its primary concern the legislative intent of Parliament in creating the tribunal whose decision is being reviewed. That intention must be gleaned from the constating statute of the tribunal in order to appreciate whether the question which the tribunal has answered was intended by legislators to be left to its exclusive jurisdiction (*Pasiechnyk v. Saskatchewan (Worker's Compensation Board)*, [1997] 2 S.C.R. 890 at para. 18).

[17] This task requires a Court to consider and weigh a number of different factors which assist in indicating the degree of deference to be given to the decision under review. That degree of deference is now measured on a spectrum of standards running from the most deferential - patent unreasonableness, to the least deferential - correctness. Since the Supreme Court's decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a mid-point on the spectrum of deference has been identified which requires a standard of reasonableness *simpliciter*.

[18] The principal factors to be considered in arriving at the appropriate standard of review are the following: (i) the existence or absence of a privative clause, (ii) the expertise of the tribunal relative to that of the reviewing court, (iii) the purpose of the Act as a whole and of the provision in particular and (iv) the nature of the problem or question decided by the tribunal (See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29ff). No one of these factors alone is dispositive. Rather, they must be analysed together in order to identify the proper standard of review to apply in each case. This is the "pragmatic and functional" approach to determining legislative intent, and it must be applied in this case to determine the amount of curial deference this Court owes to the Board and its decision in respect of the applicant.

[19] In this case, the Court did not have the benefit of full submissions from the parties on the question of the appropriate standard of review, because the appellant was unrepresented by counsel. Though the respondent did make submissions on this point, those submissions were limited to the appropriate deference to be accorded the Board on questions of fact. That issue is quite straightforward and I agree with the respondent that on questions of fact the standard is one of patent unreasonableness. This view has been articulated in previous decisions of this Court involving judicial reviews of decisions of the Board pursuant to section 28 and paragraph 18.1(4)(d) of the *Federal Court Act* (See *Wirachowsky v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 2094; *Powell v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 1008).

[20] However, the appropriate standard of review on questions of law or mixed fact and law decided by the Board has never, to my knowledge, been thoroughly addressed by this Court, except on one other occasion. In *Canada (Minister of Human Resources Development) v. Skoric (C.A.)*, [2000] 3 F.C. 265, [2000] F.C.J. No. 193 (QL), this Court reviewed a decision of the Board respecting the appropriate contributory period applicable for the payment of a benefit to a surviving spouse under paragraph 44(1)(d) of the *Plan*. The primary issue was whether the Board erred in deciding whether the pre- or post-January 1, 1987 version of subparagraph 44(2)(b)(ii) applied to the circumstances of the case.

[21] Evans J.A. applied the pragmatic and functional approach and concluded that the decision of the Board was entitled to little or no deference. He reasoned as follows:

¶ 15 It was more or less common ground between the parties that the standard of

review applicable in this case is at the correctness end of the spectrum. I agree. A pragmatic or functional analysis clearly indicates that this is not a situation in which curial deference is appropriate.

¶ 16 First, there is no privative clause restricting the scope of judicial review. Subsection 84(1) of the Plan provides that, "except for judicial review under the *Federal Court Act*", the Board's decisions are "final and binding for all purposes of this Act". Since this provision expressly exempts judicial review from its scope, the effect of the finality clause can only be to restrict the jurisdiction that the Board would otherwise have had to reconsider its decisions pursuant to *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848. However, subsection 84(2) expressly permits the Board to reconsider its decisions "on new facts".

¶ 17 Second, the Board has no broad regulatory responsibilities, but performs only the adjudicative function of hearing appeals from the Review Tribunal: subsection 83(1) [as am. by S.C. 1995, c. 33, s. 36]. Third, the Chair, Vice-Chair and other members of the Board must be judges of the Federal Court or of specified section 96 [*Constitution Act*, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act* 1982, 1982, c. 11 (U.K.), *Schedule to the Constitution Act*, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5]] courts: subsection 83(5); retired judges of these courts are eligible to be appointed as additional "temporary members": subsection 83(5.1). Fourth, the questions in dispute in this case involve the interpretation of the Board's enabling statute and have an application beyond the facts of this dispute. Fifth, the subject-matter of the dispute is the adjudication of an individual's legal rights.

¶ 18 On the other hand, a consideration pointing to curial deference is the fact that Parliament probably entrusted appellate functions to an administrative tribunal, the Pension Appeals Board, rather than to the Federal Court, to take advantage of the benefits of economical and expeditious decision-making, and more accessible process, normally offered by tribunals.

¶ 19 In my view, the balance of the factors in the pragmatic or functional mix favours affording little deference to the Board's interpretation of its constitutive legislation, especially in the absence of any evidence in the record indicating that members of the Board acquire considerable expertise in the Canada Pension Plan as a result of the volume of appeals that they hear and decide.

[22] There is little to distinguish the decision of the Board in *Skoric* from the decision of the Board in the present case. In each case, the decision related to the application of the statutory language of the *Plan*. None of the factors in the pragmatic and functional analysis point to a deferential standard of review in this case. On the contrary, except as relates to questions of fact, I am of the view that the decision in this case is one which involved the interpretation and application of the definition of a "severe" disability within the meaning of subparagraph 42(2)(a)(i) of the *Plan*. As such, it should be reviewed on a standard of correctness, at the least deferential end of the spectrum.

Benefits for Disabled Persons Under the *Plan*

[23] Section 44 of the *Plan* lists the various benefits that are payable under that statute. Specifically, that section provides for the payment of retirement pensions, death benefits, survivor's pensions, disabled contributor's child's benefits and orphan's benefits. There is also

provision for a disability pension. In this connection, it is worth repeating the text of

paragraph 44(1)(b) of the *Plan*:

44. (1) Subject to this Part,	44. (1) Sous réserve des autres dispositions de la présente partie_:
[...]	[...]
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui_:
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii)soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;
(iv) [Repealed, 1997, c. 40, s. 69]	(iv) [Abrogé, 1997, ch. 40, art. 69]

[24] Not surprisingly, one of the conditions in paragraph 44(1)(b) for the payment of a disability pension is that the applicant be disabled. The *Plan* contains a comprehensive definition of the term "disabled" for the purposes of determining entitlement to a disability pension. That definition is found in paragraph 42(2)(a) of the *Plan* which reads:

42(2) For the purposes of this Act,	42(2) Pour l'application de la présente loi_:
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa_:
(i) *a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation*, and	(i) *une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice*,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and [emphasis added]	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[25] Subsection 42(2) makes it clear that an applicant's disability must be both severe and prolonged before a pension will be payable under paragraph 44(1)(b). There is no issue here as to whether the

applicant's disability is prolonged. The only issue is whether it is severe. Of interest in this application is the statutory definition of a "severe" disability contained in subparagraph 42(2)(a)(i). This Court has not yet had occasion to comment on that definition. However, the circumstances of the present case warrant a close analysis of the legal test for determining whether or not a disability is "severe" within the meaning of the *Plan*.

(a) Applicable Principles of Legislative Interpretation

[26] Section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 reads:

12: Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The enactment of this general principle abolished the traditional distinction between penal and remedial legislation for the purposes of statutory interpretation (See R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 356). Under the traditional distinction, penal legislation was construed strictly while remedial legislation was given a large and liberal construction. The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.

[27] In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. This interpretive approach to legislation designed to secure a social benefit has been adopted in a number of Supreme Court decisions dealing with the *Unemployment Insurance Act, 1971* (see *Abrahams v. A.G. Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (A.G.)*, [1988] 1 S.C.R. 513; *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 S.C.R. 29; and *Caron v. Canada (Canada Employment and Immigration Commission)*, [1991] 1 S.C.R. 48).

[28] It is evident to me that the *Plan* is benefits-conferring legislation analogous to the *Unemployment Insurance Act, 1971*. The *Plan* provides for the payment of disability benefits to claimants who have been contributors under the scheme. When the *Plan* wasintroduced in the House of Commons as Bill C-136 (26th Parl., 2nd Session, November 9, 1964, *Hansard* at 9899), the Minister of National Health and Welfare referred to the proposed legislation as a

... comprehensive social insurance measure... which provides help as of right rather than on a need or a means test, for those who suffer the loss of a loved breadwinner or those who find themselves disabled and unable to carry on work. I think hon. members will agree this is a giant step forward in Canada's social security program.

The Minister was more specific in her characterization of the supplementary benefits made available under the proposed legislation (*Hansard, supra* at 9923):

In a sense, therefore, supplementary benefit pensions are more generous, especially for those in lower income brackets, than the new retirement pensions. This approach is justified because of the special need of widows, orphans and disabled contributors, and is certainly warranted on both humanitarian and economic grounds.

On second reading, the Minister of National Revenue added his opinion that the Bill was "the most far reaching piece of social legislation ... proposed in many years" (*Hansard* at 10140, November 16, 1964).

[29] Accordingly, subparagraph 42(2)(a)(i) of the *Plan* should be given a generous construction. Of course, no interpretive approach can read out express limitations in a statute. The definition of a severe disability in the *Plan* is clearly a qualified one which must be contained by the actual language used in subparagraph 42

(2)(a)(i). However, the meaning of the words used in that provision must be interpreted in a large and liberal manner, and any ambiguity flowing from the those words should be resolved in favour of a claimant for disability benefits.

(b) Is the Disability "Severe"? - The Board's Approach

[30] The Board has readily acknowledged that, on its reading of the *Plan*, the requirements for a severity finding with respect to an alleged disability are extremely strict indeed. This was expressed by the Board in the following passage from its reasons in *Marie Atkins v. The Minister of Employment and Immigration*, CP 3408 (February 16, 1996) at 5:

The intention of the legislation has been found on many occasions to preclude disability pensions being granted except in cases of total disability, incapacity to work, in the sense of Section 42(2). This legislation is not welfare legislation. The fact that many applicants are older, cannot return to their old jobs, cannot find any part-time or sedentary positions (in which they could perform) in today's very difficult work place, is not the question we must answer. Nor are those facts, in the real world, a reason, sympathetic as we might be to applicants, to allow a pension.

[31] The position that subparagraph 42(2)(a)(i) of the *Plan* does not permit consideration of an applicant's age, skills level, education or language proficiency in deciding whether he or she is incapable regularly of pursuing any substantially gainful occupation has been repeated in a number of Board decisions (See *e.g. Antonio Macri v. Minister of Employment and Immigration*, CP 3079 (January 9, 1996);*Alfred Wilson v. Minister of Employment and Immigration*, CP 4109 (May 31, 1996); *Surjit Bains v. Minister of Human Resources Development*, CP 04153 (January 24, 1997); *Minister of Human Resources Development v. Steven W. Stewart*, CP 07942 (September 28, 1999); *Patricia J. May v. Minister of Human Resources Development*, CP 06197 (November 22, 1999)).

[32] However, there is another and earlier line of cases in which the Board has adopted a more liberal interpretation of the severity definition in subparagraph 42(2)(a)(i) of the *Plan*. In these cases, the Board chose to take what it has called a "real world" approach to the application of the severity requirement. This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing any substantially gainful occupation.

[33] The "real world" approach was first adopted by the Board in *Edward Leduc v. Minister of National Health and Welfare, CCH Canadian Employment Benefits and Pension Guide Reports, Transfer Binder 1986-1992* at ¶ 8546, pp. 6021-6022 (January 29, 1988). In that case, the Board found for the applicant on the following basis:

The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

[34] The "real world" approach has been applied in a number of Board decisions since *Leduc* (See *e.g. Danells v. Minister of National Health and Welfare*, CP 2657 (June 18, 1993); *Reuben Daly v. Minister of Employment and Immigration*, CP 2919 (August 11, 1994); *Elaine Gaudreau Morley v. Minister of Employment and Immigration, CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1993-1997* at ¶ 8592, pp. 6115-6116 (November 23, 1995); *Constance M. Osachoff v. Minister of Human Resources Development*, CP 05635 (July 7, 1997); *Appleton v. Minister of Human Resources Development*, CP 04619 (November 21, 1997); *Paul M. Scott v. Minister of Human Resources Development*, CP 10014 (September 30, 1999).

[35] In fact, the first recorded disability determination under the *Plan* of which I am aware took a generous view of the severity requirement analogous to the Board's approach in *Leduc*. That view, however, was not couched in the "real world" terminology coined by the Board in *Leduc* and repeated in subsequent cases. In *Minister of National Health and Welfare v. Jaeger CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985* at ¶ 8546, pp. 6066-6068 (August 25, 1971), the Board applied then subparagraph 43(2)(a)(i) in the following manner:

On the merits of the case, the medical and other evidence tendered persuades us that the degenerative arthritis of the respondent, in that it prevents him and will prevent him from engaging in his normal work or anything remotely resembling an occupation which is suitable to his peculiar abilities and aptitudes, must be classified as a severe disability... We find that the respondent is, as s. 43(2)(a)(i) of the Act puts it, "incapable of regularly pursuing any substantially gainful occupation". The words "regularly" and "substantially" must be given due emphasis in the light of the evidence as to the respondent's work record, station in life and future economic prospects. In this case, there is undoubted incapacity to carry on any sort of gainful occupation in any line of work for which the respondent is suited.

Similarly, in *Minister of National Health and Welfare v. Raymond G. Russell, CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985* at ¶ 8684, pp. 66279-6280 (June 26, 1974), the Board restated its jurisprudence to that time in the following words:

The Board has always interpreted the language of the statute to mean exactly what it says, and in many cases has had to say that the fact that suitable work has not been available to an applicant is irrelevant to the question of whether or not he qualifies. However, various circumstances have been held to bear upon this question, such as age, education and aptitude.

[36] It is evident from a review of the Board's disability decisions, particularly its recent case law, that the Board's position regarding the severity requirement in subparagraph 42(2)(a)(i) of the *Plan* has been applied inconsistently. In the recent cases, there has been no discernible reason for the change in approach to the definition of "severe" in the *Plan*. For this reason, it becomes necessary for this Court to give direction concerning the proper legal test to be applied in determining whether an applicant suffers from a "severe" disability within the meaning of the *Plan.*

(c) The Appropriate Legal Test for Disability under the Plan

[37] Except for one case, none of the recent decisions of the Board has analyzed fully the text of subparagraph 42(2)(a)(i) of the *Plan*. That one occasion was the Board's relatively recent decision in *Patricia Valerie Barlow v. Minister of Human Resources Development*, CP 07017 (November 22, 1999). It is worth repeating the central passage of the Board's decision in that case:

Is her disability sufficiently severe that it prevents her from regularly pursuing any substantially gainful occupation?

To address this question, we deem it appropriate to analyze the above wording to ascertain the intent of the legislation:

Regular is defined in the *Greater Oxford Dictionary* as "usual, standard or customary".

Regularly - "at regular intervals or times."

Substantial - "having substance, actually existing, not illusory, of real importance or value, practical."

Gainful - "lucrative, remunerative paid employment."

Occupation - "temporary or regular employment, security of tenure."

Applying these definitions to Mrs. Barlow's physical condition as of December, 1997, it is difficult, if not impossible, to find that she was at age 57 in a position to qualify for any usual or customary employment, which actually exists, is not illusory, and is of real importance.

[38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[39] I agree with the conclusion in *Barlow, supra* and the reasons therefor. The analysis undertaken by the Board in that case was brief and sound. It demonstrates that, on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the "real world". It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.

[40] I find additional support for adopting the ordinary meaning of subparagraph 42(2)(a)(i), as interpreted by the Board in *Barlow*, in the *Canada Pension Plan Regulations*, C.R.C. c. 85. Subsection 68(1) of those *Regulations* requires that anyone applying to the Minister for disability

benefits under the *Plan* must supply the Minister with particular information. It reads:

68. (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:	68. (1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer :
(a) a report of any physical or mental impairment including	a) un rapport sur toute détérioration physique ou mentale indiquant
(i) the nature, extent and prognosis of the impairment,	(i) la nature, l'étendue et le pronostic de la détérioration,
(ii) the findings upon which the diagnosis and prognosis were made,	(ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,
(iii) any limitation resulting from the impairment, and	(iii) toute incapacité résultant de la détérioration, et
(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;	(iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;
(b) a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability commenced; and	b) une déclaration indiquant l'emploi et les gains
(c) a statement of that person's education, employment	

experience and activities of daily life. [emphasis added]

de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et

c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

On the Board's strict interpretation of the severity requirement, the information relating to an applicant's education, employment experience and activities of everyday life which is required to be supplied to the Minister pursuant to paragraph 68(1)(c) of the *Regulations* would be completely irrelevant to a disability determination. Of course, the mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the *Plan*.

[41] It is also clear from the minutes of the special joint committee appointed to consider Bill C-136 that the precise words of subparagraph 42(2)(a)(i) were chosen with particular care by the drafters of the *Plan*. During the clause by clause review of the Bill, the severity requirement was explained in the following way by the Deputy Minister of Welfare at the time, Dr. Joseph Willard (See Special Joint Committee of the Senate and House of Commons Appointed to Consider and Report upon Bill C-136, Minutes of Proceedings and Evidence, No. 2 at 247 (Tuesday, December 1, 1964)):

Mr. Thorson: ...Subclause (2) defines what is meant in this bill by the expression "disabled"...

Hon. Mr. Croll: How does it vary from the definition in the disability act at the present time?

Dr. Willard: Mr. Chairman, the disabled persons' legislation that we have at the present time has the definition of permanent and total disability, which would be a more severe definition than the one set out here. You will notice in this Bill that the severity is related to a person being capable of regularly pursuing any substantially gainful occupation. It, therefore, brings in an additional concept of employability...

[42] The explanation by the Deputy Minister of Welfare is unambiguous. The test for severity is not that a disability be "total". In order to express the more lenient test for severity under the *Plan*, therefore, the drafters introduced the notion of severity as the inability regularly to pursue any substantially gainful occupation. The clear wording of the legislation, the companion provisions in the *Regulations*, and the clear intent of the drafters all indicate with equal force that

the crucial phrase in subparagraph 42(2)(a)(i)'s severity definition cannot be ignored or pared down.

[43] But this is precisely what the Board has done in the present case. The Board has adopted the strict abstract approach to the severity requirement in subparagraph 42(2)(a)(i) without analysing all of the legislative language. For ease of reference, the Board's analysis of the severity definition in subparagraph 42(2)(a)(i) is repeated below (See page 10 of the decision):

It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.

A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

It is evident, to my mind, that the Board in this case has effectively read out of the severity definition the

words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the drafters of the *Plan*. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test for severity.

[44] In my respectful view, the Board has invoked the wrong legal test for disability insofar as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

[45] Unfortunately for decision-makers under the *Plan*, employability is not a concept that easily lends itself to abstraction. Employability occurs in the context of commercial realities and the particular circumstances of an applicant. That is not to say that the Minister, the Review Tribunal or the Board must make intricate postulations respecting an applicant's employability in order to arrive at a severity determination. Furthermore, I wish to express that I should not be taken as stating that employability is to be determined purely by reference to an applicant's chosen occupation. Unlike section 95, paragraph 3 of the *Quebec Pension Plan*, R.S.Q. c. R-9, which specially provides that an applicant who is sixty years of age or over will have a severe disability where he or she is "incapable regularly of carrying on the usual gainful occupation" that he or she holds at the time of becoming disabled, the federal *Plan* makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the *Plan* is in relation to *any substantially gainful occupation*.

[46] What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. Naturally, decision-makers already adopt a certain measure of practicality in their severity determinations. As an obvious example, the scope of substantially gainful occupations suitable for a middle-aged applicant with an elementary school education and limited English or French language skills would not normally include work as an engineer or doctor.

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

[48] Indeed, the tendency to speak in terms of vague categories of labour was singled out for criticism by this Court in *Wirachowsky, supra*. In that case, the applicant was only able to sit and stand for short intervals but had been found by the Board to be capable of semi-sedentary work. On behalf of the Court, McDonald J.A. noted (at paragraph 7) that the phrase "semi-sedentary work" was, in his opinion, incapable of conveying any meaning for the purposes of assessing disability under the *Plan*. The risk of thinking in terms of such "occupational" categories is that all reference to a regular, tangible, and profitable occupation is likely to be forgotten. As a consequence, an applicant may be deprived of the very protection which the *Plan* was designed to provide and for which an applicant has been contributing during periods of healthy and active employment in the labour force.

[49] Bearing in mind that the hearing before the Board is in the nature of a hearing *de novo*, as long as the decision-maker applies the correct legal test for severity - that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[50] This restatement of the approach to the definition of disability 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, of course, be available to test the veracity and credibility of the evidence of claimants and others.

[51] In summary, I am of the opinion that the Board has failed to attribute meaning to the plain words of subparagraph 42(2)(a)(i) of the *Plan*. It has preferred to articulate an abbreviated and decidedly ungenerous version of the statutory definition of a "severe" disability, thereby subverting the benevolent purposes of the legislation. Having reached this conclusion, I do not find it necessary to canvass the many procedural grounds of review which the applicant advanced in his oral and written argument.

Disposition

[52] Accordingly, for these reasons, I would allow the application for judicial review with costs to the applicant, set aside the decision of the Board dated 11 February, 2000, and remit the matter to the Board for redetermination by a differently constituted panel in accordance with these reasons and on the basis of the record as constituted as well as other relevant evidence that the parties may wish to adduce.

"Julius A. Isaac"

J.A.

"I agree

A.M. Linden J.A."

"I agree

B. Malone J.A."