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Report of the Veterans Ombudsman
March 2012

Veterans' Right to Fair Adjudication

Analysis of Federal Courts decisions pertaining to the Veterans Review and Appeal Board

Canada

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March 29, 2012

The Honourable Steven Blaney, P.C., M.P.
Minister of Veterans Affairs
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Minister:

I am pleased to submit to you the report *Veterans' Right to Fair Adjudication*. The report is based on the analysis of judgments issued by the Federal Court and the Federal Court of Appeal on applications for judicial review of decisions made by the Veterans Review and Appeal Board.

The Board has a critical role to play in ensuring that Veterans and other clients of Veterans Affairs Canada receive the disability benefits to which they are entitled. The fact that half of cases reviewed at the Board's review level and a further one-third at the Board's appeal level are varied in favour of applicants attests to the need for an independent administrative tribunal that Veterans and other applicants can turn to when they are dissatisfied with decisions made by Veterans Affairs Canada.

To ensure fairness in the redress process, the Board must act according to its enabling legislation, the *Veterans Review and Appeal Board Act*, and the principles of procedural fairness. In 60 percent of the 140 Board decisions reviewed by the Federal Court, the Court ruled that the Board has failed to do so. Despite assurances from the Board that it analyzes Federal Court judgments to ensure that guidance given is reflected in its decisions, which is also important to ensure fairness in the redress process, Court judgments point to the same errors over an extended period of time.

It must be acknowledged that Board members and staff have the difficult task of determining the merits of cases by deciding on questions of law and fact in an environment characterized by heavy workloads, increasingly complex cases, and pressure to issue timely decisions. Nonetheless, in fairness to Veterans and other applicants, I must conclude that improvements to the Board's decision making are needed to restore the trust of those who turn to it for redress.

I look forward to discussing the recommendations at your earliest convenience.

Yours sincerely,

Guy Parent
Veterans Ombudsman

Canada

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THE MANDATE OF THE VETERANS OMBUDSMAN

The Office of the Veterans Ombudsman, created by Order in Council,[1] works to ensure that Veterans, serving members of the Canadian Forces and the Royal Canadian Mounted Police, and other clients of Veterans Affairs Canada are treated respectfully, in accordance with the *Veterans Bill of Rights,* and receive the services and benefits that they require in a fair, timely and efficient manner.

The Office addresses complaints, emerging and systemic issues related to programs and services provided or administered by the Department of Veterans Affairs, as well as systemic issues related to the Veterans Review and Appeal Board.

The Veterans Ombudsman is an independent and impartial officer who is committed to ensuring that Veterans and other clients of Veterans Affairs Canada are treated fairly. The Ombudsman measures fairness in terms of *adequacy* (Are the right programs and services in place to meet the needs?), *sufficiency* (Are the right programs and services sufficiently resourced?), and *accessibility* (Are eligibility criteria creating unfair barriers, and can the benefits and services provided by Veterans Affairs Canada be accessed quickly and easily?).

VETERANS BILL OF RIGHTS

The *Veterans Bill of Rights* applies to all clients of Veterans Affairs.

You have the right to:

- Be treated with respect, dignity, fairness and courtesy.
- Take part in discussions that involve you and your family.
- Have someone with you for support when you deal with Veterans Affairs.
- Receive clear, easy-to-understand information about programs and services, in English or French, as set out in the *Official Languages Act*.
- Have your privacy protected as set out in the *Privacy Act*.
- Receive benefits and services as set out in published service standards and to know your appeal rights.
- You have the right to make a complaint and have the matter looked into if you feel that any of your rights have not been upheld.

[1] Order in Council P.C. 2007-530, April 3, 2007.

REPORT SUMMARY

The Veterans Review and Appeal Board has a critical role to play in ensuring that Veterans and other clients of Veterans Affairs Canada receive the benefits and services to which they are entitled by determining whether the laws governing the disability benefits program have been properly applied by the Department at the adjudication level and by providing applicants the opportunity to present additional evidence in support of their application. Given its role, the Board must be held to a higher standard of review and procedural fairness than the Department. The degree to which the Board adheres to these standards by rendering decisions in compliance with the *Veterans Review and Appeal Board Act* has been the source of much concern within the Veterans community, and this erodes the trust in the institution.

Through their decisions, the Federal Court and the Federal Court of Appeal provide an independent judicial assessment of the manner in which questions of law, fact, and procedural fairness were handled in cases before them. For this reason, the Veterans Ombudsman determined that an analysis of Federal Courts judgments pertaining to Board decisions would provide valuable information about the degree to which the Board adheres to high standards of review and procedural fairness. The services of the law firm of Borden Ladner Gervais LLP (BLG) were retained to perform an independent analysis that included the 140 Board decisions that have been challenged to the Federal Court and the 11 decisions that were subsequently appealed to the Federal Court of Appeal. The review was conducted in the fall of 2011.

In 60 percent of Board decisions reviewed by the Federal Court, the Court ruled that the Board erred in law or fact, or failed to observe principles of procedural fairness. The failure to liberally construe the provisions of the *Veterans Review and Appeal Board Act*, to accept credible uncontradicted evidence, to give the benefit of the doubt, and to accept credible new evidence pertain to the Board's failing to allow the latitude granted to it by its enabling legislation. The failure to ensure procedural fairness by not providing sufficient reasons for decisions or not disclosing medical evidence considered by the Board further undermines the rights of Veterans and the credibility of the Board.

The findings of the analysis are of great concern to the Veterans Ombudsman:

> *It is difficult to think that fairness is assured when the Federal Court returns more than half of Board decisions it reviews for errors of fact or law, or for procedural fairness issues. Ultimately, this is about the fair treatment of the men and women who have served their country honourably. In the case of 85 Veterans, the Federal Court has concluded that the adjudication process has failed them. Veterans Affairs Canada and the Veterans Review and Appeal Board have the obligation to fully consider the reasons for the Courts' decisions.*

VETERANS OMBUDSMAN'S RECOMMENDATIONS

- That the Veterans Review and Appeal Board report to Parliament on its performance using the *percentage of Federal Court judgments that uphold Board decisions* as an indicator of fairness in the redress process, and on remedial measures to attain the 100 percent target.
- That the Veterans Review and Appeal Board, Veterans Affairs Canada, and the Bureau of Pensions Advocates establish a formal mechanism to review each Federal Court decision rendered in favour of the Veteran or other applicant, for the purpose of remedial action to procedures and adjudication practices.
- That the Veterans Review and Appeal Board provide reasons for its decisions that clearly demonstrate that its obligation to liberally construe the legislation has been met, as well as its obligations under Section 39 of the *Veterans Review and Appeal Board Act* to draw every reasonable inference in favour of applicants, to accept credible uncontradicted evidence, and to give applicants the benefit of evidentiary presumptions (benefit of the doubt).
- That the Minister of Veterans Affairs ensure that the Veterans Review and Appeal Board is sufficiently resourced so that the Board may publish all of its decisions on its Web site and all Federal Court judgments pertaining to Board decisions.
- For the Minister of Veterans Affairs to mandate the Bureau of Pensions Advocates to represent applicants on judicial review of decisions of the Veterans Review and Appeal Board in the Federal Court.
- For the Veterans Review and Appeal Board and the Bureau of Pensions Advocates to review their processes and service standards for the priority treatment of cases returned by the Federal Courts for rehearing.
- For the Minister of Veterans Affairs to put forward the necessary legislative and regulatory amendments to allow Veterans to be compensated retroactively to date of application under the *Pension Act* and the C*anadian Forces Members and Veterans Re-establishment and Compensation Act*.

THE ISSUE

Veterans and serving members of the Canadian Forces and the Royal Canadian Mounted Police who suffer an illness or disability related to their service may apply to Veterans Affairs Canada for disability pensions or disability awards. One of the most important rights to which Veterans and other applicants are entitled is the right to appeal decisions made by the Department to the Veterans Review and Appeal Board.

Reporting to Parliament through the Minister of Veterans Affairs, the Veterans Review and Appeal Board is an independent, quasi-judicial body established by law[2] with the authority to uphold, change, or overturn decisions[3] made by Veterans Affairs Canada, and to refer decisions back to the Department for reconsideration.

The Board has a critical role to play in ensuring that Veterans and other clients of Veterans Affairs Canada receive the benefits and services to which they are entitled by correcting adjudication errors made at the Department level and providing applicants the opportunity to present additional evidence in support of their application. To that end, and to fulfill *the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants*[4], the Board has been granted very liberal powers under its enabling legislation, the *Veterans Review and Appeal Board Act*. In particular, Section 39 of the Act provides that the Board shall:

- *Draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;*
- *Accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and*
- *Resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.*[5]

To ensure fairness and retain the trust of those who turn to it for redress, the Board must act according to its enabling legislation as well as to principles of procedural fairness, including the right to a fair hearing, freedom from bias, and the provision of reasons for its decisions.

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2 The *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18.

3 The Veterans Review and Appeal Board has full and exclusive jurisdiction over applications made under the *Pension Act*; the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, Part 3; and the *War Veterans Allowance Act*; as well as disability pension applications under the *Royal Canadian Mounted Police Pension Continuation Act* and the *Royal Canadian Mounted Police Superannuation Act*.

4 The *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, Section 3.

5 The *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, Section 39.

Since the Board's role is *to determine whether the laws governing the disability benefits programs for Veterans and other applicants have been properly applied by VAC [Veterans Affairs Canada] in individual cases*[6], the Board must be held to a higher standard of review and procedural fairness than the Department.

The degree to which the Board adheres to these standards by rendering decisions in compliance with the *Veterans Review and Appeal Board Act* has been the source of much concern within the Veterans community, and this erodes the trust in the institution.

To address these concerns, the Veterans Ombudsman informed the Minister of Veterans Affairs of his intention to conduct an analysis of the reasons for decisions issued by the Federal Court[7] and the Federal Court of Appeal on applications for judicial review of decisions made by the Veterans Review and Appeal Board.

It is important to mention at the outset that the Veterans Ombudsman firmly believes that the Veterans Review and Appeal Board fulfills a critical function in the adjudication process and he recognizes the inherent complexity of the work carried out by the Board's members and staff. They have the difficult task of determining the merits of a case by deciding on questions of law and fact in an environment characterized by heavy workloads, increasingly complex cases, and pressure to issue timely decisions.

METHODOLOGY

In cases where Veterans and other applicants have exhausted all redress options at the Veterans Review and Appeal Board (review level and appeal level) and remain dissatisfied with the outcome, they have the right to apply to the Federal Court for a judicial review of the matter. If the Court determines that the Board has made an error of law or an unreasonable error of fact, or has failed to observe principles of procedural fairness, it will set aside the decision and ask the Board to rehear the case.

Since the Board was created in 1995, it has made more than 118,600 decisions, of which approximately 33,990 could have been subject to judicial review (decisions made at the Board's appeal level). Of those decisions, 140 have been challenged to the Federal Court and 11 decisions were subsequently appealed to the Federal Court of Appeal.

Through their decisions, the Federal Courts provide an independent judicial assessment of the manner in which questions of law, fact, and procedural fairness were handled in cases before them. For this reason, it was determined that an analysis of Federal Court judgments pertaining to Board decisions would provide valuable information about the degree to which the Board adheres to high standards of review and procedural fairness by rendering decisions in compliance with its enabling legislation and principles of procedural fairness.

6 Department of Veterans Affairs, *2010-2011 Departmental Performance Report*, p. 35.

7 Formerly, the Federal Court of Canada (Trial Division). Until 2003, the Federal Court of Canada consisted of two divisions: a Trial Division and an Appeal Division. With amendments to the *Federal Courts Act* coming into force on July 2, 2003, these divisions became two separate courts: a trial court (Federal Court) and a court of appeal (Federal Court of Appeal).

It is worth noting that until recently, the Veterans Review and Appeal Board relied on the *percentage of Federal Court decisions that uphold VRAB decisions* as a performance indicator of fairness in the redress process for disability pensions and awards.[8] This is a clear indication that the Board also considers Federal Court decisions meaningful in this regard.

The services of the law firm of Borden Ladner Gervais LLP (BLG) were retained to perform an independent analysis of all decisions of the Federal Court and Federal Court of Appeal (the Federal Courts) pertaining to the Board in an effort to identify any systemic issues having a negative impact on Veterans. The terms of reference included an analysis of the findings of the Federal Courts in regard to the consistency of Board decisions and how the Board considered evidence in the cases before it, as well as the identification of legal trends. The review was conducted in the fall of 2011.

BACKGROUND

THE ADJUDICATION PROCESS

It is helpful to briefly summarize the various steps in the adjudication process for disability benefit claims (disability pensions and disability awards):

1) Application for a disability pension or award is made to the Department with the assistance of a disability benefits officer (formerly, pension officer).
2) **First-level Adjudication** – adjudication of the application in terms of entitlement and assessment[9] by an adjudicator.

   Applicants may exercise their redress options in respect of both entitlement and assessment decisions. Those who exercise their appeal rights can obtain legal representation at no cost from a lawyer from the Bureau of Pensions Advocates.
3) **Departmental Review** – the Department may confirm, amend, or rescind the adjudicator's decision if an error with respect to any finding of fact or interpretation of law has occurred or, on application, if new evidence is presented.[10]

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[8] The Board reported against this indicator in departmental performance reports up to 2009-2010, but did not do so in the 2010-2011 Departmental Performance Report.

[9] The entitlement decision pertains to the relationship between a disability and the applicant's service. If it is established that a relationship does exist, partial or full entitlement is expressed on a fifths scale, from 1/5 (minimal link between disability and service) to 5/5 (disability arises fully from service). The assessment decision pertains to the degree of severity of the disability and its impact on the applicant's quality of life, expressed on a percentage scale, from 0 to 100 percent. The rate of disability benefit payable is obtained by multiplying the entitlement figure, expressed in fifths, by the assessment figure, expressed as a percent.

[10] Pursuant to Section 82 of the *Pension Act* or Section 84 of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

4) **Review Hearing Before the Veterans Review and Appeal Board** – the Board has exclusive jurisdiction to review decisions (first-level decision and departmental review decision) of the Department.[11] The review hearing is the only time in the process when applicants may appear and testify about the facts of their application. Review hearings are normally conducted by two Board members. On its own motion, the Board may also reconsider its decisions if an apparent error of fact or law has occurred.[12]

5) **Appeal Hearing Before the Veterans Review and Appeal Board** – an applicant who is not satisfied with the result of the review hearing may appeal to the Board.[13] While the legislation does not permit applicants to testify in person again, they may submit written statements and new evidence. The appeal hearing is an additional opportunity for the applicant's representative to make arguments before three different Board members.

6) **Reconsideration Before the Veterans Review and Appeal Board** – on its own motion, the Board may also reconsider its decisions on appeal if an apparent error of fact or law has occurred, or, on application, if the applicant alleges that an error of fact or law was made or has new evidence for the Board to consider.

7) **Application for Judicial Review to the Federal Courts** – if the applicant remains unsatisfied, he or she may seek judicial review on application to the Federal Court, and subsequently to the Federal Court of Appeal. Since the Bureau of Pensions Advocates is not mandated to represent applicants in the Federal Courts, applicants must either represent themselves or secure legal counsel at their own expense.

   The *Federal Courts Act*[14] gives the Federal Court the power *to declare invalid or unlawful, or quash, set aside, or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal* if it finds that the federal board, commission, or other tribunal:

> *(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;*
>
> *(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> *(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;*
>
> *(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;*
>
> *(e) acted, or failed to act, by reason of fraud or perjured evidence; or*
>
> *(f) acted in any other way that was contrary to law.*

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[11] Pursuant to Section 84 of the *Pension Act* and Section 18 of the *Veterans Review and Appeal Board Act*.

[12] Pursuant to Section 23 of the *Veterans Review and Appeal Board Act*.

[13] Pursuant to Section 26 of the *Veterans Review and Appeal Board Act*.

[14] *Federal Courts Act*, R.S.C., 1985, c. F-7, Subsections 18.1(3) and 18.1(4).

Unlike appeal courts for civil and criminal matters, the Federal Court and the Federal Court of Appeal cannot substitute their own decisions to those made by a federal board, commission, or other tribunal. The authority of the Federal Courts is limited to setting aside a decision and returning it for reconsideration if an error of fact or law was made, or if principles of procedural fairness were not observed.

ADJUDICATION STATISTICS IN CONTEXT

In 2010-2011:

- Veterans Affairs Canada issued approximately 40,000 decisions[15] with appeal rights to the Veterans Review and Appeal Board. Slightly more than 70 percent of applicants received a "favourable" decision on first application, meaning that they obtained the relief sought, or some part thereof.

  It should be noted that a "favourable" decision does not mean that the applicant is satisfied with the decision or that the applicant has received the level of compensation to which he or she is entitled. The applicant may disagree with either or both the entitlement decision (degree to which the disability was caused or aggravated by service, expressed on a fifths scale) and the assessment decision (the degree of severity of the disability and its impact on the applicant's quality of life, expressed on a percentage scale, from 0 to 100 percent). It is common for applicants to appeal a "favourable" first-level decision and obtain an increase in their disability benefits (pension or award) based on a review of the existing evidence or new evidence introduced at the review and appeal levels.

- The Veterans Review and Appeal Board issued 3,539 review decisions, 974 appeal decisions, 131 reconsideration decisions, and 24 decisions on applications for the War Veterans Allowance.

  On average, 50 percent of the Board's review decisions and 33 percent of the Board's appeal decisions varied or overturned a previous decision of the Department, either by correcting an adjudication error or upon consideration of new evidence. Notwithstanding the reasons for which the Board varied a previous decision, it means that the Board ruled in favour of the applicant with respect to some aspect of his or her entitlement or assessment for benefits.

  It is worth noting that in any given year, the Board will review 10 to 15 percent of decisions made by the Department with appeal rights to the Board and will vary more than half of the Department's decisions. While outside the scope of the current analysis, this suggests to the Veterans Ombudsman that there is a need for the Department to determine why so many decisions are varied at the Board level and to consider ways to improve decision making at the Department's first adjudication and review levels.

[15] Includes decisions made by the Department on first applications for disability benefits, departmental reviews, and medical reassessments. Those who experience a deterioration of the condition for which they receive a disability pension or received a disability award may ask to have the condition reassessed, potentially resulting in an increase in their disability benefits.

There is a high cost to Veterans when they must go through various levels of review and appeal to obtain the benefits to which they are entitled. The Veterans Ombudsman also has concerns about the impact of the volume of applications on the Board's operations.

- In 2010-2011, the Federal Court issued 13 decisions on application for judicial review. Of those 13 decisions, the Federal Court asked the Board to rehear 9 applications and dismissed 4 applications. This means that the Federal Court found errors in 69 percent of Board decisions (9 out of 13 decisions) reviewed that year.

FEDERAL COURTS DECISIONS IN CONTEXT

Since the Board was created in 1995, it has made more than 118,600 decisions, of which approximately 33,990 could have been subject to judicial review (decisions made at the Board's appeal level). Of those decisions, 140 have been challenged to the Federal Court and 11 decisions were subsequently appealed to the Federal Court of Appeal.

While the number of court challenges represents only a small percentage of the total number of cases decided by the Veterans Review and Appeal Board, the Veterans Ombudsman contends that it would be misleading to conclude that those who did not seek redress in the Federal Court were satisfied that the merit of their case was fully considered by the Board.

As noted by Borden Ladner Gervais LLP (BLG), *the option of challenging a Board decision in the Federal Courts may be more illusory than real for many reasons*, including the complexity and legal costs associated with Federal Court proceedings, which can range from $15,000 to $50,000, depending on the complexity of the case. The Office of the Veterans Ombudsman has assisted a number of Veterans in securing pro bono legal services for Federal Court proceedings and the law firm has valued the cost of its services at approximately $50,000 per case.

Chief Justice of Canada, the Right Honourable Beverley McLachlin, P.C., has pointed out on numerous occasions that access to justice is the greatest challenge facing the Canadian justice system. As she said to the Council of the Canadian Bar Association at the Canadian Legal Conference in Calgary, Alberta on August 11, 2007:

> *The cost of legal services limits access to justice for many Canadians. The wealthy, and large corporations who have the means to pay, have access to justice. So do the very poor, who, despite its deficiencies in some areas, have access to legal aid, at least for serious criminal charges where they face the possibility of imprisonment. Middle income Canadians are hard hit, and often left with very difficult choices that if they want access to justice, they must put a second mortgage on their home, or use funds set aside for a child's education or for retirement. The price of justice should not be so dear.*

Another reason Veterans and other clients of Veterans Affairs Canada may be dissuaded from challenging a Board decision in the Federal Court is the fact that the Court does not have the ability to substitute its decision for that of the Board. While the Court can compel the Board to reconsider a decision, there are no guarantees that the Board will decide the matter any differently the second time around.

Insofar as decisions of the Federal Courts provide an independent judicial assessment of the manner in which questions of law, fact, and procedural fairness were handled in cases before them, it is the reasons for the Courts' decisions and any identifiable trends that are significant, not the number of Court challenges.

Until recently, the Veterans Review and Appeal Board relied on the *percentage of Federal Court decisions that uphold VRAB decisions* as a performance indicator of fairness in the redress process for disability pensions and awards.

The Board's performance against that indicator is worrisome: only 31 percent of Federal Court judgments in 2010-2011 upheld Board decisions; 42 percent in 2009-2010; 44 percent in 2008-2009; and 44 percent in 2007-2008. Moreover, these numbers do not take into account decisions returned to the Board pursuant to consent orders, also known as consent judgments. When the Attorney General considers that the Federal Court will likely allow the application, that is, decide in favour of the Veteran, the parties agree to seek a consent judgment from the Court, and the matter is returned to the Board for reconsideration. Between April 1, 2007 and March 31, 2011, there have been 50 Federal Court judgments (60 percent of those judgments set aside the Board's decision and asked the Board to rehear the case) and 8 consent orders.[16]

The Veterans Ombudsman is also concerned about the 50 percent target that the Board used to measure its performance against the performance indicator. To suggest that fairness is assured when the Federal Court returns almost half of Board decisions for errors of fact or law is questionable. Given its role in determining whether the laws governing the disability programs for Veterans and other applicants have been properly applied by Veterans Affairs Canada in individual cases, the Board must be held to a higher standard of review and procedural fairness than the Department. The Board's performance must be measured against a much more ambitious target: **one hundred percent of Federal Court judgments uphold Board decisions**.

[16] Because consent orders are not reported by the Federal Court, it is difficult to ascertain the exact number. The Office of the Veterans Ombudsman is aware of 8 consent orders between April 1, 2007 and March 31, 2011.

The Board should continue to use the percentage of Federal Court judgments that uphold the Board's decisions as a performance indicator of fairness in the redress process, with a target of 100 percent, and report against it in performance reports to Parliament.

- Recommendation 1 – That the Veterans Review and Appeal Board report to Parliament on its performance using the *percentage of Federal Court judgments that uphold Board decisions* as an indicator of fairness in the redress process, and on remedial measures to attain the 100 percent target.

SUMMARY OF BORDEN LADNER GERVAIS LLP (BLG) FINDINGS

- The majority of applications (60 percent, that is, 85 out of 140 applications) were granted by the Federal Court and returned to the Veterans Review and Appeal Board for reconsideration.
- From 1995 to 2011, the Federal Courts have found errors in the Board's interpretation and application of the provisions of the *Veterans Review and Appeal Board Act,* the *Pension Act*,[17] and common law principles of procedural fairness. The five most common errors for which the Federal Courts returned decisions to the Board for reconsideration were:
  - Failure to liberally construe the provisions of the *Veterans Review and Appeal Board Act* and the provisions of the *Pension Act* most acutely demonstrated by cases where the Board has assessed the meaning of "on duty" in an overly narrow manner and too narrowly construed what activity was or was not part of a Veteran's service.
  - Failure to accept credible uncontradicted evidence, including medical evidence, and failure to provide detailed reasons where the Board finds that uncontradicted medical evidence is not credible.
  - Failure to give the benefit of evidentiary presumptions (benefit of the doubt) in cases where sufficient credible evidence was provided that establishes a reasonable link between the applicant's disability and service.
  - Failure to ensure procedural fairness by not providing sufficient reasons in support of a decision[18] or not disclosing medical evidence (i.e., medical opinion or passages from medical textbooks) considered by the Board in making its decision and, as a result, not giving applicants the opportunity to make submissions in response.

[17] The Federal Courts (the Federal Court and the Federal Court of Appeal) have yet to consider a Board decision related to the *Canadian Forces Members and Veterans Re-establishment and Compensation Act* (New Veterans Charter).

[18] In *Johnston v. Canada* (Attorney General), [2010] F.C.J. No. 408, the Federal Court granted Johnston's application because the Board had provided inadequate reasons for its decision. On that ground alone, the case was sent back to the Board for reconsideration.

- Failure to accept credible new evidence[19] that concerns a decisive issue and could affect the result in a case.

- The average lapse of time between a judgment of the Federal Court and subsequent Board decision was 260 days.
- Veterans without the means to secure legal counsel are much less likely to be successful in challenging Board decisions in the Federal Court: 72 percent of those represented by legal counsel were successful (66 out of 92 cases) compared with 40 percent among self-represented applicants (19 out of 48 cases).
- The Board changed its decision in 63 percent of cases returned by the Federal Court for reconsideration.

DISCUSSION

THE BOARD'S DECISION MAKING

Application of the provisions of the *Veterans Review and Appeal Board Act*

The main finding of BLG's analysis is that 60 percent of Board decisions reviewed by the Federal Court were returned to the Board for errors of fact or law, or for failure to observe principles of procedural fairness.

Despite assurances from the Board that it *monitors the outcomes of applications for judicial review to ensure that any guidance given by the Court is reflected in its decisions and operations*,[20] Board decisions have been returned by the Federal Courts for the same reasons over a long period of time. This only further erodes the trust of Veterans in the Board, particularly when four of five errors identified, namely, the failure to liberally construe the provisions of its enabling legislation, the failure to accept credible uncontradicted evidence, the failure to give the benefit of the doubt, and the failure to accept credible new evidence, pertain to the Board's failing to allow the latitude granted to it by the *Veterans Review and Appeal Board Act*.

It is worth noting that Federal Court judgments reflect not only on the Board's decision making but also on the Department's, since they pertain to cases where the initial decision was made by the Department and subsequently upheld by the Board. At issue here is the

[19] In *Mackay v. Canada* (Attorney General), [1997] F.C.J. No. 495, the Federal Court held that the Board should follow the test and principles for new evidence outlined by the Supreme Court of Canada in *Palmer v. the Queen* (1979), 106 D.L.R. (3d) 212 (S.C.C.) [*Palmer*]. The "new evidence" test in *Palmer* provides that new evidence should 1) generally not be admitted if it could have been adduced at a hearing; 2) must be relevant in the sense that it bears upon a decisive or potentially decisive issue; 3) must be credible in the sense that it is reasonably capable of belief; and 4) if believed, must reasonably be expected to have affected the result.

[20] Veterans Review and Appeal Board's Web site.

sufficiency of the Board's procedures to apply corrective measures to ensure that Board decisions are compliant with the provisions of its enabling legislation and to bring about improvements in the Department's decision making.

- Recommendation 2 – That the Veterans Review and Appeal Board, Veterans Affairs Canada, and the Bureau of Pensions Advocates establish a formal mechanism to review each Federal Court decision rendered in favour of the Veteran or other applicant, for the purpose of remedial action to procedures and adjudication practices.

Adherence to principles of procedural fairness

The fifth error, the failure to ensure procedural fairness by not providing sufficient reasons for decisions or not disclosing medical evidence considered by the Board, undermines the rights of Veterans and the credibility of the Board as an impartial administrative tribunal that Veterans and other applicants can turn to when they are dissatisfied with decisions made by Veterans Affairs Canada.

The Ombudsman agrees with the notation made by BLG that as ... *a quasi-judicial administrative tribunal, the Board owes a common law duty of fairness to parties appearing before them. While the circumstances of a given case will dictate what is required to ensure procedural fairness, the most common requirement includes providing sufficient reasons in support of a decision or allowing a party to have access to all of the evidence considered by Board members in making their decision*.[21]

The Ombudsman's report, *Veterans' Right to Know Reasons for Decisions: A Matter of Procedural Fairness*,[22] argues the need for well-documented reasons in the Department's decision letters and makes recommendations to do so. These recommendations can be applied to any administrative body, including the Veterans Review and Appeal Board.

- Recommendation 3 – That the Veterans Review and Appeal Board provide reasons for its decisions that clearly demonstrate that its obligation to liberally construe the legislation has been met, as well as its obligations under Section 39 of the *Veterans Review and Appeal Board Act* to draw every reasonable inference in favour of applicants, to accept credible uncontradicted evidence, and to give applicants the benefit of evidentiary presumptions (benefit of the doubt).

The Ombudsman also draws attention to an earlier recommendation he made[23] that the Board publish its decisions on its Web site, in keeping with guidance provided by the Privacy Commissioner of Canada in relation to administrative tribunals. Tribunals such as the Pension Appeals Board and provincial workers' compensation boards are able to reconcile the objectives of open government and the protection of individuals' privacy. The Office believes that publishing decisions would increase the Board's transparency and enable

[21] Borden Ladner Gervais LLP, *Systemic Analysis of Federal Courts Decisions Veterans Review and Appeal Board*, 2011.

[22] Report of the Veterans Ombudsman, December 2011.

[23] Office of the Veterans Ombudsman, *2010-2011 Annual Report, One Veteran: A Matter of Fairness*.

Veterans and other applicants who are preparing appeals to be aware of decisions rendered in cases similar to their own. Justice must not only be done, it must be seen to be done, and posting decisions on its Web site would aid in accomplishing this.

- Recommendation 4 – That the Minister of Veterans Affairs ensure that the Veterans Review and Appeal Board is sufficiently resourced so that the Board may publish all of its decisions on its Web site and all Federal Court judgments pertaining to Board decisions.

THE COST TO VETERANS

Legal representation

Borden Ladner Gervais LLP (BLG) found that those represented by legal counsel during Federal Court proceedings are much more likely to be successful than those who represent themselves (72 percent and 40 percent respectively). The Ombudsman finds that Veterans' right to seek judicial review of Board decisions should not be subjugated to their financial ability to secure legal representation. The Bureau of Pensions Advocates provides free legal assistance to individuals for review and appeal hearings at the Veterans Review and Appeal Board. It would be consistent with the principle of adequate representation that the mandate of the Bureau include representation to the Federal Court.

- Recommendation 5 – For the Minister of Veterans Affairs to mandate the Bureau of Pensions Advocates to represent applicants on judicial review of decisions of the Veterans Review and Appeal Board in the Federal Court.

Delays

The BLG review found that the average lapse of time between a judgment of the Federal Court and subsequent Board decision was 260 days. There are many contributing factors to administrative delays that are beyond the Board's control. Nevertheless, the Ombudsman finds that where applications are allowed by the Federal Court, it is unfair for Veterans to be forced to wait any longer than possible for the Board to rehear the case. Cases sent back to the Board by the Federal Courts should be heard on a priority basis. The Veterans Review and Appeal Board and the Bureau of Pensions Advocates should be sufficiently resourced to do so.

- Recommendation 6 – For the Veterans Review and Appeal Board and the Bureau of Pensions Advocates to review their processes and service standards for the priority treatment of cases returned by the Federal Courts for rehearing.

Retroactivity

Delay alone is a serious issue when one considers what is at stake for applicants. These individuals suffer from disabilities and may have limited or no participation in the workforce. The impact of delays on applicants is compounded by the restriction on retroactive entitlement to disability and treatment benefits. Section 39 of the *Pension Act* provides for retroactive payment going back three years, plus an additional two years for administrative delays. In such cases, Veterans would receive retroactively disability pensions and reimbursement for treatment expenses related to the pensioned condition. There are no retroactivity provisions under the New Veterans Charter; applicants receive a disability award at the rate in effect when the decision is made and they are not reimbursed for treatment expenses incurred while their application is being processed. As such, treatment expenses can only be reimbursed if they are incurred after the decision to grant a disability award is made.[24]

The restriction on retroactivity and legal costs incurred by Veterans and other applicants can diminish considerably the value of the disability benefits awarded to them when they are successful in obtaining a favourable decision, particularly for those who are in the Courts for many years. The Ombudsman finds this to be unfair. Where the Board renders a favourable decision as the result of a successful application to the Federal Court, retroactivity should be to the date of original application. The Government of Canada has the obligation to make such restitution to applicants where benefits were originally denied but eventually granted. The only fair solution is to amend the current statutory regime to properly balance delay with the cause of that delay.

- Recommendation 7 – For the Minister of Veterans Affairs to put forward the necessary legislative and regulatory amendments to allow Veterans to be compensated retroactively to date of application under the *Pension Act* and the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

[24] The issue of retroactivity for the reimbursement of treatment expenses under the New Veterans Charter is of concern to the Office of the Veterans Ombudsman and discussed in its 2010–2011 Annual Report.

CONCLUSION AND RECOMMENDATIONS

The Veterans Review and Appeal Board has a critical role to play in ensuring that Veterans and other clients of Veterans Affairs Canada receive the benefits they are entitled to by correcting adjudication errors made by the Department and providing applicants the opportunity to present additional evidence in support of their application. To that end, the Board has been granted very liberal powers under its enabling legislation, the *Veterans Review and Appeal Board Act*.

To ensure fairness and retain the trust of those who turn to it for redress, the Board must act according to its enabling legislation as well as to principles of procedural fairness. In 60 percent of Board decisions reviewed by the Federal Court, the Court ruled that the Board has failed to do so. Despite assurances from the Board that it analyzes Federal Court judgments to ensure that guidance given is reflected in its decisions, policies, and operations, Court judgments point to the same errors over an extended period of time.

The failure to liberally construe the provisions of the *Veterans Review and Appeal Board Act,* to accept credible uncontradicted evidence, to give the benefit of the doubt, and to accept credible new evidence pertain to the Board's failing to allow the latitude granted to it by its enabling legislation. The failure to ensure procedural fairness by not providing sufficient reasons for decisions or not disclosing medical evidence considered by the Board further undermines the rights of Veterans and the credibility of the Board as an impartial administrative tribunal that Veterans and other applicants can turn to when they are dissatisfied with decisions made by Veterans Affairs Canada.

In any given year, the Veterans Review and Appeal Board reviews between 10 to 15 percent of decisions (approximately 5,000 decisions) made by the Department with appeal rights to the Board, and varies more than half of the Department's decisions in favour of applicants. While outside the scope of the current analysis, the Veterans Ombudsman has concerns about the impact of the volume of applications on the Board's operations, and he strongly suggests that there is a need for the Department to determine why so many decisions are varied by the Board and to improve its decision making at the adjudication and review levels.

Ultimately, this is about the fair treatment of the men and women who have served their country honourably. They should come to the Department confident that they will obtain the benefits and services that they are entitled to on first application, and if they choose to appeal decisions with the Department or the Veterans Review and Appeal Board, they should be equally confident that the merits of their case will be considered fully and fairly.

In the case of 85 Veterans, the Federal Court has concluded that the adjudication process has failed them. Veterans Affairs Canada and the Veterans Review and Appeal Board have the obligation to fully consider the reasons for the Courts' decisions.

Where Veterans decide to seek judicial review of decisions of the Board to the Federal Court, their right to do so should not be subjugated to their financial ability to secure legal representation. Moreover, where benefits were originally denied to Veterans as a result of adjudication errors but eventually granted, the value of those benefits should not be diminished by restriction on retroactivity or legal expenses.

The Veterans Ombudsman makes the following seven recommendations:

RECOMMENDATION 1 – That the Veterans Review and Appeal Board report to Parliament on its performance using the *percentage of Federal Court judgments that uphold Board decisions* as an indicator of fairness in the redress process, and on remedial measures to attain the 100 percent target.

RECOMMENDATION 2 – That the Veterans Review and Appeal Board, Veterans Affairs Canada, and the Bureau of Pensions Advocates establish a formal mechanism to review each Federal Court decision rendered in favour of the Veteran or other applicant, for the purpose of remedial action to procedures and adjudication practices.

RECOMMENDATION 3 – That the Veterans Review and Appeal Board provide reasons for its decisions that clearly demonstrate that its obligation to liberally construe the legislation has been met, as well as its obligations under Section 39 of the *Veterans Review and Appeal Board Act* to draw every reasonable inference in favour of applicants, to accept credible uncontradicted evidence, and to give applicants the benefit of evidentiary presumptions (benefit of the doubt).

RECOMMENDATION 4 – That the Minister of Veterans Affairs ensure that the Veterans Review and Appeal Board is sufficiently resourced so that the Board may publish all of its decisions on its Web site and all Federal Court judgments pertaining to Board decisions.

RECOMMENDATION 5 – For the Minister of Veterans Affairs to mandate the Bureau of Pensions Advocates to represent applicants on judicial review of decisions of the Veterans Review and Appeal Board in the Federal Court.

RECOMMENDATION 6 – For the Veterans Review and Appeal Board and the Bureau of Pensions Advocates to review their processes and service standards for the priority treatment of cases returned by the Federal Courts for rehearing.

RECOMMENDATION 7 – For the Minister of Veterans Affairs to put forward the necessary legislative and regulatory amendments to allow Veterans to be compensated retroactively to date of application under the *Pension Act* and the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*.

APPENDIX

SYSTEMIC ANALYSIS OF FEDERAL COURTS DECISIONS VETERANS REVIEW AND APPEAL BOARD

Report of Findings
Borden Ladner Gervais LLP

Vincent J. DeRose
Nadia Effendi
Jack Hughes
Roberto Ghignone

Borden Ladner Gervais

EXECUTIVE SUMMARY

The mandate of the Veterans Ombudsman, as established pursuant to Order in Council P.C. 2007-530, provides that the Ombudsman shall review systemic issues related to the Veterans Review and Appeal Board ("Board"). To that end, we have been retained to conduct an analysis of the various Federal Court (Trial Division) and Federal Court of Appeal (collectively "the Federal Courts") decisions which have reviewed decisions of the Board in an effort to identify any systemic issues having a negative impact on veterans.

At the outset, it is important to recognize two important caveats. First and foremost, our mandate was limited to examining those decisions of the Board which had been considered by the Federal Courts. These represent only a small percentage of the total number of cases which have been decided by the Board since its creation. In our opinion, however, the number of cases which have been reviewed by the Federal Courts was sufficiently large and varied so as to allow us to draw the conclusions detailed in this report.

Second, we have interpreted the term 'systemic issues', as found in Order in Council P.C. 2007-530, in its ordinary sense, meaning any issue pertaining to the Board as a whole. Consequently, our review considered all aspects of the Board and the regime in which it operates – not merely the specific administrative practices it employs in the discharge of its mandate. As such, the systemic issues we have identified are a combination of legal issues and administrative issues.

In reviewing the various decisions of the Federal Courts, given the purposes of our analysis, we were required to give particular attention to those cases where the Federal Courts had found that the Board made errors in the decision under review. In so doing, we were able to identify the five most common errors historically made by the Board. To the extent that these five types of errors were repeated, we believe they are evidence of general systemic problems which warrant further consideration.

The five most common errors identified by the Federal Courts were: (1.) failure to liberally construe the applicable statutory regimes; (2.) failure to accept uncontradicted evidence, including uncontradicted medical evidence; (3.) failure to give veterans the benefit of the evidentiary presumptions; (4.) failure to provide veterans with procedural fairness; and (5.) failure to accept new evidence presented by veterans.

Based on our analysis of the various Federal Court (Trial Division) and Federal Court of Appeal decisions, and given the nature of the errors identified, we believe there are systemic problems underlying how the Board is required to fulfill its mandate. Chief among these being that while the *Veterans Review and Appeal Board Act* contains a number of safeguards intended to relieve the procedural burdens imposed on veterans, they are still subject to the most difficult burden – the onus of proving they are entitled to the benefits sought.

In our opinion, the various decisions rendered by the Federal Courts suggest that the Board has had difficulty in the past reconciling its obligation to give veterans the benefit of the doubt with its obligation to require veterans to discharge the onus of proving they are entitled to the benefits they seek. It is the tension between these conflicting obligations, compounded by other procedural obstacles, which has resulted in undue hardship for some veterans.

In the end, however, it is our strong view that there is a clear and continuing benefit for veterans in having an independent quasi-judicial body tasked with reviewing government decision where a veteran has been denied a pension or other benefits. To the extent that the Board can provide veterans with an informal and expeditious review of such decisions, we believe that it can continue to help veterans secure the pension benefits to which they are entitled and deserve.

Moreover, and more importantly, our review did not identify any systemic or personal bias against veterans. None of the conclusions or corresponding recommendations contained in this report are intended to question, in any way, the dedication that members of the Board have to their task and to the rights of veterans. Rather, the observations support the conclusion that the system within which the Board operates could be strengthened and streamlined in such a way as to assist them to better fulfill their mandate going forward.

BACKGROUND / OVERVIEW

The Board is an independent quasi-judicial tribunal with the jurisdiction over applications made under the *Pension Act*[1], the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*[2], Part 3, the *War Veterans Allowance Act* as well as disability pension applications under the *Royal Canadian Mounted Police Pension Continuation Act*[3] or the *Royal Canadian Mounted Police Superannuation Act*[4].

The Board provides veterans with two levels of hearings for disability pension and disability award decisions as well as the final level of appeal for War Veterans Allowance applications. The first level is the review hearing, which provides veterans with the opportunity for an in-person hearing before two members of the Board. The second level is the appeal hearing, where cases are heard by three members who were not involved in the review hearing.

The Board has the authority to review Veterans Affairs Canada's decisions related to: disability pensions or awards; special awards, including Attendance Allowance, Exceptional Incapacity Allowance and Clothing Allowance; prisoner of war compensation; dependent/survivor benefits; and War Veterans Allowance appeals. Depending on the circumstances of a given case, the Board may affirm, vary or reverse those decisions or refer decisions back to Veterans Affairs Canada for reconsideration.

The *Veterans Review and Appeal Board Act*[5] expressly provides that the Board shall liberally construe and interpret both its own Act as well as any other Act of Parliament which confers powers or jurisdiction on the Board, including any regulations made thereunder, in an effort to fulfill the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependents.

The *Veterans Review and Appeal Board Act* further provides that the Board shall draw from all the circumstances of a given case, and all the evidence presented to it, every reasonable inference in favour of the veteran. Moreover, the Board is required to accept any credible uncontradicted evidence presented to it by a veteran, and resolve in favour of the veteran any doubt, in the weighing of evidence, as to whether the veteran has established a case[6].

RECOURSE TO THE FEDERAL COURTS

In a case where a veteran has completed both the review and appeal processes at the Board, they then have a right to apply to the Federal Court of Canada for a judicial review of the matter. If the Court determines that the Board has made an error of law or an unreasonable error of fact, it will set aside the decision and may direct a new panel of the Board to reconsider the matter subject to whatever specific directions the Court may deem appropriate in the circumstances.

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[1] *Pension Act*, R.S.C., 1985, c. P-6
[2] *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21
[3] *Royal Canadian Mounted Police Pension Continuation Act*, R.S.C., 1970 c. R-10
[4] *Royal Canadian Mounted Police Superannuation Act*, R.S.C., 1985, c. R-11
[5] *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18
[6] *Veterans Review and Appeal Board Act*, *supra*, s. 39

As noted in *Powell v. Canada (Attorney General)* [7], the role of the Federal Court (Trial Division) and, ultimately, Federal Court of Appeal is not to determine whether the Board came to the right conclusion – or whether a pension should be given. Rather, the Court's role is to consider the reasons given by the Board and determine whether the line of analysis given by the Board could reasonably have led it from the evidence it received to the conclusion at which it arrived.

At the same time, the Court will examine whether the Board acted within its jurisdiction when making its decision. This analysis can include an examination of whether the veteran was afforded the requisite degree of procedural fairness, as well as whether the Board's decisions and reasons demonstrate that they undertook their analysis based on a proper interpretation and application of the provisions of the *Veterans Review and Appeal Board Act* and/or the *Pension Act*.

Since the Board was created in 1995 it has made over 118,600 decisions, of which approximately 33,990 could have been subject to judicial review. Some 140 of those decisions have been challenged to the Federal Court (Trial Division), and, of those cases, 11 were then appealed to the Federal Court of Appeal.[8].While the number of court challenges has been statistically low, we caution against concluding that this means veterans who did not seek judicial review were satisfied with the decisions of the Board. In the course of our review, we identified a number of systemic issues which could have dissuaded veterans from going to the Federal Courts.

First, Board hearings are structured to be as informal as possible and veterans can obtain the often invaluable assistance of representatives of the Bureau of Pensions Advocates and the Royal Canadian Legion, who act on their behalf free of charge to help present the case to the Board. Judicial review applications in the Federal Court (Trial Division), as well as appeals before the Federal Court of Appeal, are complex proceedings often requiring the assistance of legal counsel.

The legal fees associated with such proceedings can be very significant, and they are the personal responsibility of the veteran involved. As a result, even where a veteran may strongly disagree with a Board decision, a Court proceeding may not be a financially viable option for them. While veterans can represent themselves in any Federal Court proceedings, and some have with great success, our analysis found that veterans who were represented by counsel were much more likely to be successful before the Court than their unrepresented counterparts.

In 85 of the 140 cases before the Federal Court (Trial Division), representing approximately 60%, the Court allowed the applications either in whole or in part. In those 140 decisions we reviewed, veterans were represented by counsel in 92 cases and were self-represented in 48 cases. The veterans represented by counsel were successful 72% of the time (66 out of 92 cases), while self-represented veterans were only successful 40% of the time (19 out of 48 cases).

While outside the scope of our study, given this significant disparity as well as the inherent complexity of court proceedings as compared to Board proceedings, there may be compelling public policy reasons to consider whether some type of additional funding should be set aside to help offset the legal fees incurred by veterans

[7] *Powell v. Canada (Attorney General)*, 2005 FC 433, [2005] F.C.J. No. 537 [*Powell*]
[8] The cases reviewed are chronologically listed in Appendix "A" to this Report.

when they challenge Board decisions in the Federal Courts. Again, however, we recognize that this is a matter best considered by Veterans Affairs Canada, the Veterans Ombudsman and the Board itself.

A second reason why veterans may be dissuaded from challenging the decision in the Federal Court (Trial Division) is the fact that the Federal Courts do not have the ability to substitute its decision for that of the Board. At best, the Federal Court (Trial Division) can compel the Board to reconsider an earlier decision. While the Court may also direct the Board to reconsider the decision in a particular manner, it does not mean that the Board will do so or that its decision will necessarily change.

Consequently, it is not uncommon for a veteran to successfully challenge a decision of the Board in court – only to have the Board reject their claim a second time. This can lead to a single veteran having to proceed to the Federal Court (Trial Division) more than once. While some veterans have the ability and financial means to challenge any subsequent rejections, many do not. Some 15 veterans have been forced into a cyclical loop of multiple Board proceedings and multiple Federal Court applications which have continued for several years.

Among the most troubling examples is the sequence of events which took place in a series of cases involving an unnamed RCMP veteran identified only as 'John Doe'. In respect of the same set of facts, successive Board decisions were the subject of three separate judicial review applications (1999, 2002 and 2004).[9] In each case, the Court referred the matter back to the Board with specific directions about how the case and the evidence should be considered.

The John Doe decisions concerned an individual who had been a member of the RCMP for 26 years. Mr. Doe developed certain medical conditions, and there was medical evidence presented to the Board that those conditions were linked to the stress he had experienced as a result of his service. The first Board decision refused to accept the uncontradicted medical evidence in support of the claim, believing instead that the stress should have been attributed to his personal life.

Mr. Doe successfully challenged the Board's decision in what was ultimately the first of the three judicial review applications. In that first case, the Court held that the Board had based its decision on a patently unreasonable error on a question of law. In setting aside the Board's decision, the Court then highlighted the specific medical evidence which had been presented by Mr. Doe. Despite these findings, the Board did not change its decision when reconsidering the matter.

As a result of the Board's continued refusal to grant him a pension, Mr. Doe was forced to seek recourse to the Federal Court (Trial Division) a second time – where he was again successful. The Court hearing the second judicial review application found, again, that the Board had made a patently unreasonable error in its consideration of the evidence and set aside the decision. Following this second Court decision, the Board awarded two fifths of a pension for one of the medical claims.

Believing that the Board had made yet another error in its consideration of the evidence before it, Mr. Doe sought judicial review a third time. As was the case in the first two challenges, the Court again found that the

[9] *John Doe v. Canada (Attorney General),* (February 5, 1999) T-59-98 (F.C.T.D.); *John Doe v. Canada (Attorney General)*, 2002 FCT 106, [2002] F.C.J. No. 157; *John Doe v. Canada (Attorney General)*, 2004 FC 451, [2004] F.C.J. No. 555

Board had made a patently unreasonable error in not taking into account the uncontradicted expert medical evidence. The Court also found that the Board had made an error of law in not correctly applying the terms of the *Pension Act*.

Mr. Doe was not the only veteran to have been subjected to this type of extreme procedural wrangling. It underscores a systemic deficiency in the entire process. Even where the Federal Courts have concluded the Board has made a patently unreasonable error, and has directed the Board to reconsider the case in view of their error, the Board may still uphold its earlier decision. The practical consequence being that a veteran may expend significant time, effort and money for a challenge that may not afford them the relief they deserve.

Moreover, and more importantly, the length of time spent in these disputes can have a profoundly negative impact on the value of the pension given to veterans – an issue that might be best described as retroactivity. Section 39 of the *Pensions Act* provides that a disability pension shall be made payable from the later of either the day on which the application was first made or the day three years before to the day on which the pension was awarded to the pensioner.

While the *Pension Act* further provides that the Board has the discretion to make an additional award, where it believes that pension should be awarded from a day earlier than the Act otherwise stipulates, the amount of the additional award cannot exceed an amount equal to an additional two years pension. In other words, in the best case scenario, the Board can only award a retroactive pension for a period of five years from the date of their decision.

Where many veterans are only awarded their pensions after protracted Board and Court proceedings, sometimes lasting the better part of a decade or more, this restriction on the retroactivity of the pensions can result in an unfair result. This is particularly true in those cases where the veteran has been repeatedly denied a pension in successive Board decisions that have later been set aside by the Federal Court (Trial Division) or Federal Court of Appeal.

This systemic issue, and the evident frustration of the Court, was recently made clear in *Arial v. Canada (Attorney General)*, where the Court concluded that Veterans Affairs Canada had failed to fulfill its duty to Mr. Arial and his family.[10] The Court noted that certain officials at Veterans Affairs Canada had not only provided incomplete or inaccurate information about Mr. Arial's entitlement to a pension, in some respects they had misled the Arial family.

The issue in *Arial* concerned a veteran who had made an initial request for a pension in 1996. The various legal proceedings which followed would run until 2011. Because of the statutory limitation in the *Pension Act*, the maximum retroactive award that could be given by the Board was five years from the date of its last decision. While the Court was constrained in the remedy it could give, it held the decision was unfair given that Veterans Affairs Canada erred in 1996.

A related issue is the length of delay which occurs between when a Board decision is set aside by the Courts and when it is reconsidered by the Board. Based on the information contained in the Board decisions that

[10] *Arial v. Canada (Attorney General)*, 2011 FC 848, [2011] F.C.J. No. 1051

were available to us, we calculated that the time lag between a decision of the Federal Court and any subsequent Board decision is approximately 260 days. There are signs, however, that the situation is improving. Prior to 2005 the average length of time was approximately, 395 days, but since 2005 the average length of time has reduced to 171 days.

These calculations are only estimates based on the limited information provided. Prior decisions of the Board are not easily accessible to members of the general public, including veterans trying to prepare for their own hearings before the Board. We understand that the Board may, in the future, publish decisions on its website, which would greatly assist all concerned. Moreover, we also recognize that these estimates do not address the broad range of factors which can contribute to administrative delays – some of which would be beyond the Board's control.

The estimates, or the trends that they suggest, are nevertheless important to veterans because for every day that the Board is delayed in hearing, and then deciding, a given case, the veteran's entitlement may be lessened. While they still may be awarded the full five year retroactive payment discussed above, it is the timeframe moving forward which is condensed. Consequently, the cumulative value of the pension over the veteran's lifetime could be reduced as a direct result of administrative delays.

Finally, we note in passing that the Federal Courts have not yet had an opportunity to review a Board decision which related to the New Veterans Charter (*Canadian Forces Members and Veterans Re-establishment and Compensation Act*[11]), which came into force on April 1, 2006. While the Federal Courts have not yet considered a Board decision related to the New Veterans Charter, which therefore takes it outside the primary focus of this report, we note that it contains no provision addressing retroactivity or payment of interest.

In summary, while veterans have the option to challenge an unfavourable or otherwise unsatisfactory Board decision in the Federal Courts, our review identified a number of systemic issues which could deter them from exercising that option. To the extent that some veterans may not be able to afford a costly court challenge, and where the outcome of any such challenge does not guarantee subsequent success before the Board, the option may be more illusory than real.

[11] S.C. 2005 c. 21

TRENDS IN FEDERAL COURTS DECISIONS

In the course of conducting our analysis of the various Federal Courts decisions which have reviewed decisions by the Board, we were able to identify certain common trends. Most notably, we determined that the cases where the Courts had set aside a Board decision often shared similar errors of fact and law – most relating to how the Board had interpreted or applied either the *Veterans Review and Appeal Board Act* or the *Pension Act*.

The Federal Courts have upheld approximately 40% of the Board decisions which have been challenged by either the veterans themselves or their dependents. In those cases, the Courts have adopted or endorsed the Board's analysis of the facts and its interpretation of the relevant statutory regimes. In some cases, the Courts have even provided guidance to the Board with respect to how it should interpret applicable statutes in the future.

For the purposes of our analysis, however, our focus was necessarily on the 60% of cases where the Federal Court (Trial Division) or Federal Court of Appeal had set aside or quashed the decisions of the Board. It was these decisions, many replete with strong language from the Court, which identified the most common errors of fact and law made by the Board. The sections which follow will describe these errors and provide some examples of how they have negatively impacted veterans.

FAILURE TO LIBERALLY CONSTRUE STATUTORY REGIME

Section 3 of the *Veterans Review and Appeal Board Act* and section 2 of the *Pension Act* expressly provide that the Board shall liberally construe and interpret the provisions of those Acts as well as any other Act of Parliament conferring or imposing jurisdiction on the Board. As earlier noted, section 3 of the *Veterans Review and Appeal Board Act* was intended to help recognize the obligation of the people and Government of Canada to those who have served their country and their dependents. [12]

Despite this direction from Parliament, the Federal Courts have determined in a number of cases that the Board has failed to "liberally construe" the provisions of both its enabling statute as well as the provisions of the *Pension Act*. In fact, the Courts have held that the provision is in addition to the common law obligation to adopt a liberal and generous approach to the interpretation of any social welfare legislation.

The majority of these cases arise where the Board has found that a veteran was not 'on duty'. When considering whether to grant a pension, the Board is required to consider whether the medical issues, injuries or disabilities claimed arise out of, or was directly connected with, their service. In a number of cases, the Federal Courts have found that the Tribunal made errors of law by too narrowly construing what activity was or was not part of a veteran's service.

Chief among these, and arguably the most disconcerting, was the Federal Court (Trial Division)'s decision in *R.E.C. v. Canada (Attorney General)*.[13] The decision considered the Board's refusal to grant a pension to a

[12] *Veterans Review and Appeal Board Act*, *supra*, s. 3
[13] *R.E.C. v. Canada (Attorney General)*, [1998] F.C.J. No. 1420, (1998) 155 F.T.R. 306

female member of the Canadian Armed Forces who was victim of a sexual assault while on temporary assignment at CFB Halifax and while sleeping at the shared living quarters on base. The Board held that because she was asleep, she was not engaged in military training.

The Court in *R.E.C.* noted that the veteran had been required, as part of her military duties, to sleep in the quarters at CFB Halifax provided by military authorities, and, in that sense, was no different than if she had been assigned sleeping quarters on a naval vessel at sea. Moreover, the Court held that while the Board was seized with the fact that she was sleeping, that activity should have been viewed as a normal human activity directly connected to her service.

As the Court concluded: "If she had not been where she was, when she was, she would have been in breach of her orders and very possibly subject to discipline. Equally, of course, if she had not been where she was, when she was, she would not have been the victim of this vicious attack."[14] For these reasons, the Court determined that the Board had erred in law in its application and interpretation of both the *Veterans Review and Appeal Board Act* and the *Pension Act*.

In *Frye v. Canada (Attorney General)*, the Federal Court of Appeal reviewed a decision by the Board in which a career soldier was killed when he was struck by tractor trailer on his way back to camp after having gone for a swim.[15] The solider had been recalled to duty from his annual leave for immediate deployment to fight forest fires in British Columbia, and, for the period of his deployment, was considered 'on duty' 24 hours a day, seven days a week.

The veteran's widow was refused a pension by Veterans Affairs Canada on the basis that she had not established that the death "arose out of or was directly connected with" his military service. This refusal was then upheld by the Board, and the widow was forced to challenge the Board's decision in the Federal Court (Trial Division). The Court set aside the Board's decision and remitted the matter to the Board, but that decision was appealed to the Federal Court of Appeal by the Crown.

The Federal Court of Appeal held that the Board had both a common law and statutory obligation to liberally construe the applicable provisions of the *Pension Act*. It then explained that the *Veterans Review and Appeal Board Act* as a whole, not merely section 3, further supports a liberal and generous interpretation and application of the Act. Not only does it require a liberal interpretation, it requires the Board to draw every reasonable inference in favour of the claimant.

Applying this principle to the Board's decision, the Federal Court of Appeal agreed with the lower Court decision that the Board had erred in law by not having liberally construed the relevant provisions of the *Pension Act*. More specifically, the Court of Appeal held that the Board had erred in treating recreational activities and military service as mutually exclusive categories – which was inconsistent with the liberal and generous interpretative approach required by law.

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[14] *Ibid.* at para. 7

[15] *Frye v. Canada (Attorney General)*, 2005 FCA 264, [2005] F.C.J. No. 1316

The distinction between the Board considering a specific military duty and the statutory requirement that an injury arise as a result of military service was also an issue for the Federal Court (Trial Division) in *Bradley v. Canada (Attorney General)*.[16] In that case, the veteran in question suffered back injuries when he slipped in the shower while serving on board the Canadian destroyer escort *HMCS Qu'Appelle*. The Board denied multiple claims on the basis that he was not 'on duty'.

The Court in *Bradley* criticized the Board for approaching the claim in a "bureaucratic, narrow and parsimonious manner", which it viewed as being entirely inconsistent with the statutory regime as well as the decisions of the Courts: "It is not sufficient to pay lip service to the generous reading and application of the legislation which Parliament intended, this Court has affirmed and which members of the Armed Forces deserve."[17]

The Board was further criticized for what the Court termed as "slicing and dicing" or "dissecting every activity minutely as to whether it was a military duty."[18] By way of analogy, the Court stated that if the veteran had been burned by coffee, the Board would have analysed the case from the perspective of whether it had occurred "on the bridge or on the mess deck" and whether it was due to a "passing ship and, if so, what type of ship."[19]

Instead, the Court held that the legal test the Board should have considered was whether cause of the injury arose from military service. Instead, the Board focused on whether the veteran was performing a "specific military function or duty at the specific moment of the injury", rather than whether the veteran's injury arose from his being in military service as required by the *Pension Act*.[20] On that basis, the Court found the Board's decision to be unreasonable.

In summary, the Federal Courts jurisprudence shows that a failure by the Board to "liberally construe" the provisions of both its enabling statute and *Pension Act*, has had a negative impact on veterans. This is most acutely demonstrated by cases where the Board has assessed the meaning of 'on duty' in an overly narrow manner. To the extent that changes can be implemented to materially decrease the likelihood of this occurring in the future, such changes will benefit veterans.

FAILURE TO ACCEPT UNCONTRADICTED EVIDENCE

Section 39(b) of the *Veterans Review and Appeal Board Act* states that the Board shall "accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances." The Federal Courts have found in several cases that the Board failed to comply with this provision by refusing to accept uncontradicted evidence, including medical evidence, presented by veterans or their dependents.

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[16] *Bradley v. Canada (Attorney General)*, 2011 FC 309, [2011] F.C.J. No. 389
[17] *Ibid*. at para. 20
[18] *Ibid.* at para. 21
[19] *Ibid*.
[20] *Ibid*. at para. 31

In *Bremner v. Canada (Attorney General)* the Federal Court (Trial Division) reviewed a decision of the Board in which it had rejected a claim for a disability pension made by a veteran of the Second World War.[21] Mr. Bremner enlisted in the Canadian Armed Forces in 1942, and served in active duty in Europe. He landed on Juno Beach at Normandy a few days after D-Day, and later suffered injuries to his back when he fell from a Bren gun carrier while under Nazi fire in France.

Mr. Bremner's service records show that when he joined the Army, he had no back injury or other health problems. When he was discharged in January 1946, however, the Medical Officer responsible reported that he complained of having pain in his back and that his back got stiff after hard work. The medical report documented that Mr. Bremner fell on his back in December 1944, after which he had pain for more than a week.

In 1991, Mr. Bremner applied to the Canadian Pension Commission for a pension based on his condition of degenerative disc disease lumbar spine, as a result of his injuries suffered while on active service. The Commission denied the claim on the basis that the condition was a "post discharge development".[22] That finding was made notwithstanding that Mr. Bremner's doctor had prepared a letter which stated the back pains originated from the injuries in 1944.

Mr. Bremner was forced to appeal the decision both to the Canadian Pension Commission Entitlement Board, and then later to the Veterans Appeal Board ("VAB") – as it then was. Both of these bodies rejected his claim. As the Federal Court (Trial Division) would subsequently note, the Veterans Appeal Board decision was particularly difficult to accept where they appeared to both accept the findings of fact about the accidents in 1944 but then state that the accidents could not be substantiated.

Mr. Bremner appealed the decision to the Veterans Review and Appeal Board, presenting additional evidence both from his doctor as well as a supporting letter from a chiropractor. In rejecting his claim, the Board held the medical opinions were speculative, not supported by any documented factual medical evidence and based on the history provided by the veteran. The Board instead preferred the evidence of the Pensions Medical Advisory Division.

In setting aside the Board's decision, the Court noted that the Board was required to accept any credible uncontradicted evidence. To that end, the Court concluded that the medical opinions provided were credible and, moreover, that there was no contradictory evidence before the Board. At most, the Board had an inconsistent opinion, from the Pensions Medical Advisory Division, which was based solely on documents and not on a physical examination of Mr. Bremner.

A similar set of facts was discussed in *Powell v. Canada (Attorney General)*, which concerned a retired airborne paratrooper.[23] The veteran, Mr. Powell, suffered from pain in his knees which impacted his ability to earn a living. The Board had rejected Mr. Powell's claim for a disability pension related to his knee injury on

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[21] *Bremner v. Canada (Attorney General)*, 2006 FC 96, [2006] F.C.J. No. 122
[22] *Ibid*. at para. 5
[23] *Powell*, *supra* note 6

the basis that there was no documented medical or other evidence of significant service-related injuries which could be considered to have caused the disability.

Mr. Powell's claim was supported both by his and his wife's testimony, as well as a medical opinion which concluded that the "main contributory factor" for the disability was Mr. Powell's history of jumping out of airplanes for the military. All of this evidence, however, was rejected by the Board on the basis that it was not supported by documented evidence of injuries at the time of the service. The Court in *Powell* concluded that this was an unreasonable determination.

First, the Court noted that the Board is required – pursuant to section 39 of the *Veterans Review and Appeal Board Act* – to accept any uncontradicted evidence that it finds credible. In *Powell*, the Board did not suggest that either the veteran's testimony or the supporting medical opinion were not credible. Consequently, absent any contradictory evidence, the Court held that the Board was required to accept the evidence provided.

Second, the Court was critical of the Board's finding to the extent that it seemed to state that it would not accept any evidence or medical opinions if they were not supported by documentation found on the veteran's service file. The Court explained that this went beyond what was set out in the *Veterans Review and Appeal Board Act*, and, moreover, that the veteran had provided a reasonable explanation for why his service record did not reflect the injuries.

This second issue is one that has been encountered in a number of cases. A number of veterans have explained that at the time of their service they did not report injuries or other medical issues out of a fear of being considered a "complainer". As the Court in *Powell* noted: "One does not have to be steeped in military culture to understand that proud members of the armed forces do not wish to be perceived as complainers or malingerers."[24]

In some respect, this is the classic example of a 'Catch-22'. Members of the military do not mention injuries or other medical issues in an effort to complete their service to Canada. When those medical conditions worsen in the future, they can be denied a disability pension on account of the fact that the service record shows no evidence of the underlying medical issues. As noted in *Powell*, the Board has at times struggled with how to address these types of issues.

In summary, where the Board has failed to accept uncontradicted evidence, in particular medical evidence, there is obviously a negative impact on veterans. While the Board can reject uncontradicted evidence if it determines that the evidence is not credible in the circumstances, the Board must provide very detailed reasons describing the circumstances which make uncontradicted medical evidence not credible.[25] The transparency and fairness of the process is improved by detailed reasons on such a fundamental issue.

[24] *Ibid*. at para. 33
[25] *Comeau v. Canada*, [2004] F.C.J. No. 1323

FAILURE TO GIVE BENEFIT OF EVIDENCIARY PRESUMPTIONS

Section 39(a) of the *Veterans Review and Appeal Board Act* provides that in all proceedings the Board shall: "draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant." Yet, the Federal Court (Trial Division) has found in several cases that the Board failed to comply with this provision by either refusing to draw inferences favourable to the veteran or, worse, drawing adverse inferences.

In *Metcalfe v. Canada*, the Court reviewed a decision of the Board concerning a veteran of both the Second World War and the Korean War.[26] During the Second World War, Mr. Metcalfe was an air gunner and was awarded the Distinguished Flying Medal. During the Korean War, Mr. Metcalfe served in the artillery. As part of his service in the artillery, Mr. Metcalfe was exposed to excessive noise from the use of, among other weapons, 60mm mortars.

After being discharged from the Army, Mr. Metcalfe returned to his position on the Toronto Police Force. It was at this time that he began to experience hearing problems, but it was only after he consulted a specialist in 1976 that he learned that his hearing problems could be pensionable. The specialist wrote to the Canadian Pension Commission Medical Examiner, stating there was a "strong possibility that this injury was partially caused" by his active military service.[27]

Despite the medical opinion offered by the specialist, Mr. Metcalfe's pension claim was dismissed on the basis that his hearing loss was not sufficiently serious to be pensionable, and, moreover, that there was insufficient evidence to attribute the hearing loss to military service. When his hearing loss became more serious, Mr. Metcalfe made a second claim for a disability pension. This second claim was also rejected – a decision that was upheld by the Board.

The Court in *Metcalfe* ultimately concluded that the Board erred in law by basing its refusal on a finding of fact that "in light of the evidence before it and the relevant statutory provisions, was patently unreasonable."[28] More specifically, the Court noted that the Board denied Mr. Metcalfe's claim notwithstanding that it had accepted the evidence that he was exposed to excessive noise while on military service and that his hearing was seriously impaired.

The Court wrote: "the Board could only have reached its conclusion by misdirecting itself on the effect of section 39…While paragraphs (a), (b) and (c) of this section may not create a reverse onus by requiring the respondent to establish that a veteran's injury or medical condition was not attributable to military service, they go a considerable way in this direction by requiring, in effect, that claimants be given the benefit of any reasonable doubt."[29]

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[26] *Metcalfe v. Canada*, [1999] F.C.J. No. 22, (1999) 160 F.T.R. 281
[27] *Ibid*. at para. 4
[28] *Ibid*. at para. 23
[29] *Ibid*. at para. 17

On the facts of the case before it, the Court explained that while nobody could be absolutely certain whether a causal link existed between the excessive noise to which Mr. Metcalfe was exposed and his subsequent hearing loss, he had still provided sufficient credible evidence about the cause of his hearing loss that if the Board had resolved any doubts it had about the link in favour of Mr. Metcalfe – and complied with section 39 – it must in law have upheld his claim.

The decision in *Metcalfe* is very similar to a matter considered by the Federal Court (Trial Division) in *King v. Canada (Veterans Review and Appeal Board)*.[30] The facts in *King* concerned a 32 year veteran of the Canadian Armed Forces who had contracted Type A Hepatitis while deployed in Sardinia on authorized temporary duty to participate in NATO training exercises. B/Gen. King claimed that the Hepatitis infection occurred as a result of his having eaten tainted seafood.

While B/Gen. King did not suffer any disability as a direct result of the Hepatitis, he did suffer continuing disabilities as a result of the Genitourinary Tuberculosis which was, in whole or in part, a consequence of the earlier Hepatitis infection. The 1997 decision of the Federal Court (Trial Division) was, the first in a series of proceedings which B/Gen. King was forced to endure in what ultimately was a five year battle for his pension entitlement.

In the decision under review in *King*, the Board had concluded that B/Gen. King had contracted Hepatitis as a result of an off duty activity. Specifically, the Board concluded that B/Gen. King had contracted Hepatitis as a result of eating mussels at a local restaurant in a small village in Sardinia. The Board essentially concluded that because he chose to eat off base, it could not be said that the resulting Hepatitis arose out of his military service.

In quashing the Board's decision, the Court noted that the only direct evidence on the record about the origins of the mussels was from B/Gen. King himself. And, more importantly, B/Gen. King's evidence had been that he didn't know whether it the tainted seafood was consumed either in a local restaurant or in the all-ranks mess on the base – where mussels were regularly served. There was no direct evidence that the mussels had been eaten off base.

In light of the foregoing, and the express language in section 39 of the *Veterans Review and Appeal Board Act*, the Court determined that the Board's decision was patently unreasonable. As in *Metcalfe*, while nobody could be absolutely certain that there was a causal link between mussels eaten on base and the Hepatitis, if the Board had any doubt about the location where the tainted seafood was consumed it was required to resolve those doubts in B/Gen. King's favour.

In summary, where the Board has failed to give veterans the benefit of any evidentiary presumption, there is obviously a negative impact on veterans. As with situations where the Board rejects uncontradicted evidence, when the Board elects not to draw inferences in favour of the veteran, it would significantly benefit veterans if the Board were to always provide very detailed reasons describing why the inference was not drawn.

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[30] *King v. Canada (Veterans Review and Appeal Board)*, [1997] F.C.J. No. 1517, (1997) 138 F.T.R. 15; *King v. Canada (Veterans Review and Appeal Board)*, 2001 FCT 535, [2001] F.C.J. No. 850

FAILURE TO ENSURE PROCEDURAL FAIRNESS

As a quasi-judicial administrative tribunal, the Board owes a common law duty of fairness to parties appearing before them. While the circumstances of a given case will dictate what is required to ensure procedural fairness, the most common requirement includes providing sufficient reasons in support of a decision or allowing a party to have access to all of the evidence considered by Board members in making their decision.

Our review of the Federal Courts decisions identified a number of cases where a Board decision was set aside on the basis that the Board failed to discharge its duty of procedural fairness. While these examples may not point to specific deficiencies in the *Veterans Review and Appeal Board Act*, they are further evidence of the need for further procedural safeguards to ensure that veterans appearing before the Board are treated in a fair manner.

One of the most recent examples under this heading would be the Federal Court (Trial Division) and Federal Court of Appeal decisions in *Ladouceur v. Canada (Attorney General)*, where both Courts held that the Board failed to provide the veteran in question with the appropriate degree of procedural fairness.[31] More specifically, the Courts determined that the Board improperly relied on a medical opinion that was not disclosed to the veteran during the proceedings.

Citing the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal held that the level of procedural fairness afforded to veterans in Board cases should be "quite high" given the importance of the matter to the veteran.[32] Applying that standard to the facts of the case before them, the Court concluded that the Board failed to meet it in how it handled the medical advice.

In essence, the Board sought to rely on its statutory ability to receive and consider medical advice. Yet, it did not disclose the advice it had received to Mr. Ladouceur. The Court held that procedural fairness required the Board to not only disclose the medical advice it had received, but also give Mr. Ladouceur an opportunity to test, challenge or rebut it. By failing to provide these basic procedural rights, the Board made a reversible error.

A similar error was identified by the Federal Court (Trial Division) in *Deschênes v. Canada (Attorney General)*, where the Court set aside a decision of the Board in which it had simply relied on passages from medical textbooks to dismiss a medical report prepared by the veteran's gastroenterologist.[33] As in *Ladouceur*, the external sources were not brought to Mr. Deschênes' attention and he was not given an opportunity to make submissions in response.

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[31] *Ladouceur v. Canada (Attorney General)*, 2011 FCA 247, [2011] F.C.J. No. 1287
[32] *Ibid*. at para. 21
[33] *Deschênes v. Canada (Attorney General)*, 2011 FC 449, [2011] F.C.J. No. 623

FAILURE TO ACCEPT NEW EVIDENCE

Sections 34, 39 and 111 of the *Veterans Review and Appeal Board Act* provide that the Board may, on its own motion, reconsider certain types of decisions made either by it or by a predecessor body (e.g. Veterans Appeal Board, the Pension Review Board, and the War Veterans Allowance Board) if there was an error made with respect to any finding of fact, an error made with respect to the interpretation of any law, or new evidence is presented.

While there is no statutory definition of the term "new evidence" in the *Veterans Review and Appeal Board Act*, the Federal Court (Trial Division) set out the test to be applied by the Board to determine whether new evidence has been presented in *Mackay v. Canada (Attorney General)*.[34] In that decision, the Court held that the Board should follow the test and principles for new evidence previously outlined by the Supreme Court of Canada in *Palmer v. The Queen*.[35]

The 'new evidence' test in *Palmer* provides, first, that new evidence should generally not be admitted if it could have been adduced at a hearing. Second, the evidence must be relevant in the sense that it bears upon a decisive or a potentially decisive issue. Third, the evidence must be credible, in the sense that it is reasonably capable of belief. Fourth, if believed, the new evidence must reasonably be expected to have affected the result.[36]

The case under review in *MacKay* related to a veteran of the Canadian Armed Forces who, while on duty in 1958, was involved in a motor vehicle accident. The veteran experienced some neck pain at the time, but did not mention it out of fear that he would be "perceived a maligner" by his fellow soldiers.[37] After his discharge in 1960, the veteran continued to experience neck pain of varying degrees of severity at various times.

The veteran, Mr. MacKay, first sought a pension for his condition in 1988, after having received a medical diagnosis. Mr. MacKay's pension claim included a medical report prepared by his family doctor, which noted that it would be possible to relate the pain described to the accident in 1958. Later that same year, the pension claim was rejected by the Canadian Pension Commission on the basis that the disability was found to be age-related and not related to his military service.

Two years later, in 1990, Mr. MacKay's appeal to the Entitlement Board of the Canadian Pension Commission was also dismissed. Following this second rejection, Mr. MacKay sought an additional medical report which said that the uncommon experience of twenty-five years of gradually increasing neck pain is usually associated with a traumatic injury. As had the original medical report, this second report concluded the neck pain could be linked to the accident.

Despite this second medical report, the VAB upheld the Entitlement Board's decision. The VAB held that the second medical report did not raise a doubt about the Entitlement Board's decision. Following this further

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[34] *Mackay v. Canada (Attorney General)*, [1997] F.C.J. No. 495, (1997) 129 F.T.R. 286 [*MacKay*]
[35] *Palmer v. The Queen* (1979), 106 D.L.R. (3d) 212 (S.C.C.) [*Palmer*]
[36] *Palmer* cited in *Mackay, supra* note 30, at para. 26
[37] *Mackay*, *supra* note 30, at para. 3

rejection, Mr. MacKay obtained another medical report detailing how an early violent whiplash could predispose patients to later cervical disc disease. The VAB refused to reconsider its earlier decision in light of the new report.

In 1995, pursuant to the systemic changes made pursuant to the *Veterans Review and Appeal Board Act*, the VAB was replaced by the present Board. Mr. MacKay asked the new Board to review the previous VAB decision in light of another medical report he had obtained from a different doctor. The new medical report stated that it was possible, even probable, that Mr. MacKay's cervical symptoms are connected to the 1958 motor vehicle accident.

In a letter dated June 1996, the Board refused to reconsider the earlier VAB decision. The stated reason for the refusal was that the new medical report was believed to be 'speculative', and, as a result, did not outweigh the medical evidence already available and considered by the VAB. On that basis, the Board concluded that there was no 'new evidence', and, consequently, that it would not review the earlier decision.

Mr. MacKay challenged the Board's decision in the Federal Court (Trial Division), and was ultimately successful. Applying the 'new evidence' test in *Palmer*, the Court concluded that the last medical report met the criteria for new evidence: MacKay had not failed to exercise due diligence in obtaining the report; the report concerned a decisive issue that was relevant to the earlier decision; and the report could have had a determinative result if it had been accepted.

A similar decision was reached by the Court in *Saumure v. Canada (Attorney General)*.[38] In that case, Ms. Saumure had sought a pension for certain disabilities related to a sexual assault she claimed had occurred while she was a recruit at CFB Cornwallis. After her claim was rejected by the Board, Ms. Saumure consulted a psychologist who found that her symptoms were characteristic of chronic maladjustment as a result of post traumatic stress disorder (PTSD).

Armed with the psychologist's letter, Ms. Saumure applied to the Board to reconsider its earlier decision – it refused. In rejecting the request, the Board held that the psychologist's letter did not constitute "new evidence that could be expected to persuade the Board that the Appellant's condition is connected with service, in a manner that would give rise to pension entitlement."[39] Rather, it simply noted that the letter was a "confirmation of diagnosis".[40]

Ms. Saumure challenged the Board's rejection by way of Application to the Federal Court (Trial Division). The Court, in turn, was unable to determine the exact basis upon which the Board had concluded that the psychologist's letter was not new evidence. While the Board had accurately quoted the four-part test in *Palmer* and *MacKay*, it did not specify which of the four branches of the test it found were not met that case – only that the letter was not 'new evidence'.

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[38] *Saumure v. Canada (Attorney General)*, 2002 FCT 998, [2002] F.C.J. No. 1319
[39] *Ibid.* at para. 10
[40] *Ibid.*

Absent clear reasons, the Court interpreted the Board's decision as indicating that "the letter was not credible evidence in the absence of supporting evidence, and that it could not reasonably be expected to have affected the result in this case."[41] The Court then concluded that the Board erred in finding the letter not to be credible evidence, and, moreover, that if the letter had been believed it would constitute evidence that Ms. Saumure's PTSD was linked to her service.

In summary, the failure to accept new evidence is an error which can have a significant negative impact on veterans. Moreover, the importance of accepting new medical evidence is heightened when the Board has previously rejected uncontradicted medical evidence, or required additional medical evidence. To permit new evidence in such circumstances is consistent with both the provisions of the Board's enabling statute and the *Pension Act*.

[41] *Ibid.* at para. 15

STATISTICS

In the course of our review of the various Federal Courts decisions, we noted several interesting statistical trends which offer further insight into the challenges faced by veterans. As noted, we reviewed some 140 decisions of the Federal Court (Trial Division) and 11 decisions of the Federal Court of Appeal in which decisions of the Board were reviewed. Veterans were successful in approximately 60% of these cases.

The vast majority of the veterans who challenged the Board in Federal Court (Trial Division) were members of the Canadian Armed Forces. Only 23 of the applications for judicial review were made by retired RCMP officers. Further, the vast majority of applicants were applying for a pension under section 21(2) of the *Pension Act*, for injuries suffered in service during peacetime. Applications under Section 21(1) of the *Pension Act*, for service during wartime, represented less than 10% of the cases.

We also thought it was noteworthy that veterans who were represented by counsel were much more likely to be successful before the Court than their unrepresented counterparts. In the 140 cases before the Federal Court (Trial Division), veterans were represented by counsel in 92 cases. The veterans represented by counsel were successful 72% of the time (66 out of 92 cases), while self-represented veterans were only successful 40% of the time (19 out of 48 cases).

These statistics are important given the impact of success before the Federal Courts. Based on the information available to us, which was principally drawn from Board reconsideration decisions, where the Court has ruled in favour of a veteran the Board, after reconsidering the matter, has subsequently awarded either all or some of the pension benefits requested approximately 63% of the time. In the remaining cases, where the Board again rejected the claim by the veteran, the Board generally – though not always - provided more detailed and cogent reasons for their decision.

In terms of the types of errors made by the Board, the most common error was the Board's failure to accept uncontradicted medical evidence presented by the applicant. The Federal Court (Trial Division) quashed the Board's decision on this basis in some 38 cases. Most often, the Federal Court (Trial Division) stated that the Board should either accept the medical evidence or, instead, should have provided reasons outlining why it did not find the evidence to be credible.

The second most common error, which occurred in some 22 cases, was the Board's failure to apply the statutorily required evidentiary presumptions as found in sections 3 & 39 of the *Veterans Review and Appeal Board Act*. In these cases, the Federal Court (Trial Division) found that the Board did not resolve doubts in the veteran's favour regarding whether their disability was attributable to their military service.

CONCLUSIONS

In reviewing the Federal Courts decisions related to the Board, we have identified certain systemic issues that we believe warrant further attention. In addition, we determined the five most common grounds upon which Board decisions have been quashed or set aside. It is our opinion that these errors share a common root cause, one which undermines the Board's ability to truly give veterans the benefit of the doubt and draw every favourable inference from the evidence presented by the veteran.

Under the current statutory regime, the veteran bears the onus of proving that they are legitimately entitled to the benefits they have been denied. This requires the veteran, not Veterans Affairs Canada, to compile and lead all of the evidence required to demonstrate their entitlement on a balance of probabilities. The result is that veterans, who are already suffering from a range of medical conditions, disabilities and injuries, must suffer the further indignity of having to prove they are entitled to the benefits claimed.

A clear trend in the Federal Court (Trial Division) and Federal Court of Appeal decisions is the difficulty that the Board has had when it seeks to reconcile its obligation to give veterans the benefit of the doubt and draw favourable inferences from the evidence presented with what it perceives as its overarching obligation to ensure that veteran demonstrates their entitlement to the pension. The balancing of those competing concepts has led the Board to make errors in fact and law.

As the Courts have noted, the current regime goes a considerable way in the direction of establishing a reverse onus on the government. In an effort to avoid future errors, and to ensure that the favourable presumptions contained in the *Veterans Review and Appeal Board Act* are applied to the full benefit of veterans, the Veterans' Ombudsman could ask Parliament to consider whether the onus of proof should be fully reversed – meaning that when a decision to deny a pension is challenged by a veteran, it would be the government who would bear the burden of proving to the Board that the denial was correct.

Not only would the government be in a far better position to defend its decisions, having vastly superior resources than any individual veteran, the knowledge that its decisions might be more easily challenged could instil a further rigour in the original decision-making process. The Board could then examine the evidence presented by the government while still giving the full benefit of the doubt and every other favourable presumption to the veteran.

Beyond the legal errors which we identified in the course of our review, we were also able to identify some additional systemic issues which could negatively impact veterans. These issues included the financial and other burdens which can deter veterans from challenging unfavourable or otherwise unsatisfactory decisions in the Federal Courts; the limited public availability and general absence of information about prior Board decisions; as well as impact of administrative delays on retroactive payments.

Finally, we wish to underscore the fact that our review of the Federal Court (Trial Division) and Federal Court of Appeal decisions did not disclose any bias against veterans on the part of the Board or its members. To be certain, the majority of Board decisions are not challenged in the Federal Courts – and, to be fair, many of the decisions which have been challenged were upheld by the Courts. Any failings we discovered were purely systemic, and not personal, in nature.

In addition, it is our view that there is a clear and continuing benefit for veterans in having an independent quasi-judicial body tasked with reviewing government decision where a veteran has been denied a pension or other benefits. To the extent that the Board can provide veterans with an informal and expeditious review of such decisions, we believe that it can continue to help veterans secure the pension benefits to which they are entitled and deserve.

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Chart of Judicially Reviewed Veterans Review and Appeal Board Decisions

#	Case name & citation	Court	Judgment date	Decision	Representation	Error Identified by Court
1	Mackay v. Canada (Attorney General), [1997] F.C.J. No. 495	FC	97-04-24	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
2	Ewing v. Canada (Veterans Reviews and Appeal Board), [1997] F.C.J. No. 1346	FC	97-10-15	Application Granted	Lawyer	Incorrect Legal Test
3	King v. Canada (Veterans Review and Appeal Board), [1997] F.C.J. No. 1517	FC	97-11-07	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
4	Henderson v. Canada (Attorney General), [1998] F.C.J. No. 85	FC	98-01-13	Application Dismissed	Lawyer	
5	Brychka v. Canada (Attorney General), [1998] F.C.J. No. 124	FC	98-02-02	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
6	Leclerc v. Canada (Attorney General), [1998] F.C.J. No. 153	FC	98-02-09	Application Dismissed	Lawyer	
7	Hunt v. Canada (Minister of Veterans Affairs), [1998] F.C.J. No. 377	FC	98-03-20	Application Dismissed	Lawyer	
8	MacLeod v. Canada (Veterans Review and Appeal Board), [1998] F.C.J. No. 428	FC	98-04-03	Application Dismissed	Lawyer	
9	Hall v. Canada (Attorney General), [1998] F.C.J. No. 890	FC	98-06-22	Application Dismissed	Self-Represented	
10	MacNeill v. Canada, [1998] F.C.J. No. 1115	FC	98-08-04	Application Dismissed	Lawyer	
11	Weare v. Canada (Attorney General), [1998] F.C.J. No. 1145	FC	98-08-11	Application Dismissed	Self-Represented	
12	R.E.C. v. Canada (Attorney General), [1998] F.C.J. No. 1420	FC	98-09-29	Application Granted	Lawyer	Incorrect Legal Test
13	Matchee v. Canada (Attorney General), [1999] F.C.J. No. 1	FC	99-01-05	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
14	Metcalfe v. Canada, [1999] F.C.J. No. 22	FC	99-01-06	Application Granted	Self-Represented	Failure to Apply Evidentiary Presumptions
15	Bradley v. Canada (Attorney General), [1999] F.C.J. No. 144	FC	99-01-27	Application Granted	Self-Represented	Incorrect Legal Test
16	MacDonald v. Canada (Attorney General), [1999] F.C.J. No. 346	FC	99-03-11	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
17	Gavin v. Canada (Attorney General), [1999] F.C.J. No. 676	FC	99-05-07	Application Dismissed	Lawyer	
18	MacLeod v. Canada (Veterans Review and Appeal Board), [1999] F.C.J. No. 766	FCA	99-05-18	Appeal Dismissed	Lawyer	
19	McTague v. Canada (Attorney General), [1999] F.C.J. No. 1559	FC	99-09-30	Application Dismissed	Lawyer	
20	Hunt v. Canada (Minister of Veterans Affairs), [1999] F.C.J. No. 1601	FCA	99-10-18	Appeal Dismissed	Lawyer	

#	Case name & citation	Court	Judgment date	Decision	Representation	Error Identified by Court
21	Hall v. Canada (Attorney General), [1999] F.C.J. No. 1800	FCA	99-11-19	Appeal Dismissed	Self-Represented	
22	Cundell v. Canada (Attorney General), [2000] F.C.J. No. 38	FC	00-01-13	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
23	King v. Canada (Attorney General), [2000] F.C.J. No. 196 (Robert)	FC	00-02-11	Application Granted	Lawyer	Incorrect Legal Test
24	Schut v. Canada (Attorney General), [2000] F.C.J. No. 424	FC	00-04-06	Application Dismissed	Lawyer	
25	Trainor v. Canada (Attorney General), [2000] F.C.J. No. 503	FC	00-04-18	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
26	Teubert v. Canada (Attorney General), [2000] F.C.J. No. 1509	FC	00-09-18	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
27	Shmyr v. Canada (Attorney General), [2000] F.C.J. No. 1673	FC	00-10-06	Application Dismissed	Lawyer	
28	Wood v. Canada (Attorney General), [2001] F.C.J. No. 52	FC	01-01-19	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
29	Schott v. Canada (Attorney General), [2001] F.C.J. No. 126	FC	01-01-25	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
30	Desloges v. Canada (Attorney General), [2001] F.C.J. No. 775	FC	01-05-18	Application Granted	Self-Represented	Incorrect Legal Test
31	King v. Canada (Veterans Review and Appeal Board), [2001] F.C.J. No. 850	FC	01-05-29	Application Granted	Lawyer	Incorrect Legal Test
32	MacDonald v. Canada (Attorney General), [2001] F.C.J. No. 1014	FC	01-06-21	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
33	Rivard v. Canada (Attorney General), [2001] F.C.J. No. 1072	FC	01-06-26	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
34	Tousignant v. Canada (Minister of Veterans Affairs), [2001] F.C.J. No. 1083	FC	01-07-03	Application Dismissed	Lawyer	
35	Bradley v. Canada (Attorney General), [2001] F.C.J. No. 1152	FC	01-07-13	Application Granted	Self-Represented	Failure to Apply Evidentiary Presumptions
36	Smith v. Canada (Attorney General), [2001] F.C.J. No. 1225	FC	01-08-07	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
37	John Doe v. Canada (Attorney General), [2002] F.C.J. No. 157	FC	02-01-28	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
38	Yates v. Canada (Attorney General), [2002] F.C.J. No. 159	FC	02-01-29	Application Granted	Self-Represented	Incorrect Legal Test

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39	Sangster v. Canada (Attorney General), [2002] F.C.J. No. 117	FC	02-01-29	Application Dismissed	Self-Represented	
40	Trainor v. Canada (Attorney General), [2002] F.C.J. No. 133	FC	02-01-30	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
41	Kozak v. Canada (Attorney General), [2002] F.C.J. No. 220	FC	02-02-14	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
42	Kripps v. Canada (Attorney General), [2002] F.C.J. No. 742	FC	02-05-17	Application Dismissed	Self-Represented	
43	Teubert v. Canada (Attorney General), [2002] F.C.J. No. 904	FC	02-06-04	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
44	Gagné v. Canada (Attorney General), [2002] F.C.J. No. 984	FC	02-06-25	Application Granted	Lawyer	Procedural Fairness
45	Elliot v. Canada (Attorney General), [2002] F.C.J. No. 1264	FC	02-09-13	Application Dismissed	Self-Represented	
46	Saumure v. Canada (Attorney General), [2002] F.C.J. No. 1319	FC	02-09-23	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
47	Woo Estate v. Canada (Attorney General), [2002] F.C.J. No. 1690	FC	02-11-28	Application Dismissed	Self-Represented	
48	Bernier v. Canada (Attorney General), [2003] F.C.J. No. 62	FC	03-01-16	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
49	MacDonald v. Canada (Attorney General), [2003] F.C.J. No. 78	FCA	03-01-23	Appeal Allowed (in part)	Self-Represented	
50	Whitehead v. Canada (Attorney General), [2003] F.C.J. No. 94	FC	03-01-24	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
51	Giannoulakis v. Canada (Attorney General), [2003] F.C.J. No. 910	FC	03-06-04	Application Dismissed	Self-Represented	
52	Furlong v. Canada (Attorney General), [2003] F.C.J. No. 1979	FC	03-06-12	Application Dismissed	Lawyer	
53	Yates v. Canada (Attorney General), [2003] F.C.J. No. 967	FC	03-06-16	Application Dismissed	Self-Represented	
54	Stuber v. Canada (Attorney General), [2003] F.C.J. No. 991	FC	03-06-20	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
55	Cur v. Canada (Minister of Veterans Affairs), [2003] F.C.J. No. 1030	FC	03-06-27	Application Dismissed	Self-Represented	
56	Elliot v. Canada (Attorney General), [2003] F.C.J. No. 1060 Court of Appeal	FCA	03-07-04	Appeal Dismissed	Self-Represented	
57	Cadotte v. Canada (Department of Veterans Affairs), [2003] F.C.J. No. 1513	FC	03-10-15	Application Dismissed	Self-Represented	

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58	MacDonald v. Canada (Attorney General), [2003] F.C.J. No. 1645	FC	03-10-30	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
59	Schut v. Canada (Attorney General), [2003] F.C.J. No. 1672	FC	03-11-10	Application Dismissed	Lawyer	
60	Léonelli v. Canada (Attorney General), [2003] F.C.J. No. 1756	FC	03-11-21	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
61	Rivard v. Canada (Attorney General), [2003] F.C.J. No. 1948	FC	03-12-19	Application Granted	Lawyer	Incorrect Legal Test
62	John Doe v. Canada (Attorney General), [2004] F.C.J. No. 555	FC	04-03-26	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
63	Boucher v. Canada (Attorney General), [2004] F.C.J. No. 762	FC	04-04-26	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
64	De Quoy v. Canada (Attorney General), [2004] F.C.J. No. 793	FC	04-05-04	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
65	Percy v. Canada (Attorney General), [2004] F.C.J. No. 888	FC	04-05-19	Application Dismissed	Self-Represented	
66	Gillis v. Canada (Attorney General), [2004] F.C.J. No. 901	FC	04-05-20	Application Dismissed	Self-Represented	
67	Thériault v. Canada (Attorney General), [2004] F.C.J. No. 1198	FC	04-07-12	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
68	Frye v. Canada (Attorney General), [2004] F.C.J. No. 1208	FC	04-07-14	Application Granted	Lawyer	Incorrect Legal Test
69	Bradley v. Canada (Attorney General), [2004] F.C.J. No. 1211	FC	04-07-16	Application Dismissed	Self-Represented	
70	Comeau v. Canada (Attorney General), [2004] F.C.J. No. 1323	FC	04-08-09	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
71	Nisbet v. Canada (Attorney General), [2004] F.C.J. No. 1340	FC	04-08-11	Application Dismissed	Self-Represented	
72	Milligan v. Canada (Attorney General), [2004] F.C.J. No. 1343	FC	04-08-11	Application Dismissed	Self-Represented	
73	Yates v. Canada (Attorney General), [2004] F.C.J. No. 1384	FC	04-08-20	Application Dismissed	Self-Represented	
74	Rivard v. Canada (Attorney General), [2004] F.C.J. No. 1550	FCA	04-09-20	Appeal Dismissed	Lawyer	
75	Martel v. Canada (Attorney General), [2004] F.C.J. No. 1559	FC	04-09-21	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence

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76	Caswell v. (Canada) Attorney General, [2004] F.C.J. No. 1655	FC	04-10-05	Application Dismissed	Lawyer	
77	Garrammone v. Canada (Attorney General), [2004] F.C.J. No. 1897	FC	04-11-04	Application Dismissed	Lawyer	
78	Matusiak v. Canada (Attorney General), [2005] F.C.J. No. 236	FC	05-02-09	Application Granted	Lawyer	Incorrect Legal Test
79	Rousselle v. Canada (Attorney General), [2005] F.C.J. No. 407	FC	05-03-07	Application Dismissed	Lawyer	
80	Powell v. Canada (Attorney General), [2005] F.C.J. No. 537	FC	05-03-31	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
81	Trotter v. Canada (Attorney General), [2005] F.C.J. No. 538	FC	05-04-01	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
82	Fournier v. Canada (Attorney General), [2005] F.C.J. No. 573	FC	05-04-06	Application Dismissed	Lawyer	
83	Jones v. Canada (Attorney General), [2005] F.C.J. No. 767	FC	05-05-04	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
84	Frye v. Canada (Attorney General), [2005] F.C.J. No. 1316	FCA	05-08-08	Appeal Dismissed	Lawyer	
85	Nolan v. Canada (Attorney General), [2005] F.C.J. No. 1582	FC	05-09-22	Application Dismissed	Lawyer	
86	Bradley v. Canada (Attorney General), [2005] F.C.J. No. 1808	FC	05-10-28	Application Granted	Self-Represented	Incorrect Legal Test
87	Currie v. Canada (Attorney General), [2005] F.C.J. No. 1871	FC	05-11-07	Application Dismissed	Lawyer	
88	Comeau v. Canada (Attorney General), [2005] F.C.J. No. 2032	FC	05-12-06	Application Dismissed	Self-Represented	
89	Youden v. Canada (Attorney General), [2005] F.C.J. No. 2099	FC	05-12-15	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
90	Fournier v. Canada (Attorney General), [2006] F.C.J. No. 42	FCA	06-01-17	Appeal Dismissed	Lawyer	
91	Bremner v. Canada (Attorney General), [2006] F.C.J. No. 122	FC	06-01-30	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
92	Cormier v. Canada (Attorney General), [2006] F.C.J. No. 149	FC	06-02-02	Application Granted	Lawyer	Incorrect Legal Test
93	Skouras v. Canada (Attorney General), [2006] F.C.J. No. 263	FC	06-02-13	Application Dismissed	Lawyer	
94	Nelson v. Canada (Attorney General), [2006] F.C.J. No. 448	FC	06-03-15	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions

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95	Wannamaker v. Canada (Attorney General), [2006] F.C.J. No. 513	FC	06-03-30	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
96	De Leeuw v. Canada, [2006] F.C.J. No. 680	FC	06-05-02	Application Dismissed	Self-Represented	
97	Gannon v. Canada (Attorney General), [2006] F.C.J. No. 780	FC	06-05-15	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
98	Moar v. Canada (Attorney General), [2006] F.C.J. No. 766	FC	06-05-17	Application Dismissed	Lawyer	
99	Cramb v. Canada (Attorney General), [2006] F.C.J. No. 815	FC	06-05-25	Application Dismissed	Lawyer	
100	Matusiak v. Canada (Attorney General), [2006] F.C.J. No. 835	FC	06-05-29	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
101	Hunt v. Canada (Attorney General), [2006] F.C.J. No. 1296	FC	06-08-25	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
102	Thériault v. Canada (Attorney General), [2006] F.C.J. No. 1354	FC	06-09-08	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
103	Ladouceur v. Canada (Attorney General), [2006] F.C.J. No. 1817	FC	06-11-28	Application Granted	Lawyer	Procedural Fairness
104	Grant v. Canada (Veterans Review and Appeal Board), [2006] F.C.J. No. 1825	FC	06-11-30	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
105	Dumas v. Canada (Attorney General), [2006] F.C.J. No. 1920	FC	06-12-20	Application Dismissed	Self-Represented	
106	Comeau v. Canada (Attorney General), [2007] F.C.J. No. 223	FCA	07-02-15	Appeal Dismissed	Self-Represented	
107	Wannamaker v. Canada (Attorney General), [2007] F.C.J. No. 466	FCA	07-04-02	Appeal Allowed	Lawyer	
108	MacKenzie v. Canada (Attorney General), [2007] F.C.J. No. 645	FC	07-05-03	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
109	Dunn v. Canada (Attorney General), [2007] F.C.J. No. 660	FC	07-05-04	Application Granted	Self-Represented	Failure to Apply Evidentiary Presumptions
110	Nelson v. Canada (Attorney General), [2007] F.C.J. No. 753	FCA	07-05-25	Appeal Dismissed	Lawyer	
111	MacDonald v. Canada (Attorney General), [2007] F.C.J. No. 1064	FC	07-08-01	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
112	Murphy v. Canada (Attorney General), [2007] F.C.J. No. 1184	FC	07-09-12	Application Granted	Lawyer	Procedural Fairness
113	Reed v. Canada (Attorney General), [2007] F.C.J. No. 1591	FC	07-11-23	Application Granted	Lawyer	Incorrect Legal Test

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114	Sonier v. Canada (Attorney General), [2007] F.C.J. No. 1644	FC	07-12-06	Application Dismissed	Lawyer	
115	Goldsworthy v. Canada (Attorney General), [2008] F.C.J. No. 540	FC	08-03-27	Application Dismissed	Self-Represented	
116	Lenzen v. Canada (Attorney General), [2008] F.C.J. No. 654	FC	08-04-22	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
117	Dugré v. Canada (Attorney General), [2008] F.C.J. No. 849	FC	08-05-28	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
118	Macdonald v. Canada (Attorney General), [2008] F.C.J. No. 993	FC	08-06-24	Application Granted	Lawyer	Procedural Fairness
119	Rioux v. Canada (Attorney General), [2008] F.C.J. No. 1231	FC	08-09-04	Application Dismissed	Lawyer	
120	Bullock v. Canada (Attorney General), [2008] F.C.J. No. 1529	FC	08-10-06	Application Dismissed	Self-Represented	
121	Gagnon v. Canada (Attorney General), [2009] F.C.J. No. 192	FC	09-02-12	Application Dismissed	Self-Represented	
122	Clarke v. Canada (Veterans Review and Appeal Board), [2009] F.C.J. No. 673	FC	09-03-20	Application Dismissed	Self-Represented	
123	Gillis v. Canada (Attorney General), [2009] F.C.J. No. 978	FC	09-05-20	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
124	McLean v. Canada (Attorney General), [2009] F.C.J. No. 802	FC	09-06-10	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
125	Boisvert v. Canada (Attorney General), [2009] F.C.J. No. 1377	FC	09-07-20	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
126	Patterson v. Canada (Attorney General), [2009] F.C.J. No. 954	FC	09-08-05	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
127	Murray v. Canada (Attorney General), [2009] F.C.J. No. 1132	FC	09-09-09	Application Granted	Self-Represented	Procedural Fairness
128	Atkins v. Canada (Attorney General), [2009] F.C.J. No. 1159	FC	09-09-21	Application Dismissed	Self-Represented	
129	Anderson v. Canada (Attorney General), [2009] F.C.J. No. 1354	FC	09-11-02	Application Dismissed	Self-Represented	
130	Zielke v. Canada (Attorney General), [2009] F.C.J. No. 1481	FC	09-11-18	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
131	Hunt v. Canada (Attorney General), [2009] F.C.J. No. 1508	FC	09-11-30	Application Dismissed	Self-Represented	
132	MacDonald v. Canada (Attorney General), [2009] F.C.J. No. 1605	FC	09-12-10	Application Dismissed	Self-Represented	

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133	Armstrong v. Canada (Attorney General), [2010] F.C.J. No. 104	FC	10-01-27	Application Granted	Lawyer	Failure to Accept New Evidence
134	Lebrasseur v. Canada (Attorney General), [2010] F.C.J. No. 108	FC	10-01-28	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
135	Robertson Estate v. Canada, [2010] F.C.J. No. 263	FC	10-03-01	Application Dismissed	Lawyer	
136	Johnston v. Canada (Attorney General), [2010] F.C.J. No. 408	FC	10-03-30	Application Granted	Lawyer	Procedural Fairness
137	Beauchene v. Canada (Attorney General), [2010] F.C.J. No. 1222	FC	10-09-30	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
138	Ladouceur v. Canada (Attorney General), [2010] F.C.J. No. 1419	FC	10-11-16	Application Granted	Lawyer	Procedural Fairness
139	Lunn v. Canada (Veterans Affairs), [2010] F.C.J. No. 1529	FC	10-12-06	Application Dismissed	Self-Represented	
140	Gilbert v. Canada (Attorney General), [2010] F.C.J. No. 1622	FC	10-12-17	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
141	Acreman v. Canada (Attorney General), [2010] F.C.J. No. 1652	FC	10-12-23	Application Granted	Lawyer	Failure to Apply Evidentiary Presumptions
142	Arial v. Canada (Attorney General), [2010] F.C.J. No. 200	FC	10-02-19	Application Granted	Self-Represented	Failure to Accept Uncontradicted Medical Evidence
143	De Leeuw v. Canada (Attorney General), [2011] F.C.J. No. 302	FC	11-03-07	Application Dismissed	Self-Represented	
144	Bradley v. Canada (Attorney General), [2011] F.C.J. No. 389	FC	11-03-15	Application Granted	Self-Represented	Incorrect Legal Test
145	McLean v. Canada (Attorney General), [2011] F.C.J. No. 571	FC	11-04-13	Application Granted	Lawyer	Failure to Accept Uncontradicted Medical Evidence
146	Cossette v. Canada (Attorney General), [2011] F.C.J. No. 562	FC	11-04-14	Application Granted	Lawyer	Failure to Accept New Evidence
147	Deschênes v. Canada (Attorney General), [2011] F.C.J. No. 623	FC	11-04-15	Application Granted	Lawyer	Failure to Accept New Evidence
148	Trainor v. Canada (Attorney General), [2011] F.C.J. No. 749	FC	11-04-20	Application Dismissed	Lawyer	
149	Chaytor v. Canada (Attorney General), [2011] F.C.J. No. 624	FC	11-04-29	Application Granted	Lawyer	Incorrect Legal Test
150	Arial Estate v. Canada (Attorney General), [2011] F.C.J. No. 1051	FC	11-07-08	Application Granted	Self-Represented	Failure to Apply Evidentiary Presumptions
151	McLean v. Canada (Attorney General) 2011 FC 1047	FC	11-09-02	Application Dismissed	Lawyer	Application Dismissed