Date: 20080125

Docket: T-645-06

Citation: 2008 FC 96

Ottawa, Ontario, January 25, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

ROBIN PENTNEY

Respondent

and

THE OFFICE OF THE COMMISSIONER OF REVIEW TRIBUNALS

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] In this judicial review application, the Attorney General of Canada, on behalf of the Minister of Human Resources and Social Development Canada (the Minister) challenges the

decision dated March 13, 2007, pursuant to subsection 82(1) of the *Canada Pension Plan* (the "*CPP*"), rendered *ex parte* by the Commissioner of Review Tribunals (the Commissioner) extending the time within which Mr. Robin Pentney (the respondent) may appeal to the Review Tribunal the May 28, 2003 reconsideration decision of the Minister refusing Mr. Pentney's July 2002 application for a disability payment under the *CPP*. Absent statutory or regulatory authority, the ability of the Commissioner to render an *ex parte* extension of time decision was not challenged in the Court.

[2] While there have been several decisions by my colleagues beginning with that of Justice Snider in *Canada (Minister of Human Resources Development v. Gattellaro)*, 2005 FC 883, reviewing the discretion of a member of the Pension Appeals Board (PAB) to extend time for seeking leave to appeal to it, this is the first judicial review of the decision of the Commissioner to extend time to appeal as of right to the Review Tribunal. The Office of the Commissioner was established in 1991 by section 82 of the *CPP*. Its role is to support the operation of Review Tribunals established under the *CPP* to review the Minister's decisions under section 81 or subsection 84(2) of the *CPP* or section 27 of the *Old Age Security Act*. The Office has a staff of approximately 100. The Review Tribunal hears approximately 4000 appeals a year in over 100 locations. 90% of all appeals to the Review Tribunal relate to a person's eligibility for a disability pension under the *CPP*.

[3] Mr. Pentney was self represented in this judicial review. He did, however, adopt the Commissioner's position on the legal points raised.

[4] Subsection 82(1) of the *CPP* provides a party who is dissatisfied with the reconsideration decision of the Minister made pursuant to section 81 of the *CPP* may appeal that decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow. As noted above, the Commissioner made his decision *ex parte*, that is, at the request of Mr. Pentney but without input from the Minister.

[5] The Commissioner was authorized to intervene in this application on a limited basis pursuant to the Order of Prothonotary Tabib dated December 6, 2006. In her endorsement, she said she was satisfied the interests of justice will be served "by allowing the Office leave to intervene in these proceedings for the limited purpose of adducing evidence as to the factors it has considered in reaching the decision under review and which do not appear from the certified tribunal record and to make representations as to whether there is a distinction between the Office's mandate and legislative scheme and those of other tribunals which requires or justifies that different or additional criteria or considerations should apply to the exercise of the Commissioner's discretion to accept late appeals." She was of the view the interest of justice is served by having the facts and circumstances which do not appear from the certified record of the tribunal put before the Court in an objective and neutral fashion, and in having before it a structured and reasoned argument as to why the criteria to be applied in a tribunal's discretion to accept late appeals, as set out in *Gattellaro*, should not apply or apply differently in the case of the Office. She added:

> "To the extent the *Gattellaro* criteria apply to the Commissioner's decision, there would, in my view, be no public interest or justification to allow the tribunal to speak to the manner in which it assessed the materials before it, or as to how those

> materials would or not meet the criteria developed in *Gattellaro* and subsequent case law." [Emphasis mine.]

She cautioned:

> "Indeed, allowing the tribunal to speak or comment on these issues would contravene the public policy imperative of preserving the tribunal's image of impartiality."

[6] Counsel for the Minister raised a preliminary issue at the start of the hearing. She argued the Commissioner's intervention went beyond the scope of the limited intervention granted by Prothonotory Tabib.

[7] She took particular objection to the Commissioner's memorandum of argument where he took a position and argued against the Minister on the collateral attack issue and the issue of the Commissioner's obligation to give reasons. I agreed with the Minister's position. The matter was resolved by having Mr. Pentney adopt the Commissioner's written submissions into his own memorandum.

[8] This judicial review application raises three separate issues:

1) Whether the Commissioner erred in law in failing to consider the relevant applicable factors governing the issue of when an extension of time to appeal may be granted under the *CPP*. According to the Minister, the applicable criteria were set out in a series of recent decisions made by my colleagues commencing as noted with Justice Snider's decision in *Gattellaro*, above, followed in *Minister of Human Resources Development v. Roy*, 2005 FC 1456; in *Minister of Human Resources Development v. de Tommaso*,

2005 FC 1531; in *Minister of Human Resources v. Eason*, 2005 FC 1698; in *Minister of Human Resources v. Dawdey*, 2006 FC 429 and in *Minister of Human Resources Development v. Piro*, 2006 FC 791. As noted, all of these decisions judicially reviewed a decision of a member of the Pension Appeals Board (PAB) to extend the time to seek leave to appeal to the PAB from a decision of the Review Tribunal. [Emphasis mine.]

2) Whether the Commissioner erred in failing to provide reasons for decision or adequate reasons for his grant of an extension of time;

3) Was the granting of an extension of time to appeal to the Review Tribunal the Minister's first decision rendered in May 2003 an impermissible collateral attack on the Minister's February 6, 2006 decision refusing to reconsider Mr. Pentney's second application for a disability payment under the *CPP* filed by him in August 2004 and initially denied by the Minister on January 24, 2005 for which Mr. Pentney had not sought reconsideration and where Mr. Pentney did not seek judicial review of the February 6, 2006 decision. The Minister submits the Commissioner's decision to extend time to appeal to the Review Committee runs counter to the Federal Court of Appeal's decision in *Minister of Human Resources Development v. Hogervorst*, 2007 FCA 41. [Emphasis mine.]

Facts

[9] Mr. Pentney's application for an extension of time was made on January 11, 2006 addressed not to the Commissioner as provided in the *CPP* but to Human Resources

Development Canada (HRDC). Attached to his letter of January 11, 2006 was the May 28, 2003 letter from HRDC explaining why he was not eligible for a disability pension. Mr. Pentney invoked the following grounds justifying the extension:

1) "Although I did not object to your decision of May 28, 2003 (copy enclosed) because I was receiving benefits from Great West Life (GWL) I wish to do so now because GWL have refused benefits for the last year and a half. I did not see why *CPP* should be paying me when I have enhanced coverage paid out of my own pocket, so I let the issues slide.";

2) "Although I have tried to work for the last year, my efforts have been unsuccessful due partly to memory and cognitive problems resulting from a hemorrhagic stroke and the side effects of some of the 10 medications that I must take daily. There are other factors involved that I cannot include here because whenever I try to do so, I leave out some of the critical facts, which leads you to the wrong conclusion. I could include a more generalized letter from my doctor stating unequivocally that I am unemployable, but I have been advised by one of your specialists not to do so until you ask for it …"; [Emphasis mine.]

3) "That letter, and any other information that you may need, I can obtain from my doctor, or you may request it yourselves…. That covers condition 3 in your letter and the nature of degenerative disk disease, brain damage, arthritis, kidney problems and insulin rejection certainly indicates that my medical problems are long term and although they

> may not cause my ultimate demise, they may very well have me unable to walk. Soon. This covers condition 4. Please reconsider my claim. There is ample Supreme Court of Canada precedent to support it."

[10] Conditions 3 and 4 cited in Mr. Pentney's January 11, 2006 letter are contained in the HRDC's letter of May 28, 2003 ruling, on reconsideration, the applicant was not eligible for disability benefits … "because you should be able to work in some type of job that is more suitable to your level of ability". Rules 3 and 4 of that letter read:

> 3. you must have a disability that stops you from doing any type of work on a regular basis (full-time, part-time or seasonal), not just the work you usually do, and
>
> 4. you must have a disability that is long term and of unknown duration, or a disability that is likely to result in death.

[11] The May 28, 2006 letter advised Mr. Pentney: "… you do not meet the third rule listed above." and also stated the following:

> "I am aware that you are receiving benefits under a private disability insurance plan. However, the Canada Pension Plan legislation defines disability differently from other disability programs. Others may give you benefits because you can't do your regular job or you were injured at work." [Emphasis mine.]

[12] The letter also advised to Mr. Pentney he had a right to appeal the Minister's decision to the Office of the Commissioner of Review Tribunals and, if he decided to appeal, he must write to them within 90 days of the date he received the Minister's letter. The letter also told him: "If you decide not to appeal this decision, you may wish to re-apply for a disability benefit later."

[Emphasis mine] and it also said: “Since your application has been denied, it is your responsibility to inform your private insurance company of this decision.”

[13] The Commissioner’s intervention was supported by two affidavits, the principal one being deposed by Philippe Rabot, the Commissioner of the Canada Pension Plan / Old Age Security Review Tribunals.

[14] The Commissioner noted Mr. Pentney’s file with his Office consisted of a few documents in contrast to the voluminous file which HRDC has on Mr. Pentney’s application for disability payments. Those documents were: (1) Mr. Pentney’s letter of January 11, 2006; (2) An undated letter from Mr. Pentney to his Office purporting to appeal the Minister’s decision refusing to consider his late appeal said to have been rendered on February 6, 2006; (3) A copy of a recommendation made to him by a senior official in his Office, Mr. Patrick Iannitti, Director of Tribunal Operations, dated March 7, 2006 suggesting the acceptance of Mr. Pentney’s late appeal because of the extenuating circumstances mentioned in Mr. Pentney’s undated letter the Office received on March 6, 2006; (4) The Final Report of a Client Satisfaction Survey commissioned by the Office; (5) The Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities dated June 2003; and (6) The letter dated March 13, 2006 from the Commissioner to the Edmonton Regional Office of HRDC concerning Mr. Pentney’s section 82 Appeal advising HRDC: “Attached is a copy of a letter of appeal received January 12, 2006. I have accepted this letter as a Notice of Appeal to a Review Tribunal. Please submit to me within 20 days

from the receipt of this letter a copy of the documents required pursuant to Rule 5 of the *Review Tribunal Rules of Procedure*."

[15] In his affidavit, the Commissioner explained that: "There was some initial confusion about Mr. Pentney's January 11, 2006 letter, as it was addressed to the Department as opposed to the OCRT." Mr. Pentney's letter of January 11, 2006 had been received by his Office on January 12, 2006. I will say more about this confusion in these reasons when I deal with the collateral attack issue.

[16] In an undated letter to the Commissioner received on March 2, 2006, Mr. Pentney explained again to the Commissioner the substance of why he should be granted an extension of time. In that letter he made the following points:

- "The appeal is late because the first time I applied, I was receiving benefits from Great West Life and I didn't think it was right that the insurance companies should be able to collect the *CPP* disability benefits, when they had an obligation to provide me with benefits that I have already paid for. It seemed like they were shirking their responsibility at the governments expense.";

- "I was also given some wrong information at that time that led me to believe that I could not appeal, due to the *CPP* contributions rule. At that time I actually had *CPP* contributions and was eligible.";

- "Unfortunately, GWL has denied me benefits later and I have been without any income for more than a year and a half. I called a number from the gov't website to get help with this appeal, and they advised me that I could appeal the 2003 decision instead of the 2005 decision and possibly get some back payments for the time I have been without."; [Emphasis mine.]

- "Would you please allow me to appeal late for the 2003 decision, due to these extenuating circumstances, to allow me the additional benefits? At least I have saved the government several years of expense." [Emphasis mine.];

- "Although I have tried to work until last summer, my efforts have been unsuccessful due partly to memory and cognitive problems and the side effects of some of the 10 medications that I must take daily."; and

- Mr. Pentney made reference to his doctor's name and phone number, repeated his medical condition and stated that conditions 3 and 4 of the department's letter had been satisfied.

[17] In his affidavit, the Commissioner deposed as to the reasons why on March 7, 2006 Mr. Iannitti recommended in writing the Commissioner exercise his discretion to accept the late appeal, on the basis of the extenuating circumstances described by Mr. Pentney in the undated letter as well as his January 11, 2006 letter. These reasons were:

a. “Mr. Pentney’s memory and cognitive difficulties he said he experiences due to the effects of his stroke and the significant number of medications he is required to consume daily”;

b. “Mr. Pentney’s involvement with two complex disability benefit institutions, being his private insurer and the *CPP* Administration”; and

c. “Mr. Pentney’s argument that he was given incorrect information from the Department as to his eligibility for the disability benefit based on his *CPP* contribution.”

The Commissioner accepted the recommendation.

[18] At paragraph 29 of his affidavit, the Commissioner deposed:

> “In addition to the extenuating circumstances identified by Mr. Iannitti, I also considered the decision of *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883 which sets out the four factors that should be considered by the Pension Appeals Board when determining whether to grant an extension of time and leave to appeal a decision of a Review Tribunal when that request is made outside of the statutory 90 day appeal period. The factors are as follows:
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> (a) A continued intention to pursue the application or appeal;
>
> (b) The matter discloses an arguable case;
>
> (c) There is a reasonable explanation for the delay; and
>
> (d) There is no prejudice to the other party in allowing the extension.”

[19] In paragraph 30 of his affidavit, the Commissioner said he mentions in his affidavit the context of the *Gattellaro* decision "because it was important to appreciate the distinction between appeals to the Review Tribunal and appeals to the Pension Appeals Board, both procedurally and substantively." [Emphasis mine.]

[20] First, he says at paragraph 31 of his affidavit: "Not only is the OCRT managing a higher volume of appeals than is the Pension Appeals Board, but being the first administrative tribunal encountered by appellants in this multi-leveled appeal system, the OCRT is dealing with appellants in very different circumstances than is the Pension Appeals Board". [Emphasis mine.]

[21] Then, at paragraph 32, he writes:

> "In conjunction with, and in addition to, the *Gattellaro* considerations, there are also contextual factors specific to the Review Tribunal level of appeal that are not transparent from the record and which may not be readily apparent to the Applicant and the Respondent in this proceeding." [Emphasis mine.]

[22] In the next paragraph he identifies what those considerations are:

> (a) an imbalance of resources, in most instances, between the two parties to an appeal filed with the OCRT;
>
> (b) the challenge faced by many appellants in having to put their minds to appeal procedures while coping with a physical and/or mental disability;
>
> (c) the confusion and misunderstanding that may result from the multiplicity and complexity of the benefit schemes with which disability claimants must contend, particularly with respect to eligibility requirements;
>
> (d) the struggle faced by many appellants in understanding the Minister's reason(s) for denying a claim on reconsideration;
>
> (e) the literacy, educational, and economic resource barriers that may hinder a timely

appeal;

(f) the number of individuals who hesitate to appeal because they doubt a Review Tribunal will change the Minister's decision; and

(g) the high rate of successful appeals.

[23] He deposes the evidentiary basis in support of these additional considerations is found in the Client's Satisfaction Survey and the Standing Committee of the House of Commons Report previously referred to.

[24] The Commissioner states the number of late appeal requests he receives and considers is not insignificant. Statistics generated for fiscal 2004-2005 indicate that his Office received approximately 4,240 appeals, of which 316 were received after the 90 day period of appeal had expired. For fiscal 2005-2006, the Office received approximately 4,533 appeals, of which 298 were received after the 90 day appeal period had expired. Statistics indicate, also, for fiscal 2005-2006, nearly 20% of all requests for late appeals were made more than one year after the 90 day period had expired, and almost half of the 20% were made more than two years after the 90 day period had expired.

[25] The Commissioner concludes in his affidavit by writing at paragraph 35:

> "In view of these contextual factors, I have attempted to balance fairness and efficiency considerations in the exercise of my statutory discretion, including a realistic appreciation for the unequal resources of the parties to the appeal and mindful not to impose inappropriate procedural obligations on either party." [Emphasis mine.]

Analysis

(a) Standard of Review

[26] The issues in this judicial review center on legal and not on factual points. As noted, they are whether the Commissioner considered the proper factors in the exercise of his discretion to extended time for an appeal to the Review Tribunal; whether and to what extent the Commissioner must provide written reasons for extending time to appeal to the Review Tribunal and whether the Commissioner's decision represents a collateral attack on the Minister's refusal of Mr. Pentney's second disability application.

[27] These are legal points for which the Court does not owe the Commissioner deference; his expertise is not engaged. This Court is not dealing with the merits of his decision but whether his has exercised his discretion by taking into account relevant considerations. The functional and pragmatic analysis points to the standard of review of correctness. This is what the Minister argues and the Commissioner does not disagree. I agree. The Commissioner has to be correct.

(b) Discussion and Conclusions

Issue No. 1: The proper factors for consideration on an extension of time

[28] In her memorandum of fact and law, counsel for the Commissioner wrote on this point at paragraph 38:

> The Commissioner has adopted a principled approach to the exercise of his discretion on late appeal requests that includes an assessment of the information available to him in the context of the factors identified in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. However, the application of the factors contained in *Gattellaro* must be informed by contextual factors relevant to the Review Tribunal level of appeal. [Emphasis mine.]

[29] She observed *Gattellaro*, above, concerned an extension of time to file a notice of leave to appeal to the PAB and states there are "notable differences between appeals to the Review Tribunal and appeals to the PAB, both procedurally and substantively making the following points:

- There is a right to appeal to the Review Tribunal whereas to appeal to the PAB leave to appeal must be granted by a member of the PAB, normally a superior court judge;

- There is a marked difference in the Rules of Procedure governing these two bodies. Unlike the PAB hearings before the Review Tribunal are informal held in private at a location convenient to the parties;

- Unlike the PAB, the Review Tribunal does not have elaborate rules of procedure for notices of motion, consolidation and joinder, discovery of documents, subpoenas or evidence. Informality and convenience are the hallmarks of Review Tribunal procedure;

- The PAB rules of procedure specify the information which must be provided in support of an application for an extension of time including the Review Tribunal file, decision and reasons for decision. The Review Tribunal rules of procedure do not speak to such requirements;

- In 2004-05 and 2005-06 the PAB's workload was 24.6% and 15.5% of that of the Review Tribunal;

- The Review Tribunal is the first tribunal dealing with appellants. The PAB hears appeals from decisions of the Review Tribunal. Individuals are in different circumstances when before these two bodies.

[30] As noted, in addition to the Gattellaro factors, the Commissioner when deciding to extend time says he looks at factors specific to the Review Tribunal context. These additional factors are set out in paragraph 22 of these reasons.

[31] Reference has already been made to the Federal Court of Appeal's recent decision in *Hogervorst*, above, in connection with the collateral attack issue. Justice Létourneau who wrote the reasons for the Federal Court of Appeal in that case touched upon the proper principles to be applied on a motion to extend time. He wrote the following at paragraphs 32 and 33 of that case:

> [32] There is no dispute as to what the correct legal test is on a motion for an extension of time to file an application for leave to appeal: see *Marshall v. Canada*, 2002 FCA 172; *Neis v. Baksa*, 2002 FCA 230. What is required is that
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> a) there was and is a continuing intention on the part of the party presenting the motion to pursue the appeal;
>
> b) the subject matter of the appeal discloses an arguable case;
>
> c) there is a reasonable explanation for the defaulting party's delay; and
>
> d) there is no prejudice to the other party in allowing the extension.
>
> [33] This test is not in contradiction with the statement of this Court made more than twenty (20) years ago in *Grewal v. Canada (Min. of Employment and Immigration*), [1985] 2 F.C. 263 that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The above stated four-pronged test is a means of ensuring the fulfillment of the underlying

> consideration. It ensues that an extension of time can still be granted even if one of the criteria is not satisfied: see *Grewal v. Canada, supra,* at pages 278-279.

[32] It is interesting to note that Justice Snider in setting out the four part test also referred to *Grewal*, above, and *Baksa*, above, which had been relied upon by the Minister. Justice Snider was of the view that those cases were equally applicable to the decision under review before her which concerned a decision by a member of the PAB to grant the respondent an extension of time and leave to appeal from a decision of the Review Tribunal.

[33] The *Grewal* case concerned an application to extend time to commence a judicial review proceeding from a decision of an administrative tribunal (the Immigration Appeal Board). The *Baksa* case involved an application to extend time to commence a judicial review proceeding from a labor adjudicator's decision. The *Marshall* case concerned a different issue, namely, an extension of time to file a memorandum of fact and law.

[34] The message I take from Justice Létourneau's decision in *Hogervorst* is that the test in *Grewal* is a flexible one which must be geared to ensure that justice is done between the parties.

[35] This flexibility includes assigning an appropriate weight to each factor depending upon the circumstances, the granting of leave even though one of the four standard criteria are not present and the requirement of a fifth factor that is the facts of the particular case. Chief Justice Thurlow, in *Grewal*, above, cautioned it would be wrong to lay down the rules which fetter a discretionary power which Parliament has not fettered.

[36] In the case of *Harold Leighton et al v. Her Majesty the Queen in Right of Canada et al*, 2007 FC 553, I had an opportunity to review the recent jurisprudence in the Federal Court of Appeal on the proper principles surrounding applications for extension of time to commence judicial review proceedings in this Court. [Emphasis mine.]

[37] I wrote the following at paragraphs 33 and 34 of that decision:

> [33] To grant or refuse a request for an extension of time to launch a judicial review application is a matter of discretion which must be exercised on proper principles. Those principles are well known with the Federal Court of Appeal's decision in *Grewal* v. *Canada (Minister of Employment and Immigration)* [1985] 2 F.C. 263, being the seminal case.
>
> [34] From *Grewal*, above, and other decisions of the Federal Court of Appeal, the task at hand is as follows:
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> • A number of considerations or factors must be taken into account in the exercise of the discretion;
>
> • These factors include: (1) a continuing intention to bring the application, (2) any prejudice to the parties opposite, (3) a reasonable explanation for the delay, (4) whether the application has merit i.e., discloses an arguable case (hereinafter the four-prong test) and (5) all other relevant factors particular to the case [emphasis mine], see James Richardson International Ltd. v. Canada [2006] FCA 180 at paragraphs 33 to 35;
>
> • As explained in *Jakutavicius* v. *Canada (Attorney General)* [2004] FCA 289, these factors or consideration are not rules that fetter the discretionary power of the Court. Once the relevant consideration or factors are selected, sufficient weight must be given to each of those factors or considerations;
>
> • The weight to be given to each of the factors or considerations will vary with the circumstance of each case (*Stanfield* v. *Canada*, 2005 FCA 107);

> • The underlying consideration in an application to extend time is to ensure that justice is done between the parties. The usual consideration in the standard four-prong test of continuing intention, an arguable case, a reasonable explanation for the delay and prejudice to another party is a means of ensuring the fulfilment of the underlying consideration of ensuring that justice is done between the parties. An extension of time can be granted even if one of the standard criteria is not satisfied (*Minister of Human Resources Development v. Hogervorst*, 2007 FCA 41; and
>
> • The factors in the test are not conjunctive (*Grewal*, above, at pages 11 and 13).

[38] Counsel for the Attorney General argues the Commissioner had to take into account the principled approach set out in *Gattellaro*, above, which involves a consideration of the standard four-part test of (1) a continuing intention to bring the Court proceeding; (2) any prejudice to the parties opposite; (3) a reasonable explanation for the delay; and, (4) whether the application has merit.

[39] Counsel for the Attorney General suggests the four-part test contains the exclusive factors to be considered and all four factors must be met i.e. they are conjunctive.

[40] I find the Attorney General's argument reflects an inflexibility which the recent jurisprudence has discarded in the interest of justice. Clearly, the Federal Court of Appeal's jurisprudence indicates that the standard four-prong test is not exclusive. A decision maker on an application for an extension of time must consider all other factors relevant to a particular case and assign appropriate weight to each. This suggests a contextualized approach to such an application. Moreover, as noted, the weight to be accorded to each factor will vary in the circumstances. My appreciation of the Commissioner's affidavit is that he has embraced, as his

counsel did before me, the flexible and contextual approach espoused by the Federal Court Appeal as applied to the particular circumstances of appeals to the Review Tribunal as contrasted to those, in the different context of the PAB, which is the final internal review process in disability claim.

[41] I conclude on this point by finding that the standard four part test stated in *Gattellaro*, above, albeit concerned with an extension of time to obtain leave to appeal to the PAB, are equally relevant but not exclusive considerations which must be taken into account when the Commissioner decides on an application to extend time to appeal to the Review Tribunal a reconsideration decision by the Minister denying disability benefits under the *CPP* or the *Old Age Security Act*.

[42] As I see it, the essence of the jurisprudence is that the standard four part test is relevant to all instances in which an extension of time to commence a proceeding is at stake whether it be the commencement of a proceeding in this Court or before an administrative tribunal. As I see it, the distinguishing factors advanced by counsel for the Commissioner as between the Review Tribunal and the PAB are not sufficient to lead me to conclude that the standard four part test is not appropriate to the Commissioner's extension of time decisions on late appeals.

[43] The differentiating factors mentioned by the Commissioner and his counsel can be accommodated by the Commissioner in the weight to be assigned to each element of the standard four part test with an arguable case and prejudice to the other side being the major elements as well as taking into account factors relevant to the particular case.

[44] In this context, the Commissioner enumerated additional considerations or additional factors which are specific to the Review Tribunal process. I agree with counsel for the Attorney General these factors are too general and not sufficiently individualized to qualify as stand alone factors which could be invoked, on their own by the Commissioner to justify the grant of leave.

[45] This is not to say that, in a particular case, depending upon the evidence before the Commissioner, one or more of them may not be of some relevance. Whether they are will depend upon the facts of a particular case. This is where the residual factor mentioned in *Grewal*, above, comes into play. The point is that if the Commissioner is to take into account any additional factors, he must say so.

[46] Finally, counsel for the Attorney General argued that while the Commissioner stated in his affidavit he applied the *Gattellaro* test, there is no evidence in the record that he did. This argument will be considered in the context of the next issue.

[47] On the basis of the above, this Court's intervention is not warranted in connection with issue no. 1.

Issue No. 2: The duty to provide reasons which are adequate

[48] Counsel for the Minister argues the Commissioner breached the duty of fairness by providing no reasons for his decision to extend time. While it is true when he wrote to the Minister on March 13, 2006 to inform him of his decision to extend time, the Commissioner did

not provide the Minister with the reasons why he was extending time, the record shows that on March 7, 2007, Mr. Iannitti had recommended to him in writing he should extend time for three reasons which have previously been described in these reasons. The record shows the Commissioner accepted that recommendation on March 10, 2006.

[49] Counsel for the Commissioner argued the Commissioner, being an administrative tribunal making a preliminary decision which did not decide the merits of Mr. Pentney's case should not be burdened with the requirement to provide reasons for decision relying on Justice Ross' decision in *West Fraser Timber Co. v. Thomson*, 2001 BCSC 1139 sustained in the British Columbia Court of Appeal reported at 2002 BCCA 455.

[50] Counsel for the Commissioner also refers to the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 35 through 44 where Justice L'Heureux-Dubé (on behalf of the Supreme Court of Canada), discussed the requirements emphasizing that at paragraph 43 where she wrote:

> 43 In my opinion, it is now appropriate to recognize that, 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 such as this 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. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached. [Emphasis mine.]

[51] What Justice L'Heureux-Dubé wrote in the foregoing paragraph militates in favour of the argument that the Minister should know why the Commissioner extended time and, on the other hand, why an applicant for an extension of time was refused that extension. In either case, they should be told why the result was reached.

[52] I conclude the Commissioner had an obligation to provide reasons for extending the time to appeal to the Review Tribunal a decision rendered in May 2003. The length of time, in itself, calls for an explanation why an extension of time was granted in the circumstances of this case. *Hogervorst* is authority for this proposition (see paragraphs 30 and 31). I cite other relevant authority in favour of reasons in the context of the *CPP*.

[53] Justice Dawson in *Roy*, above, again dealing with a situation where an extension of time had been granted to the PAB at paragraph 13 of her decision held that while there is no statutory requirement to provide reasons "where a full discretionary power has been conferred upon a judicial officer and where there is nothing on the face of the record that suggests the judicial exercise of the discretion, it is incumbent upon the judicial officer to support the exercise of discretion with reasons.

[54] Moreover, as stated by Justice Snider in *Gattellaro*, above, where an extension of time is made *ex parte* without submission from the Minister "it seems more critical that the record demonstrates that all of these factors have been addressed by the decision maker".

[55] In the circumstances of this case, I am satisfied the Commissioner gave reasons for decision. Whether those reasons are adequate is a separate question.

[56] The record before me, on this point, is similar to the one endorsed in *Baker*, above. In this case, the reasons are found in Mr. Iannitti's written reasons for recommending to the Commissioner he extend time. In *Baker*, above, Justice L'Heureux- Dubé held the reasons requirement was fulfilled in the notes of the immigration officer. She stated at paragraph 44: "Accepting documents, such as these notes as sufficient reasons is part of the flexibility that is necessary … when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways."

[57] In my view the operational realities of the Office of the Commissioner mandate the approach suggested in *Baker* holding that the recommendations of these officials constitute the Commissioner's reasons, if accepted. This principle has been recognized in the case of other high volume decision makers such as the Canadian Human Rights Commission where investigations are numerous, carried out by staff investigators who make recommendations to the Commission whether to dismiss or accept a complaint.

[58] The next question is whether the reasons, as reflected in the record, show that they were adequate.

[59] On this point, Justice Sexton, in *Via Rail Canada Ltd. v. National Transportation Agency and Jean Lemonde, (Respondents)*, [2001] 2 F.C. 25 (C.A.) at paragraphs 21 and 22 wrote:

> **21** The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must [page36] ultimately reflect the purposes served by a duty to give reasons."[7]
>
> **22** The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.[8] Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based.[9] The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out[10] and must reflect consideration of the main relevant factors.

[60] In the case at hand, the purpose for requiring reasons which are adequate is in order to assess whether the Commissioner had regard to all relevant considerations when deciding to extend the time. This issue, in this case, is to be examined by reference to the recommendations made by Mr. Iannitti supplemented by reference to any relevant documentation in the record which would shed light on the consideration of those relevant factors.

[61] On the face of the record, Mr. Iannitti's written recommendations do not evidence a consideration of all of the relevant factors which must be considered and weighed for the grant of an extension of time by the Commissioner. Moreover, a review of the documentary record, such as Mr. Pentney's request for an extension of time, show, from an evidentiary point of view, that documentation does not support a consideration of all relevant factors.

[62] This is so with respect to Mr. Pentney's continuing intention to appeal the Minister's decision where a contrary intention is expressed – he had opted for payments from GWL and, if they had continued, would not have applied to the *CPP*. A reasonable explanation for the delay suffers from the same infirmities.

[63] In terms of arguable case and prejudice to the Minister we are left to speculate on what that arguable case or the prejudice may be, albeit, Mr. Pentney states in his request documents that he tried to work and has medical evidence which he did not provide to show that his condition, as at December 31, 2004 (the minimum contributory period), satisfies the test of disability for the purposes of obtaining disability payments under the *CPP*.

[64] Some of the reasons provided by Mr. Iannitti might qualify as appropriate additional contextual factors in Mr. Pentney's particular case but they are not clearly identified as such in Mr. Iannitti's recommendations nor in the documentary record.

[65] I conclude by finding that the record before me fails to disclose adequate reasons for the grant of an extension of time and this failure warrants this Court's intervention. Based on this record, this Court cannot exercise its supervisory jurisdiction to determine whether the Commissioner properly exercised his discretion to extend time on the basis of Mr. Iannitti's recommendation on the evidentiary record.

Issue no. 3 – Does the extension of time in this case constitute an impermissible collateral attack on a previous final decision of the Minister?

[66] This issue requires a consideration of the Federal Court of Appeal's decision in *Hogervorst*, above.

[67] The relevant facts of that case are:

1) On June 6, 2005, a member of the PAB extended time and leave to appeal to the PAB a decision of the Review Tribunal rendered seven years earlier on November 4, 1997 (hereafter referred to as RT-1).

2) By decision RT-1, the Review Tribunal dismissed the respondent's appeal from the Minister's reconsideration decision she was not eligible for disability payments under the *CPP*. The Review Tribunal informed her she could seek leave to appeal RT-1 within 90 days or such longer period as the Chairman or Vice-Chairman of the PAB might allow. The respondent did not appeal RT-1 which became final and binding under subsection 84(1) of the *CPP* which provides that a Review Tribunal or the PAB has the authority to determine any questions of fact and law and "the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act" subject to subsection 84(2) which provides that: "the Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection 1, on

new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board as the case may be." [Emphasis mine.]

3) Because RT-1 was final and binding, Joy Hogervorst could be entitled to disability benefits only if she established she became disabled between November 5 and December 31, 1997, the day she last satisfied the contributory requirements.

4) She made a second application for disability benefits in January 2000. Her application was denied by the Minister initially and upon reconsideration. She appealed to the Review Tribunal which dismissed her appeal on October 1, 2001 (hereafter RT-2) on the grounds there were no new facts with respect to RT-1 and it was not satisfied that she had a severe and prolonged disability prior to December 31, 1997. RT-2 was not appealed to the PAB and became final and binding. [Emphasis mine.]

5) On November 16, 2001, she made an application pursuant to subsection 84(2) of the *CCP* to reopen RT-2. Subsection 84(2) authorizes a Review Tribunal to rescind or amend its prior decision on the basis of new facts. On March 6, 2002, the Review Tribunal found that the new evidence submitted by Joy Hogervorst did not meet the test for new facts and consequently that application was dismissed (hereafter as RT-3).

6) Joy Hogervorst was granted leave to appeal RT-3 to the PAB who dismissed her appeal on jurisdictional grounds that the Board had no authority to hear the appeal since there were no new facts. Her recourse was to seek judicial review which she did not do. Rather,

she applied in March 2007 to a member of the PAB for an extension of time and leave to appeal RT-1. As noted, a member of the PAB granted an extension of time and leave to appeal without providing written reasons although more than seven years had elapsed since RT-1 had been rendered. [Emphasis mine.]

7) The Minister unsuccessfully challenged the extension of time and leave decision by way of judicial review to the Federal Court. The Minister's application was dismissed on March 30, 2006. The Minister appealed to the Federal Court of Appeal who allowed the appeal.

[68] The Federal Court of Appeal allowed the appeal on the basis the member's decision to grant leave to appeal RT-1 amounted to a collateral attack against RT-2. [Emphasis mine.] Both of these decisions had concluded Joy Hogervorst was not disabled in the case of RT-1 for the period ended November 4, 1997 and for RT-2 during the one month period between November 4, 1997 and December 31, 1997. Justice Létourneau found that RT-2 was conclusive on the issue of her disability for the period up to December 31, 1997 and "thus, an appeal against RT-1 collaterally attacks RT-2 that is also final and binding for all purposes of the *CPP* pursuant to subsection 84(1) of the *CPP*."

[69] Justice Létourneau stated: "The situation here is analogous to seeking a review of an initial decision without challenging or addressing a subsequent decision reconsidering the same issue and confirming the initial decision. These are two distinct decisions and the second decision must be attacked directly, not collaterally." He was of the view the applications Judge at

the Federal Court should not have permitted the collateral attack to go on citing *Berhad et al*, 2005 FCA 267 at paragraphs 61 and 62: “that collateral attacks against decisions that are final ought to be precluded in the public interest since such attacks encourage conduct contrary to the statute’s objectives and tend to undermine its effectiveness.”

[70] Moreover, Justice Létourneau held a finding of disability, pursuant to the appeal against RT-1, would be inconsistent with, and in opposition to RT-2 and RT-3 and cited the Federal Court of Appeal’s decision in *Vidéotron Télécom Ltée.*, 2005 FCA 90 at paragraph 13 for the proposition: “The state and stability of the law would be ill served if two potentially contradictory decisions were allowed to exist, involving the same parties, on the same issue.” [Emphasis mine.] He again stated the applications judge should have intervened and quashed the member’s decision in order to prevent this kind of consequence.

[71] Citing once again the Berhad case at paragraph 60, he stated: “this Court reiterated the principle that a time/limit for the commencement of challenges to administrative decisions is not whimsical and that it exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense.” He concluded the challenge to RT-1, if allowed to proceed, “can lead to an intolerable and prejudicial situation, both from the perspective of the public interest and fairness to the appellant” and found the applications judge erred in not recognizing and giving the effect to the principle of finality in the circumstances.

[72] Applying the rationale of *Hogervorst* to the case before me, counsel for the Attorney General submits that, by granting leave to challenge the Minister's May 28, 2003 decision, the Commissioner has allowed Mr. Pentney to collaterally attack the January 24, 2005 decision of the Minister denying his second application for disability benefits. Counsel for the Attorney General argues Mr. Pentney did not seek a reconsideration of the Minister's decision within ninety days and states his late request to appeal the Minister's decision was refused by the Minister on February 6, 2006. Mr. Pentney did not seek judicial review of the Minister's decision refusing his request to appeal this second Minister's decision. She argues in the absence of such an application for judicial review of the February 6, 2006 refusal to consider his late request for reconsideration, the Minister's decision became final and binding citing the Federal Court of Appeal's decision in *Pincombe v. Canada (Attorney General),* [1995] F.C.J. No. 1320 (C.A.).

[73] Mr. Pentney relies upon the Commissioner's written argument on this point. The Commissioner acknowledged Mr. Pentney's second application for a disability payment under the *CPP* was denied by the Minister by letter dated January 24, 2005 and that this denial was not reconsidered at Mr. Pentney's request pursuant to subsection 81(2) of the *CPP*.

[74] Furthermore, the Commissioner acknowledged there was some initial confusion about the intended recipient of Mr. Pentney's January 11, 2006 letter due to the fact he had inadvertently addressed his letter to HRDC as opposed to OCRT. The Commissioner states at paragraph 19 of his written memorandum: "The confusion surrounding Mr. Pentney's January 11, 2006 letter

was eventually resolved, and his letter was recognized as a request by him for a late appeal of the May 28, 2003 reconsideration decision."

[75] At paragraph 48 of his written memorandum, the Commissioner accepts Mr. Pentney did not make an application for judicial review of HRDC's decision to refuse his late request for a reconsideration of his second application and that HRDC's decision became final and conclusive.

[76] At paragraph 46 of his written memorandum, the Commissioner wrote:

> "The intervener acknowledges that Mr. Pentney's second application for *CPP* disability benefits may be affected by the Department's refusal to accept his late request for reconsideration. However, the intervener submits that even if this decision is found to be final and conclusive, it does not preclude Mr. Pentney from being entitled to appeal the Minister's denial of the *CPP* disability benefit on another prior, or subsequent application. [Emphasis mine.]

[77] Counsel for the Commissioner argues the law is well settled that a denial of a disability application by the Department, providing there is no appeal to a Review Tribunal, will not prevent a person from being entitled to the disability benefit on a subsequent application. The Commissioner states, in this regard, it has been held that the principle of *res judicata* does not apply to decisions of the Minister or decisions of the Minister's officials as these decisions are administrative rather than judicial, relying on two PAB decisions. The Commissioner further argues by allowing an unlimited number of applications for *CPP* disability pension, the Commissioner's decision in respect to Mr. Pentney's late appeal on his first application is entirely consistent with the jurisprudence and the structure and the purpose of the legislation.

[78] The Commissioner argues *Hogervorst*, above, is distinguishable on his facts. There, the applicant for disability payments had the benefit of two Review Tribunal hearings which were full *de novo* hearings which resulted in final decisions on the merits. The Commissioner acknowledges that, barring an appeal to the Pension Appeals Board, a decision of the Review Tribunal is final and binding but submits that in this case there have been no decisions of the Review Tribunal and that, in fact, Mr. Pentney has not yet had the opportunity to have his case heard once by a Review Tribunal, let alone three times.

[79] On the facts of this case, it is clear Mr. Pentney did not appeal to the Review Tribunal within the 90 day time limit prescribed under subsection 82(1) of the *CPP* the Minister's reconsideration decision of May 23, 2003 denying him a disability payment requested in his first application for a disability payment dated April 15, 2003.

[80] He was specifically advised in the May 23, 2003 decision he had an appeal as of right to the Office of the Commissioner of Review Tribunals provided he do so within 90 days. He was also told in that letter decision that if he decided not to appeal he "may wish to re-apply for a disability benefit later". He did not appeal nor did he re-apply until August 12, 2004 when he made his second disability application to HRDC.

[81] The reason he did not do so seems clear. He was receiving and continued for some time to receive disability payments from his private insurer GWL. From the record, it would appear he made his second application for disability payments after GWL terminated its disability payments to him.

[82] The record is also clear Mr. Pentney did not seek reconsideration from the Minister when he was advised on January 24, 2005 the Minister had initially denied his second application. Pursuant to section 81 of the *CPP*, he had 90 days to do so. He was advised that if decided not to request a reconsideration he "may wish to re-apply for a disability benefit later".

[83] Rather than re-applying for a disability payment, he waited until January 11, 2006 to then ask the Commissioner "I would like to appeal (late) your denial of my request for *CPP* disability benefits of April 15, 2003.

[84] Why he did so appears from his undated letter to the Commissioner received by the Commissioner's office on March 2, 2006 where he writes that he has been without any income for a year and a half; he called the government website "to get help with this appeal and they advised me that I could appeal the 2003 decision instead of the 2005 decision and possibly get some back payments for the time I have been without." Referring to the February 6, 2006 decision made by an HRDC official, Mr. Pentney continued informing the Commissioner: "As you can see from my file, when I tried to do this, they just denied this appeal as it was more than 90 days old."

[85] In parenthesis, HRDC's February 6, 2006 letter to Mr. Pentney was a denial to reconsider the Minister's January 24, 2005 decision which, as will be recalled was the Minister's initial denial of this second application for disability payment dated August 12, 2006.

[86] In his undated letter to the Commissioner, Mr. Pentney pleaded: “Would you please allow me to appeal late for the 2003 decision, due to these extenuating circumstances, to allow me the additional benefits? At least I have saved the government several years of expense.”

[87] I have reviewed Justice Létourneau’s decision in *Hogervorst*, above, in which he made extensive reference to the Federal Court of Appeal’s decision in *Berhad v. Canada*, 2005 FCA 267 where he emphasized finality principle writing a paragraph 60 as follows:

> [60] In my view, the most important reason why a shipowner who is aggrieved by the result of a ship safety inspection ought to exhaust the statutory remedies before asserting a tort claim is the public interest in the finality of inspection decisions. The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions - within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.

[88] On the facts of this case, I would hold that both the principle against collateral attacks and the principle of finality of an administrative decision have been breached affecting the integrity of the scheme mandated by the *CPP*.

[89] In these circumstances, Mr. Pentney should not be allowed to impair the Minister’s denial of his second application for disability payments via an extension of time through a grant of leave to extend time to challenge the denial of his first application of disability payments.

[90] Mr. Pentney has a remedy. He can re-apply for disability benefits. He may also invoke subsection 66(4) of the *CPP* for the reasons mentioned in his affidavit.

[91] In the circumstances, there is no point to sending the matter back to the Commissioner for a new determination on whether an extension of time should be granted to challenge the May 23, 2003 decision denying him disability benefits. See *Hogervorst*, above at paragraph 48. The Attorney General did not seek costs against Mr. Pentney and none are awarded.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed. The Commissioner's decision to extend time to appeal to the Review Tribunal the Minister's May 28, 2003 decision is quashed. No costs are awarded.

"François Lemieux"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Ms. Tania Nolet Ms. Nicole Butcher	FOR THE APPLICANT
Mr. Robin Dale Pentney	FOR THE RESPONDENT (ON HIS OWN BEHALF)
Ms. Shannon Russell Ms. Tina Head	FOR THE INTERVENER

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Office of the Commissioner of Review Tribunals Ottawa, Ontario	FOR THE INTERVENER