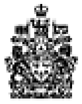

Veterans Review and Appeal Board Canada | Tribunal des anciens combattants (révision et appel) Canada

Canada

2013-976

Representative: Jane Michael, Bureau of Pensions Advocates
Decision No: 100001922976
Decision Type: Federal Court Order to Rehear Reconsideration of Entitlement Appeal
Location of Hearing: Charlottetown, Prince Edward Island
Date of Decision: 11 September 2013

INTRODUCTION

The Appellant is seeking reconsideration of an Entitlement Appeal Decision of this Board, dated 11 August 2009, that denied pension entitlement for adenocarcinoma of the prostate.

ISSUE(S)

This new Reconsideration Appeal Panel must determine whether the new evidence submitted should result in a reopening of the previous Appeal Decision, and a new determination made on the issue of whether the Appellant's prostate cancer arose out of, or was directly connected with, the performance of his Regular Force service. In particular, we will consider the claim that his prostate cancer is attributable to exposure to Agent Orange.

PRELIMINARY MATTERS

This decision follows an order of the Federal Court of Canada quashing the previous Reconsideration Panel's Decision ("the Second Reconsideration Decision," paragraph 65 of the judgement) and remit the Application for Reconsideration to a differently-constituted Panel of the Board.

The several previous decisions in this case form part of the record and this Panel will therefore not engage in an extensive repetition of all that has gone on previously.

About the Board

We hear thousands of pension claims each year, operating on two levels: Review and Appeal. At the Review level, two-member Panels hold hearings in person with Veterans and take their oral testimony and consider any new evidence provided that may alter the decision made by the Department at the first level.

At the Appeal level, those dissatisfied with their Review Decisions refer them to the Board and have an additional opportunity to submit new documented evidence. Oral testimony is not taken at Appeal (*Veterans Review and Appeal Board Act*, subsection 28(2)).

Appeal Decisions of the Board are "final and binding" according to section 31 of the Act. Notwithstanding the finality of its decisions, section 32 of the Act permits the reconsideration of Appeal Decisions when an error of fact or law has been revealed or new evidence has come forward from which an appellant should be allowed to benefit.

Reconsiderations are not provided to give access to appellants to simply reargue cases that have already been determined by the Board. There must be a justifiable reason for reopening a final-and-binding decision.

Parliament, when it created the Board in 1995, issued instructions; found at section 39 of the *Veterans Review and Appeal Board Act*:

> 39. In all proceedings under this Act, the Board shall
> (a) 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;
(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and
(c) 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.

This means that in weighing the evidence, the Panel will look at it in the best light possible and resolve doubt so that it benefits the Appellant. The Federal Court has confirmed, though, that this law does not relieve the appellant of the burden of proving the facts needed in his case to link the claimed condition to service. The Board does not have to accept all evidence presented by an appellant if the Board finds that it is not credible, even if it is not contradicted.[1] In such cases, the Board must comment on the credibility of the evidence.

The Board seeks to draw any favourable inferences that may be reasonably raised or supported by the evidence and the circumstances of the case. Where there are sufficient facts proven to the civil standard to plausibly support a causal link between the claimed disability and military service, then we will resolve any remaining doubt in the Appellant's favour, as required by section 39 of the *Veterans Review and Appeal Board Act*.

This case - a brief history

The Appellant is now 82 and served in the Regular Force for 20 years – releasing in 1975 at the age of 43. He served in Cyprus in 1966 (when Agent Orange was first tested at CFB Gagetown) and was at based in Gagetown when the second phase of testing occurred in 1967. The Appellant was diagnosed with prostate cancer in 1994 at the age of 63, and in May 2005 commenced the application process for pension entitlement for his prostate cancer. He recorded that (page 5) he served at CFB Gagetown and was exposed to Agent Orange.

In response to his application the Department denied entitlement, and this denial was upheld by the Board in a series of decisions:

- Department Decision dated 21 March 2006
- Board Review Decision dated 25 September 2008
- Board Appeal Decision dated 11 August 2009
- Board Reconsideration of Appeal Decision dated 29 March 2010
- Board Reconsideration Decision dated 9 July 2012

The basis for denial, at all levels, has been a been a lack of evidence that the Appellant was actually exposed to the substance, and therefore the absence of a connection between his prostate cancer and his military service.

In the last Reconsideration the Appellant offered two pieces of evidence from former comrades, which he believed would confirm that he was indeed exposed to Agent Orange during the 1967 testing program. The Panel rejected the new evidence, writing that it failed the credibility test as it did not align with the findings of Dr. Dennis Furlong, who researched Agent Orange for the Federal Government and reported his conclusions in August 2007 ("the Furlong Report").

That decision was taken by the Appellant to the Federal Court. In the view of the Court, the Board's decision did not properly apply the Board's four-part new evidence test – specifically on the test for credibility. The Court held that the Board should not have rejected the two pieces of evidence merely because they did not align with the Furlong Report on the likelihood of exposure to Agent Orange.

The Court held the Board failed to cite specific references in the Furlong Report that were used in rebutting the credibility of the new evidence from the Appellant's two comrades.

This Reconsideration

Following the order of the Court, this new Panel has been struck to entertain a new application for Reconsideration. We will examine and evaluate the two letters provided earlier, and also evaluate additional new evidence that was not previously seen by the Board. If we admit the new evidence under our four-part test we will then reopen the 11 August 2009 Appeal Decision and reach a new decision on the merits of the entire case. If we do not admit the evidence under the test, we will state our reasons for maintaining the 2009 decision as final and binding.

Reconsideration Requests based on New Evidence

Several years ago the Board adopted a four-part test for new evidence that is now applied to all reconsideration applications – adapted from a well-known Supreme Court Case known as *R. v. Palmer*. This test enables the Board to screen out those applications for reconsideration being sought to simply re-argue the case on essentially the same set of facts that had been used previously. The Board's new evidence test requires appellants to show their new evidence was not available earlier with the application of due diligence; that the new evidence is credible and capable of belief; that it bears upon a decisive issue in the claim; and, finally, that it has a prospect of changing the result of the previous decision.

Evidence not meeting this test is subject to exclusion by the Panel. In those cases a decision letter is issued to the Appellant, explaining why the case would not be reopened under the reconsideration provisions of subsection 32(1) of the *VRAB Act*.

The principle of applying the four-part new evidence test was challenged by the Bureau of Pensions Advocates, but was upheld in general in the case of *Chief Pensions Advocate v. Canada (Attorney General)*, 2006 FC 1317, and later affirmed by the Federal Appeal Court in *Chief Pensions Advocate v. Canada (Attorney General)*, 2007 FCA 298.

Although the Board's application of the test has been endorsed in principle, the Federal Court has cautioned us against being preoccupied with the first part of the test (due diligence) to the exclusion of a fair consideration of the other three parts; given the Board's obligation under law to broadly and generously construe the *Pension Act*, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, and its own enabling statute. As written by Heneghan J. in the trial division decision this Board, "must exercise its statutory discretion in a manner that respects and promotes the purpose of the legislation."

Evaluating the proffered evidence

Exhibits

The previous Panel was presented with two pieces of evidence, and we have been offered several more in a new submission from the Pensions Advocate. We summarize all of them as follows:

1. Exhibit R2-M1, a one-page statement date-stamped 23 February 2012 from Comrade Number One (page 225)
2. Exhibit R2-M2, a two-page statement dated 9 March 2012 from Comrade Number Two (pages 226-227)
3. An exhibit we will identify as R3-M1, an affidavit of Comrade Number Three sworn on 12 October 2012
4. Exhibit R3-M2, a statement from the Appellant dated 12 May 2009
5. Exhibit R3-M3, an excerpt from a veterans advocacy Web site
6. Exhibit R3-M4, a statement from the Appellant dated 5 August 2013
7. Exhibit R3-M5, an excerpt from the Department's adjudication policy for Agent Orange claims
8. Attachment R3-M1, an "over 40" medical examination of 26 May 1971 noting an enlarged (but not tender) prostate

The Advocate's submissions

We note that the Advocate, in her written argument, took the view that this was an "appeal de novo" and therefore she did not address our four-part test for new evidence.

However, this is not an appeal *de novo* as the Court clearly quashed the *Reconsideration* Decision of 9 July 2012 and not the *Appeal* Decisions of 11 August 2009 or 29 March 2010.

We do not believe this distinction to be a significant issue, however. Despite the Advocate's approach on the point, we will presume she is claiming that all of the newly-offered evidence meets the four-part test and we will evaluate it on that basis. And, we believe, our discussion of the admissibility of the evidence will – by the very nature of its expansiveness – effectively deal with all of the merits and the decisive issues in the case in any event.

The four-part test

Due diligence

The purpose of the new evidence component of the test is to enable appellants to benefit from evidence that had gone hidden or undiscovered until recently. On the Board we include scientific and research advances that may bear on a decisive issue in a case. The Board wants to ensure that no Veteran is disadvantaged by having an old ("final and binding") decision stand forever, even though their claims would be approached differently today based on modern medicine or new revelations.

Here, in this case, very little of the new evidence is truly "new," as it mostly comes from sources who have existed for some time. One such source is the Appellant himself, who has offered two additional statements. These statements are now added to the many other written statements he has filed at the previous levels of adjudication. The statements from Comrades Number One, Two, and Three are new – in that the Board has not considered them before – but they break no new ground nor provide new insight on the two main decisive issues here, which is the possibility of exposure to Agent Orange and the prospect that said exposure reasonably led to the Appellant's prostate cancer.

Exhibits R3-M3 and R3-M4 are new, in that they could not have existed prior to the Federal Court's involvement in the case, and certainly not at the time of the previous Appeal Decision. R3-M3 is an opinion piece in anticipation of the Court hearing, and R3-M4 is the Appellant's reaction to the decision itself. R3-M5 is not new at all, as it is a copy of a policy document from 2010, which has been considered already in previous decisions in this case.

Attachment R3-M1 is not new, as it is a document from 1971. R3-M2, although just provided now, was dated 12 May 2009 and is therefore is not new either.

We conclude that all of the newly offered exhibits, with the exception of R3-M3 and R3-M4, would fail the due diligence test for new evidence – as they could have been brought to the Board earlier.

As we have noted, we are mindful of the Court's caution to not be preoccupied with part one of the test. Therefore, below, we will explore the other three parts: relevance, credibility, and prospect of changing the result of the previous decision.

Relevance

We conclude the documents are generally relevant to one of the two key issues in this case – which is whether the Appellant was reasonably exposed to the Agent Orange chemical. The statements from Comrades Number One, Two, and Three would – if found credible – place the Appellant in the place and time in which he claims to have been exposed.

Credibility

As to whether the statements of Comrades Number One,Two, and Three and the Appellant are capable of credibly establishing the Appellant's exposure, we perform the analysis below.

Firstly, we would not say that we believe any of the gentlemen – including the Appellant – has knowingly issued misleading statements on what he believes took place. Our challenge is to decide whether they were in a position to truly know what was sprayed. We are further challenged when we try to infer with some accuracy, from the statements, the intensity of exposure to Agent Orange, if any. This analysis is necessary to try to assist us with arriving at a credible and reasonable prospect of exposure.

The Federal Court was critical of the previous Panel's decision to test the new evidence against the conclusions in the Furlong Report that, in the Panel's view, there was no opportunity to be exposed to Agent Orange because the test locations were "not accessible for regular training" after the spraying trials were concluded (Court decision, paragraph 55).

It appears that the record presented to the Court included only excerpts from the background research tasks informing the final release, and not the Report itself. It also appears that counsel for the Attorney General was unable to assist the Court in locating any passages in those research papers that may have supported the previous Panel's analysis of the evidence.

To ensure completeness of the record, therefore, we are including the entire final Report and marking it as R3-Supplement-M1.

In our evaluation of this claim we are not blindly surrendering our decision making to any report or study. Before we decide to rely – in whole or in part – on any piece of evidence we are first required to assign weight to that evidence.

The Furlong Report

What we commonly call the Furlong Report was commissioned by the Department of National Defence in 2005 to explore the potential for long term health effects arising from herbicide use at CFB Gagetown from 1956 to 1984, and in particular the 1966 and 1967 testing of Agent Orange. Results of individual scientific tasks comprising the report were released piecemeal, and the final report from Dr. Furlong was submitted to the Minister of National Defence on 27 August 2007. It consisted of a 62 -page analysis that was based on the background research.

The Report was released publicly, with wide distribution electronically. Copies of the Report are found in all hearing rooms used by the Board across Canada.

Since its release, the Report has been used by the Department to create a guideline for its adjudicators on Agent Orange claims. The guideline identified the types of diseases that may have a possible association with Agent Orange, and also guided adjudicators in determining whether a claimant was likely exposed to the substance during his or her service, based on their occupation and individual circumstances.

The Board has, in many of its decisions, concluded that the research represents the "best evidence" on the issue of exposure. One of our leading decisions on this issue (http://www.vrab-tacra.gc.ca/Decisions/ 2011-580-eng.pdf) has been selected by the Board's management to clearly outline our approach to the general topic of exposure. That decision, in part, reads as follows:

> The Panel is satisfied that these studies represent the best evidence available at this time as to what took place at CFB Gagetown. The Panel determines that it is not unreasonable to conclude that the information now available from the independent studies conducted concerning the testing of Agent Orange in June 1966 and July 1967 and the use of herbicides at CFB Gagetown during the period from 1952 to 2004, effectively rebuts any presumption of exposure due to merely serving at CFB Gagetown during the relevant time periods.
>
> The Panel is satisfied, given what is now known about the spraying and testing programs from 1952 to 2004, that a reasonable inference can now be drawn, in the absence of evidence to the contrary, that the numbers of those who actually experienced exposure of any significance during and after the spraying were very low, as claimed in the research results.
>
> The Human Health Risk Assessment Task 3A-1, Tier 1 study concluded that an individual's presence on the Base at CFB Gagetown during the testing of unregistered herbicides (i.e. Agent Orange) in 1966 and 1967 does not constitute exposure that would place an individual at risk for any long term health effects.
>
> Therefore, evidence of direct, service-related exposure, beyond merely training at the CFB Gagetown during the relevant periods, is sought in these claims. The Panel is satisfied that this also would include other spraying programs during the 1952 to 2004 period, given a lack of credible evidence to the contrary.

The above remains the Board's general approach to Agent Orange Claims. The Bureau of Pensions Advocates is aware of this approach, and when the Bureau's lawyers bring claims forward they are invited to address why a new case should be distinguished from the general treatment above.

We also acknowledge that the issue of Agent Orange is emotional and highly charged. Dr. Furlong acknowledged this as well in his study, and also acknowledged that there were those who believed the study would be tainted by the contractors themselves. Dr. Furlong addressed it this way (page 10):

> Another issue that we were asked to defend was the credibility and qualifications of those who would be conducting the studies. Fortunately we were able to say that all of the studies were being carried out by well established, reputable, international firms possessing the expertise to properly carry out the necessary technical and scientific work. The allegation

> was often made that these firms were depending on the government for contracts, and would therefore provide results favourable to the best interest of government. Many participants who spoke at the meetings or contacted our office took the position that the government wanted to hear that everything was done to the letter and that no individual's health was adversely affected. My response was that all of the companies had international reputations to protect. Additionally, I explained that we had an advisory panel of community individuals and experts to provide advice and monitor the work of the contractors. All seemed to be comforted that this work was not being done by government employees.

So, while we generally find the Report to credibly lay out the history and the science, we also note that the leading decision we quoted from provides an opportunity for Veterans to submit rebuttal evidence on the intensity of their own exposure when they were serving. In this case, we have the three statements from comrades of the Appellant, as well as multiple statements from the Appellant himself.

The Appellant's statements

We have reviewed the Appellant's new statements, R3-M2 and R3-M4. We have also noted his earlier statements on pages 5, 140, 143, 171, 172, and 173 of the existing record. We have also considered the Review Panel's account of his sworn testimony.

To summarize his position, he said he was at the Base, training, in 1967 and that no part of the Base was restricted for training purposes. From page 140 he remembered being sprayed and covering with a poncho, and getting wet. He believed he was further exposed after the spraying was over. In the statement at page 143 the Appellant added that he also pursued recreational activities and forestry on the Base in the years following the spraying.

In the statement at page 171 the Appellant reiterated that the spray areas were "open" and that he and his colleague, Comrade Number Four, were sprayed. On page 172 the Appellant wrote that his service would have been the same as the Captain (statement page 150), and that the (Furlong) research recently done was not valid as it was performed over 40 years after the spraying.

In the statement beginning at page 173 the Appellant added that he also trained troops on Base in the years following the conclusion of the spray testing, and that his exposure would have included eating, sleeping, and being exposed to water that had been contaminated.

In R3-M2 the Appellant noted there were millions of litres of chemical sprayed "all over" the Base, and reiterated the statements made earlier as to his own exposure. In R3-M4 the Appellant mostly discussed the Federal Court decision.

We note that, in all of the above statements, the Appellant made other representations aside from the issue of direct exposure – however in this phase of our evidence test we are mainly looking at the proffered evidence for how well it deals with whether the Appellant was reasonably exposed to Agent Orange.

The statement of Comrade Number One

In evidence presented to the previous Reconsideration Panel (page 225), Comrade Number One wrote that he was Platoon Sgt. of 7 Platoon "C" Company and the Appellant was "12 Platoon 'D' Company" which was on his right flank "when Agent Orange was sprayed on us." He then wrote:

> We were ordered before that to put on respirators and ponchos for the attack. This occurred when 2nd Battalion The Black Watch (RHR) of Canada were Enemy Force of 1st Battalion The Black Watch (RHR) of Canada in the summer of 1967.

The statement of Comrade Number two

In his statement (page 226) Comrade Number Two wrote that his (2nd) Battalion was tasked with assisting the 1st Battalion with training prepatory to its deployment to Cyprus. He wrote that the training took place "throughout Gagetown's manoeuvre area" and culminated with a major field exercise just days "after parts of the training are were sprayed with Agent Orange."

He also wrote that the Appellant participated in this, and also in the weeks leading up to the exercise by being in the same area. Comrade Number Two concludes (page 227):

> Although I cannot state that I personally witnessed (the Appellant) being sprayed with 'Agent Orange', I am certain that he would have been in or around the affected area at, and in the days immediately after, the spraying took place.

The statement of Comrade Number Three

In exhibit R3-M1 Comrade Number Three swore an affidavit that was initially prepared for the information of the Federal Court, but the Court declined to review it as it was not part of the evidence that had already been before the tribunal. He wrote that he was in the same Company and that before the training, "parts of the training area was sprayed by Agent Orange, known as brush kill."

He also wrote that they were sprayed again, during the training, and that they dug trenches, slept, and drank the water in the area. He also wrote that in the 1980s as Range Control he was aware that barrels of Agent Orange "had been buried throughout different locations in the training area."

Our findings

Our challenge is to square the above statements with the scientific research that has been done on the specific issue of the prospect of exposure. If they cannot be squared, then we must weigh them against each other – consistent with our instructions from Parliament – and choose which of them remains with the highest degree of credibility.

As the leading decision quoted above notes, the Furlong report reasonably rebuts the presumption that those who served and trained at CFB Gagetown in June of 1966 and June of 1967 were exposed to Agent Orange unless they worked in specific occupations associated with the testing program itself. Even if they were in those occupations and were exposed to some quantity of the substance, according to the report, the prospect of long-term health effects is expected to be minimal.

Of course, each case must be decided on its own facts, so we are alive to the requirement to weigh all of the evidence. It is therefore still open to us to conclude that the Appellant's evidence is of a higher quality or persuasiveness than the study.

The Base

Dr. Furlong gave a broad overview of CFB Gagetown and the importance of vegetation control in his introduction at page 2:

> Canadian Forces Base Gagetown (CFB Gagetown) land use totals approximately one hundred and ten thousand hectares, including 65 lakes, 365 wetlands, and 251 permanent and intermittent streams. The Range Training Area (RTA) represents approximately thirty thousand hectares of this land use. A variety of non-military land uses currently occur within the approximated eighty thousand hectares of non-RTA land, including forest management, hunting, fishing, camping, and various other recreational activities. CFB Gagetown conducts a significant amount of live-fire military training within designated RTA Impact Areas. As a result, it is absolutely critical that these impact areas are free of both softwood and hardwoods in order to provide a safe training area for the military, one with ample line-of-sight during operations and a reduced risk of forest fires resulting from live-fire exercises.

Exposure

At page 12 the Furlong Report reads, in part, as follows:

> The testing took place in an area of 83 acres in a **remote and heavily forested part of the Base.** Eighty three acres is equivalent to 0.03% of the total two hundred and seventy one thousand eight hundred and sixteen (271 816) acres which comprise Base Gagetown. I have been informed by the Base that **the specific areas used by the Americans for testing in 1966 and 1967 have not been used since for formal training by the Base.**
>
> [*our emphasis*]

This, we believe – although it went unquoted in the previous decision – forms the basis for the general presumption that ordinary soldiers doing their training at the Base did not train in the areas known to have been sprayed with Agent Orange.

As for the 1967 program specifically – which is when the Appellant trained at CFB Gagetown, the report reads:

> The second set of tests was conducted from June 21 to 24 1967. The test area was located along the Ripon Road east of the Broad Road. Fifty plots, each 200 x 600 feet with a 200 foot buffer between adjacent plots, were laid out on each side of the Ripon Road. A total of fifteen herbicides were tested in 1967. The test plots were 8.5 kilometers from the nearest populated area.

Generally, the report goes on to read:

> The location of the two test sites took into consideration their proximity to local populations, croplands and accessibility. **The testing**, **according to the records**, **was conducted in an area of the Base that was difficult to access**, **under strictly controlled conditions**, **ensuring minimal spray drift**. Helicopters were used and flew low over the treetops to ensure a spray swatch of 50 feet. Records indicate that **spraying was conducted when there was very little wind.**
>
> Reports suggest that there were a limited number of people, both American and Canadian, involved with the two test events. There is a list of the names of 18 people involved in organizing and participating in the testing. In addition, the records show a list of the military units who may have participated in the testing program as well.

[*our emphasis*]

Further in the report, at page 15, Dr. Furlong comments on the divergence between the science and the anecdotal evidence he was hearing at public meetings and through his office:

> Despite the compelling nature of the anecdotal evidence, it must be cast against the scientific studies. These studies, in summary, conclude that people who lived near or worked at the Base, including **most soldiers**, **were not at risk for long-term adverse health effects** from the products used for the herbicide spray programs. Potential long-term health risks were identified as a possibility for only those individuals directly involved with the application of the herbicides or clearing of treated brush soon after herbicide application.

[*our emphasis*]

Dr. Furlong concluded his findings as follows:

> Bystanders, including soldiers, who were directly down-wind less than 800 meters at the time of the aerial spraying may have experienced **elevated short-term exposures** to some of the herbicides. However this **would not have put them at increased risk for long-term**, **adverse health effects.** The studies have determined that the requisite rules and regulations, based on the scientific knowledge of the day, were in place for spraying since the programs began in the mid-fifties and that the rules were upgraded and strengthened as new evidence and knowledge became available. Soil testing was conducted, and based on expert modeling, the soil and vegetation was and is deemed safe. The chemical properties of the herbicides used in the spray program, have been identified and examined and, **unless people came in direct contact with the spray** as defined, **no adverse health effects would have been caused.** Spray drift modeling has demonstrated that the spray could only drift 800 meters under normal conditions. **The quantities sprayed and the methods used**, according to toxicology experts, **would not adversely affect human health.**
>
> It would appear that no person living near or around the base would have been affected given that **only the impact areas were sprayed.** Furthermore, **these impact areas are located near or well into the interior of the base**, **eliminating spray drift as a possible factor in exposure to humans.**

> Therefore, only individuals who may have been allowed access to the sprayed area **immediately after the spraying** was done **or within 24 hours** of that time were potentially at risk of incurring negative health effects. **Others who may have experienced short term health effects were those who acted as mixers, loaders, and flaggers.** Additionally, forestry workers who may have accessed the sprayed area immediately following the spraying in order to assess defoliation results may have suffered short term health effects. My conclusion is that based on the information gathered and the science as we understand it today Base Gagetown is a safe place to conduct military training, and some people may have been adversely affected by the spraying of herbicides since 1956.

The main elements of departure between all of the Appellant's evidence and the fact-finding study surround the location of the spraying of Agent Orange.

All of the supporting statements from the Appellant and his fellow servicemen allege that Agent Orange was sprayed either on the training troops directly, or over an area where the troops gained access and trained shortly afterward.

As we see from the above, the scientific study says otherwise. While the previous Panel did not cite the Report's findings specifically, we have done so to provide the highest degree of clarity.

There is a distinction that must be drawn between the different areas of the Base. There are the manoeuvre areas, as well as impact areas. Dr. Furlong noted that only the impact areas were used for the spray program. Comrade Number Two wrote that he and the Appellant would have been in the manoeuvre area.

We believe this distinction is important. The Report notes that three manoeuvre areas were repeatedly sprayed (page 24) with defoliants generally in the 1956-2004 period, but those substances were not Agent Orange.

The Report distinguishes between Agent Orange and the remainder of the regular 1956-2004 period because the longer term general defoliant chemical applications were all made using **registered** chemicals with known health effects, established standards, and well defined protocols.

The reason Agent Orange was singled out was that it was the only **unregistered** preparation used (page 39).

Aerial spraying

In many of the cases that have come before the Board it was earnestly claimed by Appellants that they were sprayed with ordinary, fixed-wing, aircraft. In fact, as we now know, the Agent Orange spray program was done exclusively with helicopters.

This divergence is not necessarily unexplainable, as it is widely known that there was other spraying taking place over CFB Gagetown through the same years as defoliants were applied, including pesticides for the spruce budworm. Dr. Furlong described this other spraying as "confounding the issue."

The affidavit from Comrade Number Three refers to helicopters, as well as other delivery methods. We note that Comrade Number Three does not say, however, that he personally saw helicopters spraying anything on him or on the Appellant in 1967.

Considering that helicopters were the only Agent Orange delivery method in 1966 and 1967, the absence of any witness reports of helicopter spraying in this case is, in our view, significant.

We are led to the following conclusions when evaluating the credibility of the new evidence:

- the Furlong Report is unequivocal on the issue of helicopters spraying Agent Orange
- the use of helicopters as the exclusive delivery method has not been rebutted
- the provided witness statements are equivocal in that none of them claim direct spraying from helicopters
- the Appellant's statements – in the main – place him in areas that had been previously sprayed but not under the spraying itself as it was taking place
- Comrade Number Three states he and the Appellant "were sprayed upon" with Agent Orange but not by what method

- Comrade Number One wrote that "Agent Orange was sprayed on us" but does not say by what method or in any other way describe the circumstances of the spraying in a way we could distinguish this account from, for instance, spraying for the spruce budworm
- Comrade Number Two is quite clear that his knowledge of the possibility of contact is limited to the period of time after the spraying concluded, and also he is clear that he did not personally witness the Appellant being sprayed

None of the provided statements come from persons in any position to **know** about the scope of the spray program in 1967, beyond what they would have learned from the Furlong Report and other sources in the many years that followed. All of them appear to have drawn their knowledge from historical sources as opposed to their own eyewitness accounts. When they do purport to be describing an event personally witnessed, they describe the event in such a way that is rebutted by the history as it has been explained in the fact finding report.

For us to accept the statements of Comrade Number Three and Comrade Number One as credible, we would have to discard the Furlong Report's description of the limited breadth and depth of the spray program itself. In that Mr. Furlong drew his history from **documented** sources and strictly maintained his independence, we find his report most credible. It leads us to the following conclusions:

- soldiers were not sprayed with Agent Orange while they were training in the manoeuvre areas of the Base
- soldiers did not approach with any proximity to the Agent Orange-sprayed area, as it was densely wooded and not used for formal training after the program concluded
- the statements claiming a specific substance (Agent Orange) was sprayed are not credible for that purpose, as none of them were prepared by people in a position to know at the time
- none of the statements distinguish between Agent Orange (by helicopter only) and any other spray programs that were active at the time
- none of the statements place the Appellant into any of the possible elevated risk groups, such as spotters, flaggers, mixers, loaders, etc.
- in the absence of "evidence of direct, service-related exposure" it is highly unlikely, if not impossible, that the Appellant was exposed to any amount of the Agent Orange chemical

From the above analysis, we conclude that none of the newly offered evidence (to the previous Panel and to this Panel) withstands our basic credibility test. As for the application of the benefit of doubt in this case, our conclusions about the history as presented by the Appellant and his comrades does not leave us with a sufficient foundation upon which any reasonable element of doubt can be raised. Dr. Furlong's report stands unrebutted on the issue of exposure, and remains as the best evidence on the point.

Prospect of changing the result

Finally, to be admitted under our four part-test for new evidence, the material needs to have, if found sufficiently admissible under the other three parts, a chance of affecting the outcome of the previous decision (or, in this case, decisions).

In our Appellant's case there have always been two live issues, even though the previous levels of decision making have placed much more focus on one of them – exposure.

The other issue is – if some element of exposure **were** accepted – whether the Appellant's prostate cancer, diagnosed in 1993 in his early 60s, can be reasonably connected to claimed contact with Agent Orange.

We have already concluded the Appellant was not reasonably exposed to Agent Orange as part of his military service. In the event the reader believes we have been too restrictive with that conclusion, then we need to also determine the degree of possibility or likelihood that his exposure – exactly as he has claimed – has led to his prostate cancer.

As to the fourth part of the four-part test, we regretfully conclude from the analysis below that the new evidence provided by the Appellant does not advance our knowledge of his degree of exposure and, more importantly, does not draw any stronger link between his military service and his prostate cancer.

Institutes of Medicine (IOM) and Agent Orange

After the Furlong Report was released Veterans Affairs Canada adopted an entitlement test that was based on the IOM tiers of possible relationship between Agent Orange exposure and specific diseases (2010 Update, page 8).

There are four such tiers. The first is "Sufficient Evidence of an Association" and includes: Soft-tissue sarcoma, Non-Hodgkin lymphoma, Chronic lymphocytic leukemia, Hodgkin lymphoma, and Chloracne.

The second tier is "Limited or Suggestive Evidence of an Association" and includes Prostate cancer, Laryngeal cancer, Cancer of the lung, bronchus, or trachea, Multiple myeloma, AL amyloidosis, Early-onset peripheral neuropathy, Parkinson disease, Porphyria cutanea tarda, Hypertension, Ischemic heart disease, and Type 2 diabetes.

The distinction between the first and second tiers is that in the former "chance, bias and confounding could be ruled out with reasonable confidence," while in the latter "chance, bias, and confounding could not be ruled out with confidence."

The third tier is titled "Inadequate or Insufficient Evidence to Determine an Association," and the fourth tier is titled "Limited or Suggestive Evidence of *No* Association."

Adjudicative framework - VAC

Veterans Affairs has elected to treat the top two tiers as similar for entitlement purposes under its decision framework. If a Veteran can establish exposure to Agent Orange and has a diagnosis of one of the diseases in the top two tiers, then he or she can benefit from the presumptive approach of the Department.

This requires exposure, and by this we mean some method of the substance entering the body. Unlike radioactive products, Agent Orange exposure would not be presumed by simple proximity to the substance. One would need to get it on his or her person in such a way that it was absorbed into the body.

Access to the test area

In the Occupational Risk Assessment (Task 3A-1) the Furlong study determined the most at-risk individuals from "routine" operations would be Mixer/Loader, followed by Applicator, and then Flagger. The study presumed entry into the body would be both through dermal absorption as well as inhalation (page 34).

(A prediction was also created for "accident" where a higher degree of exposure may occur. For Mixer/Loader this accidental additional exposure would potentially come from a spill, and for a Flagger/trainee the accidental additional exposure would come from being directly sprayed.)

Other occupations listed were Post Application Scout and Military Trainee. For Scouts the study presumed, again with routine (non-accident) operations, that exposure would come from dermal contact, but not by inhalation.

For Military Trainees, the study presumed – if there had been training in the area – exposure would presumably come through "environmental media" such as soil and wild berries. We noted the following passage (page 34):

> For the 1966-67 scenarios, it was assumed that training exercises occurred in direct proximity to the spray areas, during the time of the spraying.

The above sentence has been the source of considerable confusion, as it has been frequently alleged that, by virtue of the wording above, the Furlong study was accepting the "fact" that training took place in the sprayed area after all.

That is not, in our view, the proper inference to be drawn. The purpose of Task 3 was to **presume** the worst-case scenarios of all possibly affected persons and occupations for the purposes of assessing the methods of exposure. That task did not conclude any such exposure actually took place. The report was clear that the assessment "does not evaluate risks to particular people. Rather, risks are assessed for representative groups of people."

Without the proper surrounding context, it is possible to see how the above quoted sentence could be used as the basis for the claim by some that the spray area **was** accessed for training during and after the spraying. Supporting our interpretation of this section is a reference to page 44, where the report creates a "bystander" category representing a preschool child located directly downwind of the target area at the time of the spraying. Of course there is no allegation that preschool children were in the area. Even then, had one been in that place and time, the report noted:

> Potential bystander exposures were increased on an acute basis only. These elevated short-term exposure levels are not indicative of elevated risks of long-term irreversible health effects, rather, the potential for short-term reversible effects to have occurred

Different parts of the study assessed the access that various groups would have had to the sites. This (3A) part of the study was focussed exclusively on the potential risks for various cohorts of people if they **had** been there, which could only be done by presuming such access.

Other possible exposure

We note that the study eliminated other exposure pathways, and gave reasons for those eliminations. They are (page 34-35):

- groundwater (none in proximity)
- surface water (1967, 5 km distance from nearest river)
- hunting/fishing (areas small and remote)
- brush clearing and burning (no manual clearing conducted 1966-67)
- volatization following application (quick evaporation after application)
- contact with chemicals in non-designated spray areas (no spray drift to outside areas)

The study notes the following on page 36 for Dioxins generally:

> The short-term risks predicted for all routine exposure scenarios have been classified as "less serious" by ATSDR. "Serious" effects were not noted until exposures of more than 300-fold greater than the acute TRV. These "less serious" exposure levels are **not indicative of elevated risks of long-term irreversible health effects**, rather, the potential for short-term reversible effects, of the nature considered "less serious".
>
> Long-term or chronic risk estimates for military trainees who may have inadvertently trained in either the 1966 or 1967 spray areas more than a year following the spray applications were all less than levels that would be indicative of a concern (HQ < 1); as a result, no **dioxin related adverse health risks are predicted for military trainees potentially exposed in this manner**.
>
> [*our emphasis*]

The study made similar conclusions with respect to Hexachlorobenzene.

Page 53 of the Report reads, in part, as follows:

> No chronic human health risks were identified for all other recreational users, **soldiers** or civilians potentially exposed to herbicide residues via incidental soil ingestion, direct dermal contact with soil, dust inhalation and the consumption of wild berries.

On the following page, the following:

> Non-occupational receptors (i.e., those not directly involved with herbicide applications) are not expected to have experienced unacceptable long-term human health risks associated with herbicide use at CFB Gagetown.

The inclusion of prostate cancer in the second level of the IOM groupings allows those who have been exposed to Agent Orange to benefit from the presumption that VAC has created for his adjudicators. If there is no reasonable basis to believe the exposure took place, then the presumption is not available.

Put another way, if exposure has been settled then under VAC policy there is no further proof needed of any medical relationship to the IOM "top two" list of diseases.

However, if exposure has not been reasonably shown, then the adjudication of the claim necessarily reverts to the standard questions and proofs that surround more typical environmental exposure claims. These questions include:

- intensity of exposure (concentration + time exposed)
- method of ingress into the body (inhalation, skin absorption, ingestion)
- presence or any acute effects or symptoms at the time of exposure
- presence of any acute effects experienced by others similarly exposed
- presence of any longer-term effects following exposure
- quality of medical evidence connecting exposure to the disease
- analysis of other – possibly more likely – causes of the disease
- analysis of whether other exposed persons also developed the disease

Thus, the lack of likely exposure does not invalidate the claim altogether. It just means adjudicators (including panels of the Board) are unable to apply the "fast track" entitlement principles designed for the specific set of cases (Agent Orange) and – instead – consider the claim as if it were a routine pension entitlement matter.

In a typical claim for entitlement, we evaluate the nature of the disability to determine if it is likely caused by some element of military service, or if there are more likely alternate causes or factors. This applies to chemical exposures, broken bones, knee injuries, and the entire range of claimed disabilities.

Prostate Cancer

Prostate cancer is, according to the Canadian Cancer Society, the "most common cancer in Canadian men." Possible risk factors include:

- diets high in fat
- diets high in red or processed meats
- diets high in milk and dairy products
- inherited gene mutations
- inflammation of the prostate (prostatitis)
- circulating testosterone
- exposure to pesticides
- occupational exposures

The Canadian Cancer Society notes (http://www.cancer.ca/en/cancer-information/cancer-type/prostate/risks) that the above factors are listed in order from most significant to least significant.

The Society notes:

> The risk of prostate cancer increases as men grow older. Prostate cancer is not very common in men under 50 years of age. The chance of having prostate cancer increases after 50 and is diagnosed most often in men over the age of 65.

We note that previous decisions have considered the age of the Appellant at the time of diagnosis (63) and that the Board has been asked to conclude that the Appellant was diagnosed earlier than the average age and that his cancer would have been slowly developing before his diagnosis – thereby raising the inference that his cancer was more likely linked to his Regular Force service.

Further points have been made on the fact the Appellant was noted to have an enlarged prostate in a medical examination in 1971, only a few years after the Agent Orange testing was done. We also note, however, that by the time he presented for his release medical examination in 1974 (page 28, Statement of Case) his prostate was remarked to be "neg," which is a medical reference equating to "normal."

We have not been presented with any medical evidence that establishes an enlarged prostate is possibly a result of Agent Orange exposure, nor that it was a precursor of our Appellant's cancer. Neither do we have any medical evidence that a temporary finding of an enlarged prostate, that resolves in the subsequent examination some years later, is clinically significant or predictive of early prostate cancer.

Medical evidence specific to this claim

In the entire case record there is only a limited amount of medical evidence to weigh on the issue of any connection between military service and the Appellant's prostate cancer. The only doctor's report is that of Dr. Hickey from 10 March 2009, where he notes that the Department is considering entitlement in cases of Agent Orange exposure (page 152). In his brief letter he asked for consideration of the Department's policy in the case of the Appellant also. He did not lead the reader to any particular conclusion.

Neither did Dr. Hickey evaluate any of the other risk factors or provide an analysis as to why the Appellant should have his claim treated differently that those in a similar position to him, on a range of all possible risk factors.

Another opinion letter appears in the file, from a Dr. Sia (page 176). That letter was written in respect of another claim, however, and cannot be directly applied to our Appellant's case.

In the Federal Court case of *Jarvis* (2011 FC 944), another chemical exposure case, Madam Justice Snider wrote:

> [20] Each decision of the Appeal Board is unique to its facts. Similarly, the opinion of a physician is applicable only to the individual to whom it is given. In general, an earlier Entitlement Review Board or Appeal Board decision cannot be relied on to support another person's appeal or case before this court; each case must be assessed by the Appeal Board based on its individual facts. Simply because a medical doctor and a panel of the Appeal Board found a link between the specific chemical exposure of one individual and his medical condition does not mean that this is a "precedent" that must be followed in every case. In the decision involving the opinion of Dr. Fox, we have little information on the evidence that was presented to the Appeal Board. Dr. Fox's opinion simply cannot be extrapolated to the facts of this case.

This leads us also to consideration of the "precedent" decisions that have been offered in support of the Appellant's claim.

Previous Board decisions - other Appellants

As is well known, some Review and Appeal Panels of the Board have awarded pensions to others who have claimed Agent Orange exposure.

Those decisions have been offered in this case also, to support the Appellant's contention that those similarly situated to him have received favourable rulings, and therefore so should he.

This is an attractive argument on the face of it, however, administrative tribunals do not operate on precedent, usually for the reason that each case is factually unique. Even when facts are very similar, it does not automatically follow that one Panel of this tribunal should surrender its function to a previous decision-maker in a previous and different case. It could be that the previous decision misconstrued the facts or the science, or was made before further knowledge of additional facts was revealed.

Comity of decisions

We appreciate that an advocate in favour of a claim would want to lead only those decisions that are supporting entitlement. However, the favourable decisions submitted on behalf of the Appellant represent the outlier minority of the Board's work and not the mainstream majority.

We appreciate that, as an administrative tribunal tasked with making fact-based decisions, it can be frustrating for Appellants who learn we have made different decisions on what appears to be the same set of facts. Administrative justice is not perfect, and the best hope is that most decisions are correct, and become even more correct as the law and advances in science and knowledge progresses.

In our view, looking at the totality of all of the Agent Orange claims we have seen, the Board's approach here is widely consistent with our previous work. Our Appellant's case falls within the 86% of Appeal cases where there was insufficient evidence of exposure to the substance.

Summary

The majority of the Panel believes it has fully considered both issues in this claim:

- the likelihood of the Appellant's exposure to Agent Orange
- the possible connection between his Regular Force service and the development of his disability of prostate cancer

We believe the likelihood of exposure was negligible, and we also believe that any possible exposure – when weighed against all of the more important risk factors for that particular disease – would be an insignificant contributor to the Appellant's overall chances of developing prostate cancer.

The standard of proof for pension claims is not extreme. Absolute certainty is not required nor expected. Claims are decided on the civil standard of the balance of probabilities. This principle was recently explained in the Federal Court case of *Carnegie*[2], as follows:

> [25] While the Applicant relies on *John Doe v Canada (Attorney General)*, 2004 FC 451, [2004] FCJ no 555 at para 36 in his written submissions to suggest that a standard of proof lower than the balance of probabilities could be applied, **this is no longer the prevailing approach**. In *Wannamaker*, above at paras 5-6, the Federal Court of Appeal stated that while section 39 ensured evidence is "considered in the best light possible" it does not relieve the applicant of the burden of *"proving on a balance of probabilities the facts required to establish entitlement to a pension."* Moreover, the Board is not required to automatically accept all evidence presented by the applicant.

The new evidence, when considered in the best light possible and weighed against the professional and independent scientific study conducted by Dr. Furlong, is not capable of establishing the Appellant was exposed to Agent Orange. Neither are we left with any meaningful degree of doubt on the plausibility of the Appellant's theory and his own version of the history of the testing program as opposed to how it has been reconstructed by Dr. Furlong from the official records.

This is a case of choosing the best evidence, and the best evidence in this case – on the issue of potential exposure and potential health effects – is the independent research by Dr. Furlong.

Therefore, on a balance of probabilities, we are unable to conclude the Appellant's decision would have been any different if we had accepted the new evidence put before both this Panel and the previous Reconsideration Panel.

While we acknowledge the Appellant's firmly-held belief that he was exposed to Agent Orange and that his exposure led to his prostate cancer, we are unable to align that belief with the facts as found in the study; commissioned for the express purpose of evaluating the risks associated with that defoliant's testing at CFB Gagetown.

We believe we have fully and completely respected the ruling of the Court, and dealt with all of the points that were raised in its decision.

Our decision is to not reopen the final and binding decision of the Appeal Panel dated 11 August 2009.

Subsection 32(1) of the *Veterans Review and Appeal Board Act* provides that notwithstanding section 31, an appeal panel may, on its own motion, reconsider a decision made by it under subsection 29(1) or this section and may either confirm the decision or amend or rescind the decision if it determines that an error was made with respect to any finding of fact or the interpretation of any law, or may do so on application if the person making the application alleges that an error was made with respect to any finding of fact or the interpretation of any law or if new evidence is presented to the appeal panel.

Subsection 32(2) of the *Veterans Review and Appeal Board Act* states that the Board may exercise the powers of an appeal panel under subsection 32(1) if the members of the appeal panel have ceased to hold office as members.

Section 31 of the *Veterans Review and Appeal Board Act* provides that a decision of the majority of members of an appeal panel is a decision of the Board and is final and binding.

In all reconsiderations, the Board is mindful of its statutory obligation pursuant to section 3 of the Act to liberally construe and interpret all legislation, and pursuant to section 39 to resolve any doubt, in weighing evidence, in favour of the Applicant.

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1. *MacDonald v. Canada (Attorney General)* 1999, 164 F.T.R. 42 at paragraphs 22 & 29; *Canada (Attorney General)* v. Wannamaker 2007 FCA 126 at paragraphs 5 & 6; *Rioux v. Canada (Attorney General)* 2008 FC 991 at paragraph 32.

2. *Carnegie v. Canada (Attorney General)*,2012 FC 93

RULING

ADENOCARCINOMA OF THE PROSTATE (OPERATED)

The Appeal Decision dated 11 August 2009 remains final and binding.
Subsection 32(1), *Veterans Review and Appeal Board Act*

Original signed by:	Brent Taylor	Presiding Member
Original signed by:	J.M. Walsh	Member

REASONS FOR DISSENT HEREINAFTER INCLUDED

REASONS FOR DISSENT

I have read the Majority Decision with respect to the Federal Court Re-Hear as directed by The Honourable Madam Justice Strickland in her decision dated 19 June 2013. I am a dissenting Member on the newly-constituted Panel which heard the case on 11 September 2013.

There are two broad issues at play in the Appellant's case:

1. Whether the Appellant's disability arose from service factors; and
2. Whether there is a medical relationship between the Appellant's disability of prostate cancer and the chemical Agent Orange.

One of the main arguments put forward by the Appellant is that numerous colleagues who served in Gagetown at the same time and now suffer from the same disability or another disability which has been recognized as having an association with Agent Orange, have been awarded pension entitlement.

Let me state at the outset, that from my perspective I can certainly understand the Appellant's frustration in being denied pension entitlement when many of his colleagues have received favourable rulings as a result of disabilities arising from the Agent Orange testing at CFB Gagetown, New Brunswick in 1966 and 1967. However, this fact alone is not a basis on which I can support pension entitlement, but I do feel I have an obligation in the spirit of natural justice and fairness to afford this factor due consideration along with all other facts of the case.

In making a determination in the Appellant's case, I find it is necessary to zero in more closely on the Veterans Review and Appeal Board's (VRAB's) general approach in adjudicating claims of Agent Orange. In recent years, the VRAB has relied on what is known as the Furlong Report, which is described in more detail in my colleagues' decision. Therefore, I will not reproduce it here.

At the very heart of the Appellant's case is the role of 'direct' exposure to Agent Orange. For the most part, the VRAB's interpretation of the Furlong Report is that one must have 'direct' exposure to Agent Orange to be at risk of contracting the diseases outlined in the report. I had to ask myself - is it reasonable to conclude that 'direct exposure' can be proven by the Appellant given this testing occurred over 40 years ago? In reviewing all of the material put before me, I can honestly say that the concept of proving direct exposure is no easy task. However, in coming to a reasonable conclusion whether or not 'direct exposure' can really be established, I found it necessary to make a determination on whether Canadian Forces Members' training in Gagetown during the spray periods were accessible to the spray sites.

I realize that as a Board Member, I am not bound by the Furlong Report or any other extraneous material; however, given the scientific nature of the studies performed as part of the Furlong Report, the VRAB has chosen to accept it as the "best evidence" for Board Members to rely on when making decisions on complex cases involving Agent Orange. I, too, have relied on this report in the past and I may certainly rely on this report in future cases. I do acknowledge it is an in-depth piece of work conducted by a highly credible physician.

I find the Furlong Report is open to interpretation by the reader. Therefore, I shall not strictly follow the Furlong Report but will extract comments which I feel raise an element of doubt regarding the key issue of 'direct exposure'. I find the following points are important factors to consider in drawing conclusions regarding the findings of this report:

In Dr. Furlong's covering letter dated 27 May 2007, he provides a brief overview of "salient information":

1. With respect to the degree of exposure, the physician states that he was unable to determine how much exposure Canadian Forces Members endured during the spray periods. Therefore, I believe this statement reinforces that there was some degree of exposure.

2. Dr. Furlong states that the Government of Canada has set a precedent for exposure by providing compensation. In late 2007, the Government of Canada announced an ex-gratia payment of $20,000 to compensate individuals exposed to Agent Orange at CFB Gagetown, NB in 1966/67 and who are suffering from medical conditions associated with Agent Orange exposure. In other words, the Government of Canada has accepted that exposure occurred but it did not stipulate that 'direct' exposure must be demonstrated in order to receive the *ex-gratia* payment. Prostate Cancer is one of the recognized medical conditions.

3. It is noted that scientific literature concurs that, "Threshold dosage has not been determined either in quantity or duration that would indicate human health risk." This point raises an interesting fact - medical science cannot state with certainty how large or small the exposure would have to be to set in motion health problems.

As noted above, The Honourable Madam Justice Strickland, in her decision dated 19 June 2013, refers the Appellant's case back to a newly constituted Board and addresses what I believe is the key factor - spray site accessibility by military personnel. In her analysis, she points out in Paragraph 53, that consecutive levels of appeal determined:

> . . . that the "Furlong Report" contradicts any evidence of the Applicant's exposure to Agent Orange. According to the VRAB, the Furlong Report stated that the sprayed areas were not accessible for regular training and only those who were directly exposed to Agent Orange may have been at a higher risk. On this basis, the VRAB continued to reject any evidence the Applicant submitted to indicate that he was exposed to Agent Orange.

Madam Justice Strickland then notes that she is, ". . . unable to locate a document entitled the "Furlong Report". . . ."; however, in Paragraph 54 she lists all of the documents to which she was privy. I acknowledge that the documents in her possession are indeed incomplete. However, in reviewing the documents, Madam Strickland notes in Paragraph 55, as follows:

> I am unable to find any specific reference in those documents, or elsewhere in the record, for the proposition relied on by the VRAB that the "Furlong Report" found that the areas sprayed with Agent Orange were not accessible for regular training.

Madam Justice Strickland in Paragraphs 56 and 57 draws the conclusion based on her review of the Task 3A - Tier 1, that it would, ". . . appear to suggest, contrary to the VRAB's finding, that sprayed areas were in fact accessible by military personnel for training." The following is noted from Paragraph 56:

> . . . "in 1966, 1967 and 1990, small tracts of land **within the ranges and training areas** were used for herbicide trials" (emphasis added). . . .

At paragraph 57, the following is noted:

> . . . "Military trainees **who trained in the area after the spraying** were assumed to have longer term exposures" (emphasis added). . . .

Madam Justice Strickland offers further commentary regarding this issue in Paragraphs 58 and 59. In Paragraph 60, she states:

> Again, this would at least seem to suggest that military personnel could have trained in or near the 1966 and 1967 Agent Orange spray areas and, therefore, been exposed to contaminants.

In Paragraph 62, Madam Justice Strickland states, "I do not agree" in response to the Counsel for the Respondent argument that the definition of "military trainees" provided in Task 3A - Tier 1 infers that these trainees, "did not have access to sprayed sites."

Madam Justice Strickland concludes the following in Paragraph 63:

> Based on the record before me, the evidence does not support the VRAB assertion that the "Furlong Report" determined that Agent Orange was never sprayed in training areas, but only in remote areas where no training was held. . . .

I also note that on Page 33/34 of the Furlong Report, risks are assessed for "representative groups of people" which include, "On-Site Military Trainee", which suggests that the authors of these assessments did not rule out that military trainees had access to the spray sites but rather included them as part of their assessments.

In reviewing the Furlong Report in its entirety, I am unable to find any reference that military personnel were restricted from the spray sites and therefore, I am satisfied that military personnel did have access to these sites.

The following is a brief synopsis of other relevant factors which I took under consideration when I made my decision:

- The Appellant served in the Black Watch Regiment as a Platoon Sergeant in the Infantry Unit at CFB Gagetown during Agent Orange spraying in June 1967 and continued to serve at this site until 1975 [Statement of Case (SOC), page 36];
- The type of duties the Appellant would have participated in during his posting to Gagetown in 1967 as a MOC Inf 031 was confirmed in an e-mail by a Veterans Affairs Canada employee dated 16 March 2006. (SOC, page 34). The e-mail reads, in part, as follows:

  > . . . Duties are performed outdoors in all climatic and weather conditions, without rest or shelter, while exposed to extremes of heat, cold , nauseating odours, noise, damp dust and mud as well as fear, stress and deprivation inherent in combat. They live and work in close, cramped quarters. They walk, run, roll, crawl, monkey run, sprint, march across rough terrain for long distances 14 to 80 km, cross obstacles 2 m high, cross water obstacles 100m wide, climb on and jump off vehicles, construct defensive obstacles for up to 12 hours, including digging, sand bagging and carrying heavy loads. . . ;

- The Appellant has a confirmed diagnosis of prostate cancer and a disability has been established as is required by subsection 3(1) of the *Pension Act* (SOC, page 32);
- The Appellant previously argued that he was diagnosed much earlier than the median age. The record confirms the Appellant was diagnosed at 63 years of age in 1994 and the median age of diagnosis in the general population is 72 years of age which is reported in the "Chamie Study" (See Dr. Sia's opinion below);
- The Appellant's Health Service Records reveal that on 26 May 1971 that he had an enlarged prostate. No other complaints in service are documented (SOC, page 37);

- The Appellant released from the Canadian Military in 1975 and the record confirms there are no positive findings/complaints/treatment in relation to the current disability (SOC, pages 26-30);

- The US Institute of Medicine (IOM) indicates that there is, "limited/suggestive evidence of an association" between prostate cancer, the Appellant's current disability and the chemical Agent Orange. (SOC, page 46). Therefore, the IOM is suggestive of a medical link;

- The Appellant's condition of prostate cancer falls within Category 2 along with respiratory conditions, multiple myeloma, Type 2 diabetes, porphyria cutanea tarda, and acute and sub-acute transient peripheral neuropathy (SOC, page 50);

- The Task 3B: Epidemiological Literature Review of the Furlong Report states as follows:

    . . This study makes no attempt to draw conclusions about the causes of a particular individual's disease or death. This is the responsibility of that individual patient's physician who is able, through collection of a careful clinical and environmental history and diagnostic information from the patient, to identify those factors that are contributory to the development and prognosis of an individual's disease. ;

- Subsection 21(3) of the *Pension Act* (Presumption) states as follows:

    (3) For the purposes of subsection (2), an injury or disease, or the aggravation of an injury or disease, shall be presumed, in the absence of evidence to the contrary, to have arisen out of or to have been directly connected with military service of the kind described in that subsection if the injury or disease or the aggravation thereof was incurred in the course of . . .

        (g) the performance by the member of any duties that exposed the member to an environmental hazard that might reasonably have caused the disease or injury or the aggravation thereof. ;

- There are numerous witness statements from those who served with the Appellant, most of which are noted in the Majority Panel decision, but I will only highlight one of these statements. The statement reveals first-hand knowledge of the circumstances during the spray period;

    The Captain (Retired) was the Appellant's Platoon Commander during the spray period in 1967. His role was to prepare and train the soldiers for deployment, noting that he was, ". . . in a position to know if there were any areas in the base that we were not to use. . . ." and ". . . we were never instructed to not enter those spraying areas nor any other part of the training area. . . ."(SOC, page 150);

- The record establishes that a former colleague of the Appellant received full pension for prostate cancer on the basis of Agent Orange exposure in a decision by a Review Panel of the Veterans Review and Appeal Board on 6 August 2008. This Client served in the same platoon as the Appellant. The decision has become a part of the permanent record of the Appellant's case as it was submitted as a redacted exhibit. This decision also references another colleague who served in the same area as the Appellant and was awarded pension entitlement for prostate cancer on the same basis as the Appellant. The Panel who awarded pension entitlement accepted the credible oral testimony, the medical opinion of an oncologist, and resolved all doubt in favour of the client as per Section 39 of the *Veterans Review and Appeal Board Act*. It was also interesting to note that while this client had a family history of prostate cancer, the Appellant has no such history. Additionally, this decision was rendered subsequent to the "Furlong Report" (SOC, page 186); and

- While the medical opinion presented to support the file was brief, Dr. Liam Hickey, Urologist stated in his opinion dated 10 March 2009, that the Appellant does have advanced prostate cancer; however, I also reviewed another medical opinion prepared for a different client from Dr. Michael Sia, Radiation Oncologist, dated 26 February 2009. Even though this opinion was not presented in support of the Appellant's claim, the specialist does provide his expert opinion regarding the association between Agent Orange and prostate cancer and supports his opinion by quoting from a study (Chamie Study) conducted by the Department of Urology, University of California Davis, School of Medicine, Sacramento, California. The report reads, in part, as follows:

> Agent Orange exposure has been shown to increase the risk of soft tissue malignancies in several studies. Recent data from Chamie et al. (Cancer. 2008 Nov 1; 113(9) 2382-4) looked at over 13 000 Vietnam Veterans and analyzed the incidence of prostate cancer in men exposed and unexposed to Agent Orange. Men exposed to Agent Orange were twice as likely to be identified with prostate cancer. The authors concluded that, "individuals who were exposed to Agent Orange had an increased incidence of prostate cancer; developed the disease at a younger age, and had a more aggressive variant than their unexposed counterparts". In this regard, I think it is reasonable to state that if the Appellant was exposed to Agent Orange in CFB Gagetown, this exposure may be a contributing factor to the development of his prostate cancer. . . . (SOC, page 176)

An additional argument presented by the Appellant regarding his exposure, and supported by the various witness statements, is that they were sprayed with the chemical. I note on page 38 of Dr. Furlong's report that, ". . . Herbicides have been applied through ground and aerial applications (helicopter or fixed-wing aircraft) from 1956 to 2004 on CFB Gagetown. . . ." Therefore, I believe this fact lends credibility to the various witness statements presented as evidence of not only the occurrence of chemical spray, but that the spray was conducted by both aircraft and helicopters.

At the Reconsideration Hearing on 9 July 2012, additional witness statements were submitted from, Comrade Number One dated 23 February 2012 and from Comrade Number Two dated 9 March 2012, both of whom were colleagues of the Appellant who served at the same time in the same unit. The Reconsideration Panel did not allow these statements in as evidence. Madam Justice Strickland in paragraph 52 found that based on Sections 3 and 39 of the *Veterans Review and Appeal Board Act*,

". . . the VRAB erred in finding that the proposed new evidence was not credible because of an apparent contradiction with the "Furlong Report"."

As cited by Madam Justice Strickland in Paragraph 63, ". . . the excluded evidence is relevant and is such that, if believed, it could reasonably, when taken with the other evidence adduced by the Applicant, be expected to have affected the result".

Paragraph 64 states, "Accordingly, the VRAB erred in refusing to admit the new evidence and in declining to reconsider the Entitlement Appeal Decision".

I would accept the new evidence submitted - the Affidavit of Comrade Number Three (Retired) dated 12 October 2012 and statements from the Appellant dated 12 May 2009 and 5 August 2013 along with an excerpt from Veterans Affairs Canada policy entitled, "Exposure to Agent Orange - Disability Benefits".

In all good conscience, I cannot dismiss the role of 'fairness' in the spirit of natural justice - both real and perceived - along with ensuring I respect the benefit of doubt clause of Section 39 of the *Veterans Review and Appeal Board Act*. Therefore, I would accept the credible evidence submitted by way of witness statements and the fact that many of the Appellant's colleagues have received pension entitlement for Agent Orange exposure. The VRAB strives to have consistency in its decisions and I believe that the Appellant's case warrants the same consideration.

I also draw on The Veterans Bill of Rights of which the VRAB is committed. This Bill outlines the various rights in which, “all clients of Veterans Affairs” are entitled. It reads, in part, “Be treated with respect, dignity, fairness and courtesy”.

It is in this spirit of fairness, that the I believe the VRAB has a responsibility to the Appellant. I acknowledge that the VRAB does strive to honour and respect this responsibility in all its decisions. But I see it as a two-way street. The Appellant must also believe that he has been treated fairly. I am of the opinion that the Appellant’s current perception is that he has not been treated fairly when he compares his case to similar cases of which he is aware. As I noted earlier, the evidence of similar cases cannot be the sole determinate factor in awarding pension entitlement; however, given the totality of the evidence in this particular case, I believe there is a definitive role for fairness and consistency.

The evidence before me has raised sufficient doubt that it is reasonable to conclude, on the balance of probabilities, that the Appellant may have been exposed to Agent Orange. Whether or not military personnel suffered direct or indirect exposure may be a subject of debate for many years to come. However, the Veterans Affairs Canada policy with respect to, “Benefit of Doubt - CFB Gagetown” does not state “direct” exposure must be established. It states, “the Benefit of Doubt cannot be used as a substitute for lack of reasonable evidence of exposure” (My Emphasis). Additionally, in this case, I find there is reasonable evidence of exposure (My Emphasis) given the supporting Appellant’s statements, witness statements as well as the fact that the independent report of Dr. Furlong did not conclude that military personnel were restricted from the spray sites. In fact, most of the evidence concludes that military personnel in training had access to these sites both during the spray period and in the years to follow.

In conclusion, the Appellant served in CFB Gagetown during the 1967 spray period and for another eight years after the spray period, it has not been established that military training personnel were restricted from the spray sites, and he currently suffers from a disability associated with Agent Orange exposure. As the onus is on the Appellant to prove his case, I do believe he did all within his power to gather whatever evidence he could to establish his case, such as written statements from individuals who were on site during the same time frame. In this regard, I believe he has lived up to the intent and spirit of the *Pension Act* and I believe the scales of justice should be tipped in his favour as per the benefit of doubt clause of Section 39 of the *Veterans Review and Appeal Board Act*.

Therefore, in reviewing the totality of the evidence, in this particular case, I would award pension entitlement pursuant to subsection 21(2) of the *Pension Act*.

Original signed by:	Dorothy O'Keefe	Member

Date Modified: 2014-07-29