

Federal Court



Cour fédérale

**Date: 20120116**

**Docket: T-780-11**

**Citation: 2012 FC 52**

**Ottawa, Ontario, January 16, 2011**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**BARBARA SARAHAN**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of the Pension Appeal Board (PAB) dated March 29, 2011, which granted the respondent leave to appeal the decision of the Review Tribunal rendered on November 16, 2010. The dispute concerns benefits conferred under the *Canada Pension Plan*, RSC, 1985, c C-8 (CPP).

### The Facts

[2] Ms. Barbara Sarahan (the respondent) was injured in an automobile accident in 1989 and has suffered from chronic pain ever since. Consequently, the respondent has not been able to carry on full-time work due to her injuries and physical limitations.

[3] The respondent's application for CPP disability benefits was denied by the Minister of Human Resources and Skills Development Canada (the Minister) in a refusal letter dated August 13, 2008.

[4] In a letter dated September 3, 2008, the respondent requested a reconsideration of her application. The reply from the Minister to the respondent's reconsideration letter, dated February 4, 2009, also denied the respondent's request.

[5] On February 21, 2009, the respondent drafted a letter seeking to appeal the Minister's decision to the Review Tribunal (RT).

[6] The RT hearing was held on September 23, 2010 in Surrey, British Columbia, and the respondent was self-represented. In its decision issued on November 16, 2010, the RT dismissed the respondent's appeal and concluded that she had not provided sufficient evidence demonstrating that her disability was "severe", as per the terms of the CPP, at the time of her minimum qualifying period (MQP). In this case, the respondent's MQP was found to be December 31, 1996.

[7] Subsequent to the RT's decision, the respondent drafted two letters dated November 20, 2010 and January 20, 2011, respectively.

[8] On March 29, 2011, a designated member of the PAB granted the respondent leave to appeal the RT's decision. The designated member granted the appeal *ex parte*. No reasons were given for the appeal and the decision was not recorded.

[9] On April 4, 2011, the PAB issued a letter addressed to the Director, Medical Expertise Division, Human Resources and Skills Development Canada notifying the parties of the designated member's decision to grant leave to appeal to the respondent. Attached to this letter was the respondent's "Notice to Appeal" which comprised her letters dated November 20, 2010 and January 20, 2011.

[10] The applicant filed an application for judicial review on May 6, 2011.

[11] It is noteworthy that the respondent has not filed a Notice of Appearance with the Court, has provided no written submissions in response to the applicant's application for judicial review and has not appeared for the hearing. As well, the Registry attempted to contact the respondent on numerous occasions but received no response. It was also confirmed to the Court by the applicant and the Registry Officer that relevant documents have been filed and served to the respondent. Consequently, the Court proceeded with the application for judicial review.

[12] Following a review of the record and after hearing the grounds advanced by the applicant, the Court is satisfied that the applicant has demonstrated good grounds to succeed on this judicial review application.

### The Impugned Decision

[13] The PAB designated member's decision at issue, dated March 29, 2011, granted the respondent leave to appeal the RT's decision. The designated member did not record or provide any reasons in support of its decision.

### The Issue

[14] The issue in this case is whether the Pension Appeal Board erred in granting leave to appeal to the respondent.

### The Legislative Framework

[15] Several provisions of the CPP, namely the *Canada Pension Plan Regulations*, CRC, c 385 (the Regulations) and the *Pension Appeals Board Rules of Procedure (Benefits)*, CRC, c 390 (the PAB Rules) are applicable in the present case. These provisions can be found in the Annex to these Reasons for Judgment and Judgment.

[16] By way of a brief summary, the Supreme Court of Canada provided the following explanation of the CPP regime in the case of *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703, at para 9: "The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the

death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution."

[17] According to subsection 42(2) of the CPP, a person will only be considered to be disabled if it is determined that this person has a "severe and prolonged mental or physical disability".

### The Applicant's Arguments

[18] The applicant submits that the PAB erred in granting the respondent leave to appeal the decision of the RT as it failed to provide reasons and record the decision. The applicant further alleges that the respondent did not raise an arguable case, provide any new or additional evidence or allege any error of law or fact in her "Notice of Appeal" – effectively her letters of November 20, 2010 and January 20, 2011.

### Analysis

[19] It is important to note by way of a preliminary observation that the PAB Rules do not provide for an appeal of the decision to grant leave to appeal. Nevertheless, in the case of *Canada (Attorney General) v Landry*, 2008 FC 810, 334 FTR 157, at paras 20 and 21, Justice Blanchard set down the principle that such a decision could be judicially reviewed in the Federal Court of Canada.

#### *A. Standard of Review*

[20] The applicant advances that the review of a decision of a designated member to grant leave to appeal involves two issues: 1) whether the correct test was applied (that of an arguable case), and

2) whether a legal or factual error was committed in determining whether an arguable case was raised (see *Callihoo v Canada (Attorney General)*, [2000] FCJ No 612, 190 FTR 114, at para 15 [*Callihoo*]; *Mebrahtu v Canada (Attorney General)*, 2010 FC 920, [2010] FCJ No 1137, at para 8 [*Mebrahtu*]; and *Canada (Attorney General) v Zakaria*, 2011 FC 136, [2011] FCJ No 189, at para 14 [*Zakaria*]). The established case law has held that the issue of whether the designated member applied the proper test in granting leave is a question of law that is reviewable against the standard of correctness. The second issue, whether a legal or factual error was committed in determining whether an arguable case was raised, is reviewable against the standard of reasonableness. Moreover, with regard to the issue of the duty to provide a recorded decision with written reasons, this duty raises a question of procedural fairness that is reviewable on the correctness standard (*Canada (Attorney General) v Graca*, 2011 FC 615, [2011] FCJ No 762, at para 11; *Canada (Attorney general) v Blondahl*, 2009 FC 118, 362 FTR 1, at para 9).

B. *Is a recorded decision and written reasons required for a grant of leave to appeal where the application for leave is deficient with respect to the mandatory requirements set out in Rule 4 of the PAB Rules?*

[21] The Court notes that the issue of the designated member's duty to record its decision and its duty to provide written reasons are closely linked. Thus, the Court will address these issues together.

[22] The Court notes that the letter dated April 4, 2011 issued by the PAB notifying the parties of the designated member's decision of March 29, 2011 does not constitute the designated member's decision. Rather, the letter of April 4, 2011 simply mentions the decision made by an unnamed designated member of the PAB. The actual decision is not included in the documents pursuant to Rule 318 of the *Federal Courts Rules* or in the applicant's submissions.

[23] As well, the Court accepts the applicant's arguments that the respondent's "Notice of Appeal" – effectively her letters of November 20, 2010 and January 20, 2011 – do not meet the requirements of Rule 4 of the PAB Rules as no new evidence was adduced with the application nor was any error of law or of significant fact identified. Essentially, the Court observes that the respondent's letter of November 20, 2011 merely restates her physical discomfort associated with her injuries and mentions her disagreement with the RT's decision. The Court notes that no new evidence or documents were attached to this letter. Moreover, the respondent's letter of January 20, 2011 relays her frustrations with the process and reaffirms her position that she has a permanent disability. Again, the Court notes that no new evidence or documents were included with this letter. The Court also recalls that the RT initially dismissed the respondent's claim as it was determined that she had not provided sufficient evidence demonstrating that her disability was "severe", as per the terms of subsection 42(2) of the CPP.

[24] The Court further observes that the applicant has provided a comprehensive and useful analysis of the applicable legislation and the established case law on this question. The Court acknowledges that pursuant to subsection 83(3) of the CPP, a designated member is mandated to provide written reasons where leave is denied. Nevertheless, the Court agrees with the applicant that the vast majority of the case law supports the conclusion that the designated member should have recorded the discretionary decision and provided reasons where the application for leave to appeal is deficient. Though the applicant provided reference to numerous pertinent cases, the Court will focus its analysis on a limited number of them.

[25] Firstly, the Court finds that the present situation is similar to the case of *Canada (Attorney General) v Montesano*, 2011 FC 398, [2011] FCJ No 510, para 10, where Justice Hughes concluded that decisions of PAB designated members should be recorded despite the fact that Rule 7 of the PAB Rules allows for *ex parte* decisions. The Court adopts Justice Hughes' reasoning in the case of *Montesano* with respect to the importance of recording decisions:

[10] In the present case, Mr. Montesano did not even provide the material required by Rule 4, *supra*, in support of his application for leave to appeal. If the Board excused him from doing so this should be made of record. It was not. There is nothing on the record other than the letter from the Registrar referred to above, to show what the decision, if any, was to grant leave. There is nothing on the record to show what, if anything, was considered in making the decision. It seems that there may have been an unrecorded decision made by an unknown person on no basis whatsoever.

[26] The case of *Canada (Attorney General) v Skrzypek*, 2011 FC 823, [2011] FCJ No 1026 [Skrzypek], involved an individual who also suffered from a disability. However, his disability was not found to be "severe and prolonged" and the RT determined that he was not entitled to a disability pension under the CPP. In this case, the PAB designated member granted the individual's application for leave to appeal *ex parte* and no reasons were given. It is also important to note that the individual's application for leave to appeal was "simply accompanied by a letter restating the ailments with which Mr. Skrzypek had been diagnosed and a general dissatisfaction with the decision" (para 7). In his decision, Justice Harrington stated the following at paras 8 and 22:

[8] Since the application for leave to appeal was seriously defective, it was submitted that the designated member should have either invoked rule 9 of the *PAB Rules* and called upon Mr. Skrzypek to produce information required for the purpose of determining the leave, or else given reasons as to why leave was granted. I agree with the Attorney General's submissions. Without such reasons, one can only speculate as to whether the designated member was aware of the legal test to be applied on applications for leave and whether his assessment of the record in applying that test was reasonable.



[22] As Mr. Justice Pelletier stated, speaking for the Court of Appeal, in *North v. West Region Child & Family Services Inc.*, 2007 FCA 96, 362 N.R. 83 (F.C.A.), at paragraphs 3 and 4:

[3] The obligation to give reasons is a requirement of procedural fairness. The basis of the obligation was set out by the Supreme Court in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, a decision which, though made in the criminal context, is equally applicable to the administrative law context. In this case, the obligation to give reasons is found in the statute.

[4] If the decision-maker does not provide reasons which set out his findings and the basis upon which they are made, there is no substrate for the application of the standard of review.

[27] Moreover, in the case of *Canada (Attorney General) v Graca*, 2011 FC 615, [2011] FCJ No 762, which involved a judicial review of an extension of time and a leave to appeal, the Court found that the designated member erred by not providing adequate reasons. Specifically, the Court gave the following reasoning at paras 15 and 18:

[15] The decision to grant an extension of time is discretionary, and must be explicitly considered by the member. There is no automatic inference that just because a member granted leave, he must have also granted an extension of time. Jurisprudence of this Court holds that it is incumbent upon the member to support the exercise of discretion with reasons (*Canada (Minister of Human Resources Development) v Roy*, 2005 FC 1456, 281 FTR 198 at para 13). I see no reason for me to deviate from this well-established principle.

[18] In the present matter, the member first erred by allowing leave to appeal without indicating on the record that he considered the issue of the extension of time. The subsequent amended order granting leave failed to remedy the situation. It was completely void of any reasons supporting the decision. There is no indication of how the test was applied, or if the correct test was even applied at all. Given the absence of anything to review, it is, as the Applicant submits, impossible for this Court to assess whether the granting of the extension and leave to appeal was reasonable.

[28] More recently, in the case of *Canada (Attorney General) v Carroll*, 2011 FC 1092, [2011] FCJ No 1348, Justice O'Reilly overturned the leave to appeal under review as he concluded that the

PAB had not met its legal responsibilities of recording its decision in writing, providing reasons and indicating what test it applied in granting leave to appeal (see para 19).

[29] The Court also finds it useful to refer to the case of *Mrak v Canada (Minister of Human Resources & Skills Development)*, 2007 FC 672, 314 FTR 142 [*Mrak*], where Justice Lemieux held that pursuant to the terms of section 83 of the CPP, when no reasons are given by the PAB designated member in granting leave to appeal, the reasons are deemed to be the reasons written in the application for leave to appeal (the Notice of Appeal). In the present case, the Court notes that this approach would be entirely justified when the application for leave to appeal (the Notice of Appeal) is complete and comprises the requirements outlined in Rule 4 of the PAB Rules. However, in the case at bar, as previously mentioned, the respondent's letters of November 20, 2010 and January 20, 2011 do not include the requirements of Rule 4 of the PAB Rules, specifically in light of the fact that the RT dismissed the respondent's claim for lack of sufficient evidence.

[30] In sum, and in light of the established case law, the Court finds that, in accordance with the principles of procedural fairness, the designated member had the duty to provide reasons when making discretionary decision and also had the duty to record it. The failure to provide reasons constitutes an error in law and constitutes sufficient grounds to grant the present application for judicial review (*Canada (Attorney General) v Causey*, 2007 FC 422, 311 FTR 278, at para 23).

[31] In the circumstances, there is no need for the Court to address the remaining issues raised by the applicant at this time in light of the absence of any reasons explaining the designated member's analysis (see *Carroll*, above). Indeed, the Court cannot guess, infer or speculate which test, if any,

the designated member applied in granting leave or its grounds for concluding that the application for leave to appeal raised an arguable case. The Court is left without any guidance as to the designated member's reasoning. As Justice Harrington eloquently stated in *Skrzypek*, above, at para 16, in the absence of reasons provided by the designated member "[t]he question then is whether I should embark on a review of the record [...] [f]rankly, I am not in position to make any assessment, and indeed if I were to do so, I would be usurping the function of the designated member of the Pension Appeals Board, a person who should be an expert in these matters."

[32] For these reasons, the Court concludes that the application for judicial review will be granted.

[33] Finally, when the PAB reconsiders Ms. Sarahan's request for leave to appeal, she should be given an opportunity to say why she disagrees with the RT's decision, and to put forward any new or additional evidence (not already considered by the RT) on which she intends to rely on appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed and the decision of the designated member of the Pension Appeals Board, dated March 29, 2011, is hereby set aside.
2. The Pension Appeal Board is asked to reconsider whether to grant Ms. Sarahan's leave to appeal the Review Tribunal's decision.
3. No order as to costs.

“Richard Boivin”

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Judge

ANNEX

The applicable provisions of the *Canada Pension Plan* are the following:

Part II	Partie II
PENSIONS AND SUPPLEMENTARY BENEFITS	PENSIONS ET PRESTATIONS SUPPLÉMENTAIRES
INTERPRETATION	DEFINITIONS ET INTERPRETATION
When person deemed disabled	Personne déclarée invalide
<p><b>42.(2)</b> For the purposes of this Act,</p> <p>(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,</p> <p>(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</p> <p>(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</p> <p>(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case</p>	<p><b>42.(2)</b> Pour l'application de la présente loi :</p> <p>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 :</p> <p>(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,</p> <p>(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;</p> <p>b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le</p>

may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

cas, invalide, mais en aucun cas une personne — notamment le cotisant visé au sous-alinéa 44(1)(b)(ii) — n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été faite.

#### DIVISION A

##### BENEFITS PAYABLE

###### Benefits payable

**44.** (1) Subject to this Part,

(a) a retirement pension shall be paid to a contributor who has reached sixty years of age;

(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

(i) has made contributions for not less than the minimum qualifying period,

(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

(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

#### SECTION A

##### PRESTATIONS PAYABLES

###### Prestations payables

**44.** (1) Sous réserve des autres dispositions de la présente partie :

a) une pension de retraite doit être payée à un cotisant qui a atteint l'âge de soixante ans;

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) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,

(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) 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

that was made under section 55 or 55.1 had not been made;

(iv) [Repealed, 1997, c. 40, s. 69]

...

Calculation of minimum qualifying period in case of disability pension and disabled contributor's child's benefit

(2) For the purposes of paragraphs (1)(b) and (e),

(a) a contributor shall be considered to have made contributions for not less than the minimum qualifying period only if the contributor has made contributions on earnings that are not less than the basic exemption of that contributor, calculated without regard to subsection 20(2),

- (i) for at least four of the last six calendar years included either wholly or partly in the contributor's contributory period or, where there are fewer than six calendar years included either wholly or partly in the contributor's contributory period, for at least four years,
- (i.1) for at least 25 calendar years included either wholly or partly in the contributor's contributory period, of which at least three are in the last six calendar years included either wholly or partly in the contributor's contributory period, or
- (ii) for each year after the month of cessation of the contributor's previous disability benefit; and

à pension n'avait pas été effectué en application des articles 55 et 55.1;

(iv) [Abrogé, 1997, ch. 40, art. 69]

[...]

Calcul de la période minimale d'admissibilité dans le cas d'une pension d'invalidité et d'une prestation d'enfant de cotisant invalide

(2) Pour l'application des alinéas (1)(b) et e) :

a) un cotisant n'est réputé avoir versé des cotisations pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations sur des gains qui sont au moins égaux à son exemption de base, compte non tenu du paragraphe 20(2), selon le cas :

- (i) soit, pendant au moins quatre des six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable, soit, lorsqu'il y a moins de six années civiles entièrement ou partiellement comprises dans sa période cotisable, pendant au moins quatre années,
- (i.1) pendant au moins vingt-cinq années civiles comprises, en tout ou en partie, dans sa période cotisable, dont au moins trois dans les six dernières années civiles comprises, en tout ou en partie, dans sa période cotisable,
- (ii) pour chaque année subséquente au mois de la cessation de la pension d'invalidité;

(b) the contributory period of a contributor shall be the period

(i) commencing January 1, 1966 or when he reaches eighteen years of age, whichever is the later, and

(ii) ending with the month in which he is determined to have become disabled for the purpose of paragraph (1)(b),

but excluding

(iii) any month that was excluded from the contributor's contributory period under this Act or under a provincial pension plan by reason of disability, and

(iv) in relation to any benefits payable under this Act for any month after December, 1977, any month for which the contributor was a family allowance recipient in a year for which the contributor's unadjusted pensionable earnings are less than the basic exemption of the contributor for the year, calculated without regard to subsection 20(2).

...

Appeal to Pension Appeals Board

**83.** (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

b) la période cotisable d'un cotisant est la période qui :

(i) commence le 1er janvier 1966 ou au moment où il atteint l'âge de dix-huit ans, en choisissant celle de ces deux dates qui est postérieure à l'autre,

(ii) se termine avec le mois au cours duquel il est déclaré invalide dans le cadre de l'alinéa (1)b),

mais ne comprend pas :

(iii) un mois qui, en raison d'une invalidité, a été exclu de la période cotisable de ce cotisant conformément à la présente loi ou à un régime provincial de pensions,

(iv) en ce qui concerne une prestation payable en application de la présente loi à l'égard d'un mois postérieur à décembre 1977, un mois relativement auquel il était bénéficiaire d'une allocation familiale dans une année à l'égard de laquelle ses gains non ajustés ouvrant droit à pension étaient inférieurs à son exemption de base pour l'année, compte non tenu du paragraphe 20(2).

[...]

Appel à la Commission d'appel des pensions

**83.** (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 — autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la *Loi sur*



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 was 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.

*la sécurité de la vieillesse* - ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

Decision of Chairman or Vice-Chairman

Décision du président ou du vice-président

(2) 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.

(2) Sans délai suivant la réception d'une demande d'interjeter un appel auprès de la Commission d'appel des pensions, le président ou le vice-président de la Commission doit soit accorder, soit refuser cette permission.

Designation

Désignation

(2.1) 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).

(2.1) Le président ou le vice-président de la Commission d'appel des pensions peut désigner un membre ou membre suppléant de celle-ci pour l'exercice des pouvoirs et fonctions visés aux paragraphes (1) ou (2).

Where leave refused

Permission refusée

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.	(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.
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Where leave granted

Permission accordée

(4) 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.	(4) Dans les cas où l'autorisation d'interjeter appel est accordée, la demande d'autorisation d'interjeter appel est assimilée à un avis d'appel et celui-ci est réputé avoir été déposé au moment où la demande d'autorisation a été déposée.
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...

[...]

The applicable section of the *Canada Pension Plan Regulations* is the following:

DETERMINATION OF DISABILITY

DETERMINATION DE  
L'INVALIDITE

**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 disability including

a) un rapport sur toute invalidité physique ou mentale indiquant les éléments suivants :

- (i) the nature, extent and prognosis of the disability,
- (ii) the findings upon which the diagnosis and prognosis were made,
- (iii) any limitation resulting from the disability, and
- (iv) any other pertinent information, including

- (i) la nature, l'étendue et le pronostic de l'invalidité,
- (ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,
- (iii) toute incapacité résultant de l'invalidité,
- (iv) tout autre renseignement qui pourrait être approprié, y

- |  |  |
|--|--|
| recommendations for further diagnostic work or treatment, that may be relevant;  | 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 de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et |
| (c) a statement of that person's education, employment experience and activities of daily life.  | c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.   |
| (2) In addition to the requirements of subsection (1), a person whose disability is to be or has been determined pursuant to the Act may be required from time to time by the Minister | (2) En plus des exigences du paragraphe (1), une personne dont l'invalidité reste à déterminer ou a été déterminée en vertu de la Loi, peut être requise à l'occasion par le ministre  |
| (a) to supply a statement of his occupation and earnings for any period; and   | a) de fournir une déclaration de ses emplois ou de ses gains pour n'importe quelle période; et   |
| (b) to undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability of that person.                      | b) de se soumettre à tout examen spécial et de fournir tout rapport que le ministre estimera nécessaire en vue de déterminer l'invalidité de cette personne.                           |
| (3) The reasonable cost of any examination or report required under subsection (2) shall be  | (3) Le coût raisonnable de tout examen ou rapport requis en application du paragraphe (2) sera   |
| (a) paid by way of reimbursement or advance, as the Minister deems fit;  | a) payé par remboursement ou avance, selon l'avis du ministre;   |
| (b) paid out of the Consolidated Revenue Fund; and   | b) payé à même le Fonds du revenu consolidé; et  |
| (c) charged to the Canada Pension Plan Account as a cost of administration of the Act.   | c) imputé au compte du régime de pensions du Canada comme frais d'application de la Loi.   |
| (4) For the purposes of this section,  | (4) Aux fins du présent article, les   |

“cost” includes travel and living expenses that the Minister deems necessary of the person whose disability is to be determined and of a person to accompany that person.

« frais » comprennent les dépenses de voyage et de séjour que le ministre estime nécessaires pour la personne dont l’invalidité doit être déterminée et pour celle qui doit l’accompagner.

The applicable sections of the *Pension Appeals Board Rules of Procedure (Benefits)* are the following:

APPLICATION FOR LEAVE TO  
APPEAL

DEMANDE  
D'AUTORISATION  
D'INTERJETER APPEL

**4.** An appeal from a decision of a Review Tribunal shall be commenced by serving on the Chairman or Vice-Chairman an application for leave to appeal, which shall be substantially in the form set out in Schedule I and shall contain

**4.** L’appel de la décision d’un tribunal de révision est interjeté par la signification au président ou au vice-président d’une demande d’autorisation d’interjeter appel, conforme en substance à l’annexe I, qui indique :

(a) the date of the decision of the Review Tribunal, the name of the place at which the decision was rendered and the date on which the decision was communicated to the appellant;

a) la date de la décision du tribunal de révision, le nom de l’endroit où cette décision a été rendue et la date à laquelle la décision a été transmise à l’appellant;

(b) the full name and postal address of the appellant;

b) les nom et prénoms ainsi que l’adresse postale complète de l’appellant;

(c) the name of an agent or representative, if any, on whom service of documents may be made, and his full postal address;

c) le cas échéant, le nom et l’adresse postale complète d’un mandataire ou d’un représentant auquel des documents peuvent être signifiés;

(d) the grounds upon which the appellant relies to obtain leave to appeal; and

d) les motifs invoqués pour obtenir l’autorisation d’interjeter appel; et

(e) a statement of the allegations of fact, including any reference to the

e) un exposé des faits allégués, y compris tout renvoi aux

statutory provisions and constitutional provisions, reasons the appellant intends to submit and documentary evidence the appellant intends to rely on in support of the appeal.

dispositions législatives et constitutionnelles, les motifs que l'appelant entend invoquer ainsi que les preuves documentaires qu'il entend présenter à l'appui de l'appel.

#### DISPOSITION OF APPLICATIONS

#### RÈGLEMENT DES DEMANDES

7. An application under section 4 or 5 shall be disposed of *ex parte*, unless the Chairman or Vice-Chairman otherwise directs.

7. Il est statué *ex parte* sur les demandes visées aux articles 4 ou 5, à moins que le président ou le vice-président n'en décide autrement.

...

[...]

9. (1) The Chairman or Vice-Chairman may request the appellant or any party to produce documents or information required for the purpose of the granting or refusal of leave to appeal or an extension of time within which to apply for leave to appeal.

9. (1) Le président ou le vice-président peut demander à l'appelant ou à toute partie de produire les documents ou les renseignements dont il a besoin pour décider d'accorder ou de refuser la demande d'autorisation d'interjeter appel ou de prorogation du délai imparti pour demander cette autorisation.

(2) The appellant may produce documents that the appellant considers useful in support of the application under section 4 or 5.

(2) L'appelant peut, à l'appui de sa demande aux termes des articles 4 ou 5, produire tout document qu'il juge utile.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-780-11

**STYLE OF CAUSE:** Attorney General of Canada v Barbara Sarahan

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** December 20, 2011

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATED:** January 16, 2012

**APPEARANCES:**

Linda Lafond FOR THE APPLICANT

N/A FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Myles J. Kirvan FOR THE APPLICANT  
Deputy Attorney General of Canada