

Federal Court



Cour fédérale

Date: 20110128

Docket: T-686-09

Citation: 2011 FC 104

Ottawa, Ontario, January 28, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

INGRID V. LAMBIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Defendant

and

**OFFICE OF THE COMMISSIONER OF
REVIEW TRIBUNALS**

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] The self-represented Applicant seeks judicial review of the decision of the Commissioner of Review Tribunals (the Commissioner) to close her appeal file without convening a hearing of a Review Tribunal to consider the appeal.

[2] The right of appeal to a Review Tribunal from decisions of the Minister of Human Resources and Skills Development or his delegate (the Minister) is provided in section 82(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[3] This application, together with the companion file, *Estate Violet Stevens & June Taylor Executor v Attorney General and Office of the Commissioner of Review Tribunals*, T-1883-08 (*Stevens & Taylor*), were the subject of various motions which resulted in orders of the Court firstly, granting the Office of the Commissioner of Review Tribunals status as an intervener and secondly, directing that the two applications be consolidated to be heard consecutively by the same judge. These two applications raise for the first time the issue whether the Commissioner has the jurisdiction to refuse to convene a Review Tribunal to hear an appeal under the CPP or the *Old Age Security Act* (OAS).

[4] For reasons that follow, I am granting the judicial review in this application.

Background

[5] On July 21, 2006, the Applicant's sister applied for the CPP death benefit as executor of the estate of Dolvis Lambie, the sisters' late mother. After receiving further information, the Minister processed the application and paid the death benefit to the executor on behalf of the estate.

[6] In October 2006, the Applicant also applied for the CPP death benefit. In her application, the Applicant indicated there were several wills for her late mother and she was applying on the basis that she was the person responsible for the funeral expenses.

[7] The Minister requested a certified copy of the will of the Applicant's late mother. The Applicant sent the Minister two versions of the will on November 23, 2006, noting that there were numerous errors in the first will and that the second will contained contradictory and invalid dates.

[8] On January 10, 2007, the Minister informed the Applicant that her application for a CPP death benefit was denied because someone else met the eligibility requirements to qualify for the benefit and that benefit was paid to that person. The Applicant requested reconsideration by a letter dated April 4, 2007. The Minister advised the Applicant of the reconfirmation of the decision to deny the application on June 15, 2007.

[9] The Applicant appealed the Minister's reconsideration decision by letter on September 8, 2007 to the Office of the Commissioner of Review Tribunals (OCRT). In her letter, the Applicant said she had been told that the person who paid for the funeral would be given "prior consideration" for the death benefit.

[10] On September 24, 2007, the OCRT wrote to the Minister enclosing a copy of the Applicant's appeal letter and requesting the Minister provide the documents required under section 5 of the *Review Tribunal Rules of Procedure*, SOR/92-19 (*Rules*). On October 10, 2007, the Minister transmitted the documents relevant to the Applicant's appeal to a Review Tribunal.

[11] The OCRT document request prompted the Minister to determine whether the Applicant had been provided with erroneous advice, as defined in subsection 66(4) of the CPP, in connection with the processing of her application for a death benefit. On December 20, 2007, the Minister's delegate concluded that no erroneous advice had been provided to the Applicant. The Minister

provided the OCRT with a copy of the delegate's decision as additional information to be included in the documents provided pursuant to section 5 of the *Rules*.

[12] On February 20, 2008, the Commissioner informed the Applicant that he had decided not to schedule a hearing and her appeal was being closed.

[13] The Applicant applied for judicial review of the decision of the Minister's delegate. The Federal Court dismissed that application for judicial review in December 2008 but granted the Applicant an extension of time to commence an application for judicial review of the Commissioner's decision to close her appeal file without convening a Review Tribunal hearing.

Decision Under Review

[14] In the February 20, 2008 decision, the Commissioner described the basis for his decision:

I have decided not to schedule a hearing for this appeal because it is apparent that a Review Tribunal does not have the legal authority to grant the relief you are seeking.

To qualify for this benefit, the Canada Pension Plan states you must be the executor, administrator or legal representative of the estate; or in the absence of the person described above, you must be the individual, or representative or institution, responsible for funeral expenses. In accordance with the provisions of the CPP legislation, the benefit was paid to the estate.

I understand that you have applied for judicial review to the Federal Court of Canada against the finding by Service Canada that it had not provided you with erroneous advice. This is the appropriate recourse to address that issue as a Review Tribunal does not have the legal authority to make any findings in that regard.

[15] The Commissioner concluded stating: “Since I have decided not to schedule a hearing, your appeal file is being closed.”

Legislation

[16] The *Canada Pension Plan*, R.S.C., 1985, c. C-8 (CPP) provides:

82. (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), or a person who is dissatisfied with a decision of the Minister made under subsection 27.1(2) of the Old Age Security Act, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister’s decision and of the reasons for it.

(2) A Review Tribunal shall be constituted in accordance with this section.

...

(7) Each Review Tribunal shall consist of three persons chosen by the Commissioner from among the members of the panel referred to in subsection (3), subject to the following requirements:

82. (1) La personne qui se croit lésée par une décision du ministre rendue en application de l’article 81 ou du paragraphe 84(2) ou celle qui se croit lésée par une décision du ministre rendue en application du paragraphe 27.1(2) de la Loi sur la sécurité de la vieillesse ou, sous réserve des règlements, quiconque de sa part, peut interjeter appel par écrit auprès d’un tribunal de révision de la décision du ministre soit dans les quatre-vingt-dix jours suivant le jour où la première personne est, de la manière prescrite, avisée de cette décision, ou, selon le cas, suivant le jour où le ministre notifie à la deuxième personne sa décision et ses motifs, soit dans le délai plus long autorisé par le commissaire des tribunaux de révision avant ou après l’expiration des quatre-vingt-dix jours.

(2) Un tribunal de révision est constitué conformément au présent article.

...

(7) Un tribunal de révision se compose de trois personnes qui, provenant de la liste visée au

(a) the Commissioner must designate a member of the bar of a province as the Chairman of the Review Tribunal; and
(b) where the appeal to be heard involves a disability benefit, at least one member of the Review Tribunal must be a person qualified to practise medicine or a prescribed related profession in a province.

(8) An appeal to a Review Tribunal shall be heard at such place in Canada as is fixed by the Commissioner, having regard to the convenience of the appellant, the Minister, and any other person added as a party to the appeal pursuant to subsection (10).

...

(11) A Review Tribunal may confirm or vary a decision of the Minister made under section 81 or subsection 84(2) or under subsection 27.1(2) of the Old Age Security Act and may take any action in relation to any of those decisions that might have been taken by the Minister under that section or either of those subsections, and the Commissioner of Review Tribunals shall thereupon notify the Minister and the other parties to the appeal of the Review Tribunal's decision and of the reasons for its decision.

83. (1) A party or, subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision

paragraphe (3), sont choisies par le commissaire en fonction des exigences suivantes :

a) le commissaire doit désigner, comme président du tribunal, un membre du barreau d'une province;

b) dans les cas où l'appel concerne une question se rapportant à une prestation d'invalidité, au moins un membre du tribunal doit être une personne habile à pratiquer la médecine ou une profession connexe prescrite dans une province.

(8) Un appel auprès d'un tribunal de révision est entendu à l'endroit du Canada que fixe le commissaire, compte tenu de ce qui convient à l'appelant, au ministre et aux mis en cause en application du paragraphe (10).

...

(11) Un tribunal de révision peut confirmer ou modifier une décision du ministre prise en vertu de l'article 81 ou du paragraphe 84(2) ou en vertu du paragraphe 27.1(2) de la Loi sur la sécurité de la vieillesse et il peut, à cet égard, prendre toute mesure que le ministre aurait pu prendre en application de ces dispositions; le commissaire des tribunaux de révision doit aussitôt donner un avis écrit de la décision du tribunal et des motifs la justifiant au ministre ainsi qu'aux parties à l'appel.

83. (1) La personne qui se croit lésée par une décision du tribunal de révision rendue en application de l'article 82 —

made in respect of an appeal referred to in subsection 28(1) of the Old Age Security Act, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

(2) The Chairman or Vice-Chairman of the Pension Appeals Board shall, forthwith after receiving an application for leave to appeal to the Pension Appeals Board, either grant or refuse that leave.

...

(3) Where leave to appeal is refused, written reasons must be given by the person who refused the leave.

...

84(1) a Review Tribunal and the Pension Appeals Board have authority to determine any question of law and fact as to
(a) whether any benefit is payable to a person,

(b) the amount of any such benefit,

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

(d) the amount of that division,

(e) whether any person is eligible for an assignment of a

autre qu'une décision portant sur l'appel prévu au paragraphe 28(1) de la Loi sur la sécurité de la vieillesse — ou du paragraphe 84(2), ou, sous réserve des règlements, quiconque de sa part, de même que le ministre, peuvent présenter, soit dans les quatre-vingt-dix jours suivant le jour où la décision du tribunal de révision est transmise à la personne ou au ministre, soit dans tel délai plus long qu'autorise le président ou le vice-président de la Commission d'appel des pensions avant ou après l'expiration de ces quatre-vingt-dix jours, une demande écrite au président ou au vice-président de la Commission d'appel des pensions, afin d'obtenir la permission d'interjeter un appel de la décision du tribunal de révision auprès de la Commission.

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

...

(3) La personne qui refuse l'autorisation d'interjeter appel en donne par écrit les motifs.

...

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

contributor's retirement pension, or
 (f) the amount of that assignment,
and the decision of a Review Tribunal, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.
 (2) the Minister, a Review Tribunal or the Pension Appeals Board may notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

a) la question de savoir si une prestation est payable à une personne;
 b) le montant de cette prestation;
 c) la question de savoir si une personne est admissible à un partage des gains non ajustés ouvrant droit à pension;
 d) le montant de ce partage;
 e) la question de savoir si une personne est admissible à bénéficier de la cession de la pension de retraite d'un cotisant;
 f) le montant de cette cession.
 La décision du tribunal de révision, sauf disposition contraire de la présente loi, ou celle de la Commission d'appel des pensions, sauf contrôle judiciaire dont elle peut faire l'objet aux termes de la Loi sur les Cours fédérales, est définitive et obligatoire pour l'application de la présente loi.
 Annulation ou modification de la décision

(2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.

(emphasis added)

[17] The *Review Tribunal Rules of Procedure*, SOR/92-19 (the *Rules*), provides:

3. (1) An appeal to a Tribunal shall be commenced by conveying to the Commissioner a notice of appeal in writing setting out

...

(c) the grounds for the appeal including, if applicable, the grounds that put at issue the constitutional validity, applicability or operability of the Act or the Old Age Security Act or regulations made thereunder, and a statement of the facts, issues, statutory provisions, reasons and documentary evidence that the appellant intends to rely on in support of the appeal;

...

(2) Notwithstanding subsection (1), where it appears to the Commissioner that the appellant has failed to provide information in accordance with any of the requirements of paragraphs (1)(a) to (d), the Commissioner may take such steps to obtain the information as are necessary to rectify the failure.

...

4. The Commissioner shall, on receipt of the notice of appeal, convey a copy of the notice of appeal to the Minister.

5. The Minister shall, within 20 days after receipt of the copy of the notice of appeal from the Commissioner, convey to the Commissioner copies of the following documents relating to the appeal, where applicable:
(a) the application filed by the applicant;

3. (1) Un appel auprès d'un tribunal est interjeté par la transmission d'un avis d'appel au commissaire; cet avis écrit indique :

...

c) les motifs de l'appel, y compris, s'il y a lieu, les motifs qui mettent en cause la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, de la Loi ou de la Loi sur la sécurité de la vieillesse ou de leurs règlements, ainsi qu'un exposé des faits, points, dispositions législatives, raisons et preuves documentaires que l'appelant entend invoquer à l'appui de son appel;

...

(2) Malgré le paragraphe (1), lorsqu'il appert au commissaire que l'appelant a omis de fournir certains des renseignements visés aux alinéas (1)a) à d), le commissaire peut prendre les mesures nécessaires pour obtenir les renseignements manquants et ainsi corriger l'omission.

...

4. Sur réception de l'avis d'appel, le commissaire en transmet une copie au ministre.

5. Dans les 20 jours qui suivent la réception de l'avis d'appel envoyé par le commissaire, le ministre transmet à celui-ci une copie des documents suivants relatifs à l'appel :
a) la demande déposée par le requérant;
b) les renseignements concernant le mariage exigés en vertu du paragraphe 54(2) du

- (b) such information relating to the marriage as is required pursuant to subsection 54(2) of the Canada Pension Plan Regulations;
 - (c) the notification sent in accordance with section 46 or 46.1 of the Canada Pension Plan Regulations;
 - (d) the notification sent in accordance with subsection 60(7) of the Act or section 16 or 24 of the Old Age Security Act;
 - (e) the request made to the Minister for a reconsideration under subsection 81(1) of the Act or under subsection 27.1(1) of the Old Age Security Act; and
 - (f) the decision made by the Minister as a result of the operation of subsection 81(2) or 84(2) of the Act or subsection 27.1(2) of the Old Age Security Act, the reasons therefor and any documents that are relevant to that decision.
- ...
7. The Commissioner shall, on receipt of the documents referred to in section 5,
- (a) select the members to hear the appeal in accordance with subsection 82(7) of the Act; and
 - (b) fix the place, in accordance with subsection 82(8) of the Act, and the time for the hearing of the appeal.

- Règlement sur le Régime de pensions du Canada;
- c) l'avis donné conformément aux articles 46 ou 46.1 du Règlement sur le Régime de pensions du Canada;
- d) l'avis donné conformément au paragraphe 60(7) de la Loi ou la notification donnée conformément aux articles 16 ou 24 de la Loi sur la sécurité de la vieillesse;
- e) la demande de révision présentée au ministre conformément au paragraphe 81(1) de la Loi ou au paragraphe 27.1(1) de la Loi sur la sécurité de la vieillesse;
- f) la décision prise par le ministre en application des paragraphes 81(2) ou 84(2) de la Loi ou du paragraphe 27.1(2) de la Loi sur la sécurité de la vieillesse, les motifs de cette décision et tout document s'y rapportant.

- ...
7. Le commissaire, sur réception des documents visés à l'article 5 :
- a) choisit conformément au paragraphe 82(7) de la Loi les membres qui entendront l'appel;
 - b) fixe l'endroit, conformément au paragraphe 82(8) de la Loi, ainsi que la date et l'heure où l'appel sera entendu.

(emphasis added)

Issues

[18] I consider the issues to be:

- a) Does the Commissioner of Review Tribunals have the jurisdiction to refuse to convene a Review Tribunal to hear an appeal under subsection 82(1) of the CPP?

And alternatively,

- b) Did the Commissioner fail to observe a principle of procedural fairness by refusing to convene a Review Tribunal to hear the Applicant's appeal?

Standard of Review

[19] The Applicant does not make any submissions with respect to the standard of review.

[20] The Respondent submits that with respect to the issue of the Commissioner's jurisdiction to decide not to convene a review Tribunal hearing, the appropriate standard is correctness. The Respondent also submits that the issue of procedural fairness attracts a correctness standard.

[21] The Intervener agrees with the Respondent that the standard of review with respect to each issue is that of correctness.

[22] The Supreme Court of Canada determined in *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*) at paras. 32-34 that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Questions of law are determined on the correctness standard.

[23] The Supreme Court found that determining the appropriate standard of review in a given case requires two steps. The first step is to look at jurisprudence and see if the applicable standard has been previously determined in a satisfactory manner. If not, then a court is to conduct a standard of review analysis: *Dunsmuir* at para. 62.

[24] Generally, the jurisdiction of an administrative decision-maker is a question of statutory interpretation. In *Dunsmuir*, the Supreme Court writes at para. 29:

Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[25] The Supreme Court characterized true jurisdiction as a question of law requiring a standard of correctness in *Dunsmuir* at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. ... "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires

or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at pp. 14-3 to 14-6. (emphasis added)

[26] The above Supreme Court pronouncement points to correctness as the standard of review.

[27] However, the Supreme Court was careful to emphasize questions of “true” jurisdiction will be narrow. It had earlier in the judgment acknowledged that deference would arise “where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.

[28] Here, the Intervener submits the Commissioner was acting in accordance with the case management system developed to address the challenges of administering OAS and CPP appeals. Arguably, the Commissioner is interpreting its own statute or statutes closely connected to its function with which it has familiarity.

[29] This application, and the companion application, raises for the first time the jurisdiction for the Commissioner to close an appeal without convening a Review Tribunal. There is no prior jurisprudence with respect to the standard of review. It therefore invites a standard of review analysis.

[30] The standard of review analysis as considered in *Baker v Canada*, [1999] 2 SCR 817 at paras 58-62 (*Baker*) and *Dunsmuir* at para. 64 involves consideration of the following factors:

1. The presence or absence of a privative clause;
2. The expertise of the decision-maker;

3. The purpose of the provision in particular and the act as a whole; and
4. The nature of the problem.

[31] This application involves the refusal by the Commissioner to schedule an appeal hearing before a Review Tribunal. An appeal decision by a Review Tribunal pursuant to subsection 82(1) is subject to limited review in that it is only reviewable before the Federal Court. However, there is no restriction or privative clause concerning a decision by the Commissioner in the exercise of his functions. Accordingly, this factor tends to less deference for the Commissioner's decisions.

[32] While the CPP provides that the pool of Review Tribunal members must include a percentage of members of the bar of a province (paragraph 82(3)(a)), and that the chairperson of a Review Tribunal must be a member of the bar (paragraph 82(7)), these requirements do not apply to the position of Commissioner or Deputy Commissioner. The Commissioner may have administrative experience and expertise arising from performing the Commissioner's role and may well have legal training but that is not a requirement for the position for Commissioner. This points to a less deferential approach in review.

[33] The CPP provides contributors and their families with minimum income replacement upon the retirement, disability, or the death of a wage owner. It also provides a death benefit of \$2,500 upon the death of a contributor to the estate or the person who paid the funeral expenses. The Minister may decide on request or reconsideration if an individual is entitled to a death benefit. An individual whose request is denied has a statutory right of appeal when dissatisfied with a reconsideration decision by the Minister. Given the importance of the right of appeal to the

individual, or the individual's estate, less deference is given to a decision restricting or denying that right.

[34] Lastly, the nature of the decision under review involves an assessment of jurisdiction rather than an exercise of discretion. In this regard, no deference is to be given by a Court to an administrative body's determination of jurisdiction.

[35] I find the above analysis indicates that the appropriate standard of review of the Commissioner's decision not to convene a Review Tribunal in respect of a CPP appeal comes to the same result, that of correctness.

[36] In result the standard of review is correctness, however analyzed, and the Commissioner will be afforded no deference with respect to his determination that he has jurisdiction to refuse to convene a Review Tribunal.

[37] On questions of procedural fairness, the standard of review is the same as that of correctness which attracts no deference from a reviewing court: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para. 46.

Analysis

[38] The Applicant submits that, according to the CPP and the regulations, there are two levels of appeal available to her, first to the Review Tribunal and then the Pension Appeal Board. She submits the Commissioner failed to provide her with additional information concerning the appeal

processes and did not explain why they could not give her a hearing. She also submits that the Commissioner failed to have regard to the issues she raised about the validity of the two wills. The Applicant reiterated her understanding of the Respondent's submission in the earlier judicial review that she had a right to a hearing and should have had one to consider the issues she raised. Finally, the Applicant requests that she be awarded the sum of \$2,500, the extent of the death benefit claim.

[39] The Respondent submits that Parliament created a *de novo* appeal as a right with respect to a decision of the Minister on prescribed matters under the CPP. There is no statutory leave requirement for an appeal of the Minister's decision. The Respondent contends that once the statutory requirements are satisfied, the Commissioner is required by statute to choose the Review Tribunal members and to set a place and time to hear the appeal. The Respondent submits the Commissioner exceeded his jurisdiction when he failed to comply with the legislative requirement to convene a Review Tribunal to hear the Applicant's appeal.

[40] The Respondent also submits the Commissioner committed a breach of fundamental justice by denying the Applicant's right to be heard in deciding not to convene a Review Tribunal.

[41] The Intervener submits the Commissioner has the jurisdiction to close an appeal file where a Review Tribunal does not have the jurisdiction to consider the appeal. This jurisdiction arises by consideration of the legislative framework within which the Commissioner operates. In the alternative, the Intervener submits the Commissioner's jurisdiction is implied by the doctrine of jurisdiction by necessary implication. Central to the Intervener's submission is the case management system the OCRT has implemented for OAS Review Tribunal appeals.

[42] The Intervener also submits that the Applicant is afforded procedural fairness by the case management system as it provides multiple points of access to the process, reconsideration, renewed application and application to the Minister on the basis of new information.

The Case Management System

[43] Accordingly to the Intervener, the OCRT supports one of the largest and busiest administrative tribunals in Canada, the Review Tribunal. Briefly summarizing the Intervener's evidence:

The OCRT was established in 1991 as a result of amendments to the CPP. The OCRT receives appeals from individuals who appeal a decision by the Department of Human Resources and Skills Development (the Department) as well as applications from individuals who request their Review Tribunal decision re-opened on the basis of new facts. The OCRT provides the administrative services for the Review Tribunals and the Commissioner is responsible for convening the Review Tribunals. These Review Tribunals hear approximately 4,000 appeals (CPP and OAS) a year in locations across Canada.

When the OCRT receives a Notice of Appeal, it first determines whether the appeal has been directed to the correct level of decision maker and if not, the OCRT ensures the appeal is redirected to the appropriate level. When the appeal has been correctly directed to the OCRT, the appeal is acknowledged and then triaged into one of two processes: the appeals management system or the case management system. The case management system is a process designed for all appeals except certain disability appeals.

The OCRT ensures that the Notice of Appeal identifies an issue that a Review Tribunal is authorized to decide. Once this inquiry is satisfied, the OCRT administers an extensive pre-hearing process and the Commissioner constitutes a three-member Review Tribunal to hear the appeal.

[44] The OCRT case management process differs for appellants who raise issues on appeal that are not within a Review Tribunal's jurisdiction to determine. The Intervener identifies these issues as:

Erroneous Advice/Administrative Error: a Review Tribunal does not have jurisdiction to review determinations under section 32 of the OAS which is the erroneous advice/administrative error section; the proper remedy of a Minister's section 32 determination is an application to the Federal Court for judicial review;

Compassionate grounds/special circumstances: a Review Tribunal, as a creature of statute, has no equitable jurisdiction and cannot use the principle of fairness to grant retroactive benefits in excess of statutory grounds;

Multiple Applications: where a matter has been finally determined by either a Review Tribunal or the Pension Appeals board, a subsequent Review Tribunal is without jurisdiction to revisit the original matter on a subsequent application by the same claimant;

Remission of Overpayment: a Review Tribunal does not have the authority to entertain an appeal of the Minister's decision made under paragraph 37(4)(d) of the OAS; and

Determination of income: subsection 28(2) of the OAS requires such determination to be referred to the Tax Court of Canada;

[45] The Intervener submits that other considerations have informed the development of the case management process, including challenges by many appellants in understanding the Department's denial letters, preparing their appeal and presenting their case, precipitating events surrounding an appeal including misleading information or unfounded encouragement by third parties, the confusion, anger, or frustration appellants experience when told after presenting their case that the Review Tribunal lacks jurisdiction to grant the relief sought, the strain that frivolous appeals place on human and fiscal resources, and the concern that the appeals process will be brought in disrepute where hearings are scheduled despite there being no chance of success.

[46] The Intervener submits that the Commissioner acted within his jurisdiction when he decided not to schedule a Review Tribunal to hear the Applicant's appeal and that his jurisdiction derives from the legislation governing appeals to the OCRT. The Intervener submits that this jurisdiction flows from section 3 of the *Rules*, in particular subsection 3(2). I have addressed this issue in the companion proceeding *Stevens & Taylor*.

[47] In *Stevens & Taylor*, I held that the Applicant had a right of appeal by operation of sections 28 of the OAS and 82(1) of the CPP and that the Commissioner did not have the jurisdiction to deny that right by operation of subsection 3(2) of the *Rules* because the aforementioned statutory provisions took precedence over the latter procedural regulation. In addition, I found that this conclusion was reinforced by the *de novo* nature of an appeal to a Review Tribunal. Since an appellant may raise new issues on appeal, the Commissioner was in no position to assess the merit of an appeal beforehand.

[48] In my view, the same analysis applies in this matter since the statutory provisions and process involving appeals concerning CPP benefits to the Review Tribunal are the same. I adopt the same analysis with one additional consideration.

[49] One further difference arises because this appeal concerns a benefit under the CPP rather than the OAS. A decision of the Review Tribunal under the OAS is final subject to its review on new facts under section 84(2) of the CPP. However, a Review Tribunal decision concerning a CPP benefit may be further appealed to the Pension Appeals Board under section 83 of the CPP, upon

leave granted by the Chairperson of the Pension Appeals Board who has express jurisdiction to exercise a leave function as per subsection 83(2).

[50] The Intervener submits the Commissioner is not exercising a leave function but something of a lesser degree. I am not persuaded by this submission. In my view, in deciding not to convene a Review Tribunal to hear an appeal by concluding an appeal is without merit, the Commissioner is exercising a leave function.

[51] In enacting the CPP, Parliament has turned its mind to the exercise of a leave function and granted that power to the Chairperson of the Pension Appeals Board. Parliament's silence on the exercise of a leave function by the Commissioner of Review Tribunals can only be interpreted to mean that no such leave jurisdiction was afforded to the Commissioner in respect of appeals to the Review Tribunal.

[52] I conclude that the absence of an express leave provision is further confirmation there is no statutory jurisdiction granting the Commissioner jurisdiction to close an appeal file and not convene a Review Tribunal.

The Doctrine of Necessary Implication

[53] The Intervener submits, as an alternative, that the Commissioner has jurisdiction to close an appeal file by the doctrine of jurisdiction by necessary implication. It submits that the Commissioner of Review Tribunals has the jurisdiction necessary to accomplish its statutory mandate. It characterises this mandate as to resolve applications and appeals that are filed pursuant

to the CPP fairly, expeditiously, and in accordance with legislative objectives. This is, in other words, a very broad mandate.

[54] The Intervener relies on *R v 974649 Ontario Inc.*, 2001 SCC 81 at paras 70 and 71, where the Supreme Court of Canada instructed as follows:

It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate ... In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions ...

Consequently, the function of a statutory body is a principle of importance in assessing whether it is vested with an implied power to grant the remedy to accomplish its purpose: *National Energy Board Act (Canada) (Re)*, [1986] 3 F.C. 2765 (C.A.). While these powers need not be absolutely necessary for the court or tribunal to realize the objects of its statute, they must be necessary to effectively and efficiently carry out its purpose...

[55] The Intervener's reliance on the doctrine of necessary implication fails when one considers the limitation on the doctrine given by the Supreme Court of Canada in *ATCO Gas and Pipelines v Alberta (Energy & Utilities Board)*, 2006 SCC 4. At para. 74 the Supreme Court cites Professor Sullivan with approval:

In practice, however, purposive analysis makes the powers conferred on administrative bodies almost infinitely elastic. Narrowly drawn powers can be understood to include "by necessary implication" all that is needed to enable the official or agency to achieve the purpose for which the power was granted. Conversely, broadly drawn powers are understood to include only what is rationally related to the purpose of the power. In this way the scope of the power expands or contracts as needed, in keeping with the purpose. (emphasis in original)

[56] The wording of subsection 3(2) cannot be construed broadly given the specificity of the language and the fact it is but a regulatory provision. The Commissioner's powers in subsection 3(2) of the *Rules* are limited to obtaining information to correct a deficiency in an appeal. The purpose of this power is to complete an appeal to the extent possible. Closing an appeal file and refusing to convene a Review Tribunal is not an exercise necessary to achieve the purpose for which the narrow power to gather information was granted.

[57] The Intervener also submits that the powers derived by implication include the power to prevent an abuse of process which includes the power to refuse a hearing. It cites *Sawatsky v Norris*, [1992] 10 O.R. (3d), 93 D.L.R. (4th) 238 (Gen Div.) (*Sawatsky*). However, *Sawatsky* involved five successive applications for a hearing by the same individual on the same issue. In the case at hand, notwithstanding the twists and turns the case has taken, the Applicant is a first time appellant. She is not seeking to re-litigate her appeal; she is seeking to have her appeal heard. There is no suggestion of any abuse of process in this proceeding.

Procedural Fairness

[58] The Respondent further submits the Commissioner's refusal to convene a Review Tribunal's hearing constitutes a breach of procedural fairness because the Applicant had a statutory right to a Review Tribunal hearing.

[59] In *Baker*, the Supreme Court of Canada underlined the key values relating to procedural fairness:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the

opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[60] The Supreme Court set out a non-exhaustive list of factors to consider in determining the degree of procedural fairness that is required for a given situation:

- a) The nature of the decision;
- b) The nature of the statutory scheme;
- c) The importance of the decision to the individuals affected;
- d) The legitimate expectations of the person challenging the provision, and
- e) The choice of procedure made by the agency itself.

[61] The CPP statutory scheme provides individuals with a means of appealing a reconsideration decision by the Minister or his delegate. This right of appeal is significant. It provides for a hearing that allows for submission of evidence, receipt of relevant materials beforehand and a panel of three decision makers who would provide reasons along with their decision. Clearly, a person would have a legitimate expectation of receiving a full hearing upon filing an appeal.

[62] It is also apparent that the CPP appeal process is available to self-represented applicants and, in fact, a significant number of such appeals are made by self-represented parties who are uninformed about the requirements of subsection 3(1) of the *Rules*.

[63] When the Commissioner wrote to the Applicant on February 20, 2008, the Commissioner simply accepted the Minister's reconsideration decision that the benefit was paid to the estate in accordance with the legislation without inquiry. The Commissioner did not make any effort to inquire or address the issue the Applicant had raised about the invalidity of her late mother's wills.

[64] I find that by deciding to close the Applicant's appeal file without convening a Review Tribunal hearing, the Commissioner denied the Applicant access to a Review Tribunal hearing and thereby breached the requirement of procedural fairness.

Remedy

[65] The Applicant requests relief in that she be awarded \$2500, the amount of the death benefit, on the basis that she had been given erroneous advice by the Minister. The decision of the Minister's delegate holding that she had not been given erroneous advice was upheld by a previous judicial review by Federal Court. This issue of erroneous advice cannot be considered again because of the doctrine of *res judicata*, which means the matter was previously decided by a court.

[66] In addition, it is well established that damages are not awarded in applications for judicial review. The appropriate remedy in a successful application for judicial review is to set aside the decision and remit the matter back for re-determination.

Conclusion

[67] I conclude that the Commissioner does not have the jurisdiction to close the Applicant's CPP appeal file without convening a Review Tribunal to hear the appeal.

[68] The application for judicial review is granted and the matter is remitted back to the Commissioner with a direction to re-determine this matter in accordance with the reasons of this Court.

[69] I make no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The matter is remitted to the Commissioner to re-determine this matter in accordance with the reasons of this Court.
3. No order for costs is made.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-686-09

STYLE OF CAUSE: INGRID V. LAMBIE v. ATTORNEY GENERAL OF CANADA, ET AL.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: May 18, 2010

REASONS FOR JUDGMENT AND JUDGMENT: MANDAMIN J.

DATED: JANUARY 28, 2011

APPEARANCES:

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|---|----------------------------|
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| Ms. Shannon Russell Ms. Krista Cajka | FOR THE INTERVENER |

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