Federal Court of Appeal | Cour d'appel fédérale

Date: 20070921

Docket: A-446-06

Citation: 2007 FCA 297

CORAM: **LINDEN J.A.**
LÉTOURNEAU J.A.
SEXTON J.A.

BETWEEN:

UMBERTO MAZZOTTA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on September 12, 2007.

Judgment delivered at Ottawa, Ontario, on September 21, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: LINDEN J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] Did the Pension Appeals Board (PAB) err in allowing the Minister of Social Development's (Minister) appeal on the basis that there were no new facts before the Review Tribunal? Once again, the powers and role of the PAB come under judicial scrutiny when a reconsideration decision is rendered pursuant to subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP), and appeal is made of that decision.

[2] This application for judicial review also seeks clarification of the materiality test applicable to new evidence.

[3] Finally, the applicant submits that the PAB erred in limiting its review of the new evidence to three documents only. This submission needs to be considered only if this Court is of the view that the PAB had the power to review the Review Tribunal's positive finding regarding the issue of new evidence.

[4] I shall address first the scope of the powers of the PAB when seized with an appeal against a reconsideration decision. However, a short summary of the facts and procedure is in order for a better understanding of the issues. I also reproduce the relevant provisions of the CPP:

Appeal to Pension Appeals Board	*Appel à la Commission d'appel des pensions*
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 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.	**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 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.

...

[...]

Powers of Pension Appeals Board

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

Pouvoirs de la Commission d'appel des pensions

(11) La Commission d'appel des pensions peut confirmer ou modifier une décision d'un tribunal de révision prise en vertu de l'article 82 ou du paragraphe 84(2) et elle peut, à cet égard, prendre toute mesure que le tribunal de révision aurait pu prendre en application de ces dispositions et en outre, elle doit aussitôt donner un avis écrit de sa décision et des motifs la justifiant à toutes les parties à cet appel.

Authority to determine questions of law and fact

84. (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to

Décision sur les questions de droit et de fait

84. (1) Un tribunal de révision et la Commission d'appel des pensions ont autorité pour décider des questions de droit ou de fait concernant :

(a) whether any benefit is payable to a person,

a) la question de savoir si une prestation est payable à une personne;

(b) the amount of any such benefit,

b) le montant de cette prestation;

(c) whether any person is eligible for a division of unadjusted pensionable earnings,

c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;

(d) the amount of that division,

d) le montant de ce partage;

(e) whether any person is eligible for an assignment of a contributor's retirement pension, or	e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;
(f) the amount of that assignment,	f) le montant de cette cession.
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.	La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la Loi sur les Cours fédérales, est définitive et obligatoire pour l'application de la présente loi.
Rescission or amendment of decision	*Annulation ou modification de la décision*
(2) 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.	(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

[Emphasis added]

FACTS AND PROCEDURE

[5] The applicant applied for disability benefits in April 1995. His application was denied by the Minister. The applicant appealed this decision to a Review Tribunal, which dismissed his appeal on 17 July 1998. The applicant sought leave to appeal this decision to the PAB, which was denied by a member designate of the PAB on 6 July 1999. The applicant filed a second application for benefits

on 6 September 2002. This application was denied on the basis that the Review Tribunal had denied his earlier appeal.

[6] The applicant then requested a hearing pursuant to subsection 84(2) of the CPP to reopen the decision of the Review Tribunal. This request was granted, and the Review Tribunal held that the applicant had submitted new facts that justified reopening the original decision of the Review Tribunal. These facts, taken together with the evidence before the Review Tribunal, were found sufficient to establish that the applicant was disabled as of April 1995.

[7] The respondent sought leave to appeal this decision to the PAB. The PAB granted leave.

DECISION OF THE PENSION APPEALS BOARD

[8] The PAB proceeded on the basis that it would first determine whether the Review Tribunal erred in admitting the new fact evidence presented to it. The PAB held that it would consider the merits of whether the applicant was disabled if it was satisfied that the Review Tribunal correctly admitted the new fact evidence. The PAB determined that the only medical evidence it would consider in this regard was evidence dated prior to 25 March 1998, the date of the applicant's initial application.

[9] The PAB went on to consider certain medical reports which the applicant claimed qualified as new facts. It held that the Review Tribunal erred in admitting this evidence for two reasons. First,

the PAB held that the Review Tribunal applied to the admissibility of the new evidence the wrong materiality test. In admitting the new fact evidence, the Review Tribunal had stated that there was a "reasonable possibility as opposed to probability that it could lead the Tribunal to change its original decision". In the PAB's view, new fact evidence must have a probable, not merely possible, influence on the original decision in order to be admitted. Second, the PAB held that the applicant did not exercise reasonable diligence to obtain the evidence at the time of the first hearing before the Review Tribunal.

[10] The new fact evidence submitted consisted of medical reports that were in the possession of the applicant's lawyer at the time of the first hearing before the Review Tribunal. In the PAB's view, to hold that the applicant had exercised reasonable diligence in these circumstances would imply that he was not bound by the actions of his agents; and would open up a possibility for future applicants of relying on the failures of their agents or representatives in order to qualify evidence as new fact evidence.

[11] On this basis, the PAB allowed the Minister's appeal.

THE POWERS OF THE PAB ON AN APPEAL AGAINST A RECONSIDERATION DECISION MADE BY A REVIEW TRIBUNAL PURSUANT TO SUBSECTION 84(2) OF THE CPP

[12] The power in issue in this application for judicial review is the PAB's power to review the Review Tribunal's determination that the evidence submitted by the applicant qualifies as new

evidence and, therefore, warrants a reconsideration of the merits of the case with respect to the issue of disability.

[13] Three decisions of this Court are relevant to this first ground of judicial review: *Oliveira v. Canada (Minister of Human Resources Development)*, 2004 FCA 136; *Kent v. Canada (Attorney General)*, 2004 FCA 420; and *Canada (Minister of Human Resources Development) v. Landry*, 2005 FCA 167.

[14] I should add for the sake of completeness that the *Oliveira* decision approved a decision of the trial division of the Federal Court in *Peplinski v. Canada (T.D.)*, [1993] 1 F.C. 222. The *Oliveira* decision was subsequently applied by our Court in *Canada (Minister of Human Resources Development) v. Fleming*, 2004 FCA 288 and *Canada Minister of Human Resources Development) v. Richard*, 2004 FCA 378.

[15] The *Oliveira*, *Kent* and *Landry* decisions address three different but closely related factual scenarios.

THE *OLIVEIRA* SCENARIO

[16] The *Oliveira* scenario refers to a situation where a negative decision is rendered by the Review Tribunal on a demand made pursuant to subsection 84(2), that is to say that the Review Tribunal finds that the evidence submitted is not new evidence.

[17] In this case, the disability claimant must go to the Federal Court to challenge that negative and adverse decision by way of judicial review. This is a costly and distressful exercise for a claimant who, often impecunious, has to represent himself. The Federal Court decision, depending on the result, can be appealed by either party to our Court. Considerable delays ensue as a result of this process while the core issue of the claimant's disability is not addressed.

[18] This is hardly in harmony with the requirement that a liberal construction be applied to so-called "social legislation" and "that benefits-conferring legislation ought to be interpreted in a broad and generous manner": see *Kent v. Canada (Attorney General)*, *supra*, at paragraph 27, applying *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 36. These statements referred to the interpretation to be given to social rights. I believe, however, that a liberal construction of the procedure applicable to social rights claims is also warranted when failure to do so would defeat the claims and the objectives of the social legislation.

[19] The *Oliveira* decision was based on the rationale elaborated in the *Peplinsky* decision. In that latter case, the Federal Court concluded that, since there were no new facts which would warrant a reconsideration of the original decision, no fresh decision could be said to have been rendered and, therefore, no right of appeal to the PAB existed: see *Peplinsky*, *supra*, at paragraph 11. The right of appeal would exist if there were a finding of new facts resulting in a fresh decision rendered under subsection 84(2) pursuant to a reconsideration of the original decision. What was in

issue in *Peplinsky* was a decision of the Minister. Our Court in *Oliveira* applied the same reasoning to a reconsideration decision made by a Review Tribunal.

[20] With respect, I think that this conclusion does not reflect both the factual and legal reality. When a Review Tribunal, or for that matter the Minister, dismisses a demand under subsection 84(2) to rescind an earlier decision, it both legally and factually renders a decision. There is in such a case no less a decision rendered than if it decides to allow the demand and proceeds to rescind or vary its earlier decision. The decision to dismiss the demand to rescind or vary is a decision made under subsection 84(2). Subsection 83(1) clearly gives in this case a right of appeal to the PAB when it states that a party, dissatisfied with a decision of a Review Tribunal made under subsection 84(2), may apply for leave to appeal that decision to the PAB. It does not matter whether the Review Tribunal accepts the demand for reconsideration and proceeds to rescind its earlier decision on the basis that there is new material evidence, or refuses the demand for reconsideration because there is no new evidence or there is new evidence which is not material and maintains its earlier decision. In both cases, a decision is rendered under subsection 84(2) and, I believe, is appealable.

THE *KENT* SCENARIO

[21] The *Kent* scenario refers to the opposite situation: the Review Tribunal makes a positive finding, i.e. that there is new evidence and, on that basis, reviews the applicant's claim of disability.

[22] Our Court in *Kent* acknowledged the controversy about the correct procedure for challenging a decision of a Review Tribunal as to whether there are new facts: see *Kent*, *supra*, at paragraph 28. It then proceeded to apply to the facts of the case the same reasoning as in *Oliveira* and *Peplinsky*. Positive findings, just like negative findings, on the issue of new evidence could not be reviewed by the PAB. Challenges to positive findings would have to be brought by the Minister to the Federal Court by way of judicial review.

[23] Again, the issue of a claimant's disability is put on hold while the process is diverted to the Federal Court and ultimately our Court. Again, the impecunious citizen has to defend himself in a judicial context.

THE *LANDRY* SCENARIO

[24] As if the matter was not sufficiently complicated, the *Landry* case involved a mixed scenario: the Review Tribunal found that some alleged facts constituted new evidence, but others did not.

[25] As a result of the *Oliveira* and the *Kent* decisions, the Minister would seek judicial review in the Federal Court of the positive finding while the disability claimant would also apply for judicial review of the negative finding in the Federal Court. A motion would then have to be made to merge the two applications into a single file and hearing.

[26] Even if the Minister decided not to challenge the positive finding, the claimant would still have to go to the Federal Court to seek a reversal of the negative finding. In *Landry*, this Court described in these terms, at paragraph 9 of the reasons for judgment, the peculiarity, not to say the absurdity, of the legal situation:

> [9] Moreover, with respect to the facts that were presented to the Tribunal but were rejected by it, in purely practical terms, the Board must be able to review the Tribunal's refusal to consider those facts to be new facts. If this were otherwise, it would mean that to challenge that refusal, the aggrieved party would have to apply to the Federal Court to have that aspect of the decision reviewed, when an appeal is properly pending before the Board in respect of the facts that were accepted as new facts. The result, in operational terms and in terms of time and judicial economy, would be a pointless and potentially prejudicial splitting of the proceedings. For example, the appeal to the Board would have to be stayed while waiting for the Federal Court to rule on the case submitted to that Court regarding the existence of new facts, because the Federal Court's decision could have an impact on the Board's decision.

[27] Furthermore, the PAB is also given by subsection 84(2) the power to review its previous decisions on the basis of new evidence submitted by a claimant. It therefore possesses and develops an expertise in the assessment of new medical evidence submitted in support of a disability claim. Why should the PAB then be deprived of the power to review on appeal a decision of a Review Tribunal pertaining to new evidence when it can determine the issue of new evidence when reconsidering its own previous decisions? As we shall see, I cannot find a valid reason both legally and practically for denying this power to the PAB. This brings me to a reconsideration of the *Oliveira* and *Kent* decisions.

A RECONSIDERATION OF THE *OLIVEIRA* AND *KENT* DECISIONS

The legislative intent in subsections 83(1) and 84(1)

[28] I shall begin with a reference to subsection 84(1) which makes the decision of a Review Tribunal final and binding for all purposes of this Act, except as provided in this Act. By contrast, the PAB's decisions are also final and binding for all purposes of this Act, except, however, for judicial review under the *Federal Courts Act*.

[29] Parliament has made it clear in subsections 83(1) and 84(1) of the CPP that the review of a decision of a Review Tribunal is exclusively by way of appeal to the PAB within the time-frame therein provided. On the other hand, decisions of the PAB are challenged by way of judicial review before this Court. The French text of subsection 84(1), by using the words "sauf contrôle judiciaire dont elle peut faire l'objet", leaves no ambiguity as to which of the PAB or the Review Tribunal is subject to judicial review.

[30] By making the reconsideration decisions of the Review Tribunal on the issue of new evidence subject to judicial review before the Federal Court, the decisions in *Peplinsky*, *Oliveira* and *Kent* run contrary to the clear and unambiguous text of both subsections 83(1) and 84(1) and the legislative intent.

The legislative intent in subsection 83(11)

[31] Furthermore, none of the *Peplinski*, *Oliveira*, *Fleming*, *Richard* and *Kent* decisions considered or referred to the powers conferred upon the PAB by subsection 83(11) when sitting on appeal of a Review Tribunal's decision made under section 82 or subsection 84(2). The PAB "may take any action in relation thereto that might have been taken by the Review Tribunal under section 82 or subsection 84(2)". If the Review Tribunal erroneously found that the new facts submitted constituted new evidence, the PAB is, on an appeal from a Review Tribunal's decision rendered pursuant to subsection 84(2), given the authority by subsection 83(11) to take the proper action that the Review Tribunal might have taken and find that the evidence is not new evidence.

[32] In my respectful view, the PAB possesses under subsection 83(11), on appeal of a reconsideration decision rendered by a Review Tribunal pursuant to subsection 84(2), the power to review the Tribunal's decision relating to the issue of new evidence, whether the Tribunal's decision in this regard is a positive or a negative one.

[33] I should add that our Court, in *Kent*, understood the rationale for the *Peplinsky*, *Oliveira*, *Fleming* and *Richard* decisions to be that "the jurisdiction of the Pension Appeals Board is limited to appeals of decisions of the Review Tribunal on the merits, either in the first instance or upon a subsection 84(2) reconsideration": see *Kent*, *supra*, at paragraph 28. The *Peplinsky* decision from which the *Oliveira*, *Fleming* and *Richard* decisions originated was based, as previously mentioned, on the misunderstanding that there was no fresh decision when the finding on reconsideration was

that the proffered evidence was not new. There was no mention in the *Peplinsky* case that the jurisdiction of the PAB was limited to appeals of decisions of the Review Tribunal on the merits. Had subsection 83(11) been brought to the attention of our Court in *Kent* and considered by it in conjunction with subsections 83(1) and 84(1), I am satisfied that its decision would not have been the same.

[34] It should be recalled that subsection 84(1) expressly gives the PAB the authority to determine any question of law or fact as to whether any benefit is payable to a person. The materiality test applicable to alleged new evidence and the admissibility of that evidence are questions of law and mixed fact and law that must be determined in assessing "whether any benefit is payable to a person". These questions properly belong to the PAB on appeal.

The necessity for the PAB of possessing the power to review decisions of Review Tribunals on issues of new evidence

[35] The present case is a good example of the necessity for the PAB of having the power to review issues relating to new evidence. In this instance, the Review Tribunal applied a wrong materiality test to the proffered evidence.

[36] Relying on the decision of the Federal Court in *Mian v. Attorney General of Canada*, 2001 FCT 433, which cited a 1988 decision of this Court in immigration matters (*Castro v. Minister of Employment and Immigration* (1988), 86 NR 356) concerning the Immigration Appeal Board's refusal to reopen an appeal, it lowered the threshold of the materiality test to one of "a reasonable

possibility as opposed to probability that [the proffered evidence] could lead the Board to change its original decision".

[37] In *Kent*, *supra*, at paragraph 34, our Court concluded that the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome. It wrote:

> [34] Whether a fact was discoverable with due diligence is a question of fact. The question of materiality is a question of mixed fact and law, in the sense that it requires a provisional assessment of the importance of the proposed new facts to the merits of the claim for the disability pension. The decision of the Pension Appeals Board in *Suvajac v. Minister of Human Resources Development* (Appeal CP 20069, June 17, 2002) adopts the test from *Dormuth v. Untereiner*, [1964] S.C.R. 122, that new evidence must be practically conclusive. That test is not as stringent as it may appear. New evidence has been held to be practically conclusive if it could reasonably be expected to affect the result of the prior hearing: *BC Tel v. Seabird Island Indian Band (C.A.)*, [2003] 1 F.C. 475. Thus, for the purposes of subsection 84(2) of the *Canada Pension Plan*, the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome.
>
> [Emphasis added]

This is the proper test to be applied.

[38] On the basis of an erroneous test, the Review Tribunal admitted the proffered evidence as new evidence and rescinded its previous decision. This is a significant error that needs to be corrected. The materiality test is not a mere formality that can be ignored, overlooked or by-passed. The test is there to strike a balance between, on the one hand, the need to have disability claims assessed fairly and the need, on the other hand, to secure, in the public interest, the finality and enforcement of previous decisions which are *res judicata*.

[39] While I agree with this Court's statement in *Kent*, at paragraph 35, that some flexibility is advisable in applying the test so as to balance the above-mentioned interests, the proper test cannot be improperly applied nor can an improper test be applied. The Review Tribunal's decision on the issue of new evidence is a decision under subsection 84(2) which is part and parcel of the ultimate decision on a claimant's disability. The situation is not unlike that which prevails on an appeal against a verdict or judgment. The appeal court will address any contention that evidence has been improperly admitted and that that evidence had a material impact on the verdict or judgment on appeal. In my respectful view, the PAB is in a similar position.

The purpose and objective of the CPP

[40] The full title of the Act is an *Act to establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors*. To that end, the CPP contains adjudicative and review mechanisms and a process designed to provide an easy, flexible and affordable access to these mechanisms. An ultimate but limited access to the Federal Court of Appeal by way of judicial review ensures that the process will remain, to the benefits of the parties to a claim, within the boundaries of legality. In other words, the Federal Court of Appeal acts as a watchdog of the lawfulness of the process.

[41] It is interesting to note that Parliament has limited the control of the PAB's decision to one of legality, excluding a review of the merits of their decisions. It is also interesting to note that this

judicial control function was conferred to the Federal Court of Appeal: see section 28 of the *Federal Courts Act*.

[42] As previously mentioned, subsection 84(1) ensured that all questions of fact and law pertaining to the question of whether a benefit is payable to a person would be determined by the Review Tribunal and, on appeal, by the PAB. I do not think that Parliament envisaged a split of the process between the Federal Court, the Federal Court of Appeal and the adjudicative mechanisms which it put in place and which it invested with broad powers to determine the merits of claims along with all the factual and legal questions that inevitably accompany these claims.

[43] In a nutshell, sending the parties to the Federal Court to have the correctness of a legal ruling made by a Review Tribunal reviewed on an application for reconsideration pursuant to subsection 84(2) does not find support in the statutory provisions enacted by Parliament. Moreover, it defeats the legislative purpose and objective of the CPP because the unnecessary diversion is costly and the claimant, whether he is the applicant or the defendant in the Federal Court proceedings, always stands at the losing end of this process: he bears his own costs of the proceedings, and possibly those of the winning party if he loses, and, in the meantime, the adjudication on the merits of his disability claim is long delayed. The diversion puts an unnecessary and unwarranted constraint on the fairness and efficiency of the adjudicative process put in place by Parliament.

WHETHER THE PAB APPLIED THE CORRECT MATERIALITY TEST TO THE PROFFERED NEW EVIDENCE

[44] In my summary of the PAB's decision, I have mentioned that the PAB concluded that the Review Tribunal applied the wrong materiality test when it relied on a reasonable possibility as opposed to probability that the proffered evidence could lead it to change its original decision. While the word "reasonable" is a welcome qualifier of the word "possibility", it is not sufficient, however, to lift the test out of the realm of possibility. The PAB, in my view, rightly concluded that a wrong test had been applied.

[45] I have already mentioned in these reasons the materiality test formulated by this Court in the *Kent* decision. At paragraph 34 of that decision, our Court ruled that, for the purposes of subsection 84(2) of the CPP, the materiality test is met if the proposed new facts may reasonably be expected to affect the outcome: see also *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 22.

WHETHER THE PAB ERRED IN APPLYING THE CORRECT MATERIALITY TEST

[46] The alleged new evidence consisted of medical reports. Both the Review Tribunal on reconsideration and the PAB found that all this allegedly new evidence existed prior to the hearing of the Review Tribunal on March 25, 1998. Contrary to the Review Tribunal, the PAB found that these reports could have been obtained by reasonable diligence: they were in the possession of the

applicant's lawyer who represented him pursuant to a motor vehicle accident in which he was involved on March 31, 1997.

[47] The PAB deplored that no explanation was given by affidavit evidence as to why the applicant, according to what he said, was not aware of the reports in his own lawyer's office.

[48] It was open to the PAB on the facts before it to conclude that the applicant had failed to satisfy his onus of demonstrating that he exercised due diligence to discover the medical reports in question.

[49] It was also open to the Board to conclude that the applicant, who said that he relied upon the persons representing him, was bound by the actions of his agents.

[50] Counsel for the applicant submits that the PAB failed to consider all the reports and limited its review to only three. In so doing, he said, the Board erred. I think that counsel's submission cannot succeed.

[51] There were two aspects to the Review Tribunal's decision. First, the Tribunal concluded that all medical reports were in possession of the applicant's counsel. However, it did not conclude that the applicant would have been aware of them. Therefore, the Tribunal considered them to be all new evidence.

[52] Second, the Tribunal looked at all the reports and singled out three of them to which it applied an erroneous materiality test.

[53] The PAB reviewed the materiality test applied by the Tribunal to these three reports to point out the error made by the Tribunal. In addition, it ruled that all the medical reports which were in the hands of applicant's counsel were not new evidence because the applicant failed to demonstrate that he exercised due diligence to discover them. Therefore, there was no failure on the part of the PAB to consider all reports for the purpose of determining whether they constituted new evidence under subsection 84(2) of the CPP.

CONCLUSION

[54] In order to dissipate the uncertainty that has prevailed with respect to demands for reconsideration under subsection 84(2) of the CPP made on the basis of new evidence, I believe that I should summarize my findings. They are as follows:

a) the decisions in *Peplinsky*, *Oliveira*, *Fleming*, *Richard* and *Kent* which sent litigants to the Federal Court of Canada to have reviewed by way of judicial review a Review Tribunal's positive or negative determination of proffered new evidence are no longer good law;

b) these positive or negative determinations are appealable to the PAB pursuant to the procedure set out in subsection 83(1) of the CPP;

c) the PAB possesses the power under subsection 83(1), 83(11) and 84(1) to review the correctness of these determinations; and

d) the materiality test for the purpose of subsection 84(2) of the CPP is met if the proposed new facts may reasonably be expected to affect the outcome.

[55] For these reasons, I would dismiss the application for judicial review without costs.

"Gilles Létourneau"

J.A.

"I agree
A.M. Linden J.A."

"I agree
J. Edgar Sexton J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LINDEN J.A. SEXTON J.A.
DATED:	September 21, 2007

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