Federal Court  Cour fédérale

Date: 20110128

Docket: T-1883-08

Citation: 2011 FC 103

Ottawa, Ontario, January 28, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ESTATE VIOLET STEVENS & JUNE TAYLOR EXECUTOR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

OFFICE OF THE COMMISSIONER OF REVIEW TRIBUNALS

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of the decision of the Commissioner of Review Tribunals (the Commissioner) to close their 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 28 of the *Old Age Security Act*, R.S.C. 1985, c. O-9 (OAS) and section 82 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[3] This application, together with a companion file, *Ingrid V. Lambie v Attorney General of Canada and Office of the Commissioner of Review Tribunals*, T-686-09 (*Lambie*), 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 OAS or the CPP.

[4] Insomuch as the evidence and submissions differ in the two applications, I will address the question of a statutory basis for the Commissioner's jurisdiction to close an appeal in the present application and address the question of whether the doctrine of necessary implication applies in the companion *Lambie* application.

[5] On a preliminary point, the Applicant has submitted some additional material that was not before the Commissioner when he made his decision. Some of that material consists of new documents while other documents have handwritten notations on them that were not on the documents before the Commissioner. The principle in judicial review is that the material before the Court on judicial review should be the documents that were before the decision maker at the time of

decision. Accordingly, I will consider the Applicant's record as the originally filed and not the new material.

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

Background

[7] The Estate Violet Stevens and June Taylor Executor, Applicant, is self-represented by Ms. June Taylor.

[8] Ms. Taylor is executor of the estate of her mother, Ms. Violet Stevens, who died in March, 2007 at the age of 86 years. Ms. Taylor learned that her mother never collected the OAS pension to which she would have been entitled after turning 65 years of age. Ms. Taylor made a claim on behalf of her late mother's estate and the estate received a retroactive payment of eleven months OAS pension benefits for the period April 2006 to March 2007.

[9] Ms. Taylor sought retroactive payments of OAS benefits to August 1985, the date the late Ms. Stevens turned 65, on the basis that Ms. Stevens did not know she was entitled to a pension, had been a good citizen and had never collected an OAS pension. Her request was denied because the Stevens estate had been paid the maximum benefits allowed under the OAS. Ms. Taylor requested reconsideration of the decision. The Minister's delegate in the Department of Human Resources and Social Development Canada (the Department) denied Ms. Taylor's request for reconsideration.

[10] Ms. Taylor appealed to a Review Tribunal by a letter dated January 16, 2008 to the Office of the Commissioner of Review Tribunals (OCRT). She stated her grounds in her letter of appeal as follows:

> 1) Mother was a good Canadian and contributed to society. Income Tax was always deducted from her pay stubs. She had a below average job all her life and taxes were deducted and other government programs were deducted also.
>
> 2) While working full time employment, Mother brought up two children on her own (she was divorced from her 1st husband in 1948).
>
> 3) Mother was never a drain on the governments of Canada or Quebec by means of health care, welfare or unemployment insurance payments.

Ms. Taylor raised fairness as an issue in her appeal for a further retroactive OAS payment back to August 1985 when her mother turned 65 years of age and pointed to examples she believed to be exceptions to the rules.

[11] The OCRT sent an interim letter acknowledging receipt of Ms. Taylor's letter. It advised it requested information from the Department. In other words, it requested the documents specified under section 5 of the *Review Tribunal Rules of Procedure*, SOR/92-19 (the Rules).

[12] The section 5 documents included Ms. Taylors' original request, and the Department's response which considered not only the eleven month statutory retroactivity period but also an "incapacity provision" which is an exception for people who were physically or mentally unable to make the decision to apply for a pension earlier. The Department's response indicated Ms. Taylor could request reconsideration. In requesting reconsideration, Ms. Taylor provided further information about her late mother, stating, among other things:

> My Mother was never "diagnosed" with physical or mental incapacity. Mental incapacity or lack of knowledge of how O.A.S. would benefit her is probably the only explanation of why she never filed. (quotation marks in original)

The subsequent negative reconsideration decision by the Minister's delegate took Ms. Taylor's above statement that her late mother was never diagnosed with mental incapacity as determinative stating: "Since documentation is required when applying the diagnosed mental incapacity, it is unlikely that this provision could be considered." (emphasis added)

[13] The documents from the Department were reviewed by a case management officer in the OCRT who wrote:

> The Appellant's request for further retroactivity was denied on ground that Appellant received the maximum amount payable for Old Age Security for the late Violet Stevens.
>
> The Late Violet Stevens attained the age of 65 years in August 1985. She did not apply for OAS benefit as she was unaware of such benefit. On March 18, 2007 the late Violet Stevens passed away. Her estate applied for OAS and was approved with 11 month retroactivity for the date of her death – April 2006 to March 2007.
>
> The Appellant is appealing for further retroactivity.
>
> Not an arguable case.

The OCRT case management officer forwarded her comments to the Commissioner.

[14] On June 5, 2008, the Commissioner of Review Tribunals advised Ms. Taylor that the appeal file would be closed without convening a Review Tribunal. Ms. Taylor requested the appeal be re-opened by a letter written on June 11, 2008 which was relayed to the Commissioner by a Member of Parliament. The Commissioner responded further on July 21, 2008 confirming his decision. He

stated he was not prepared to agree to her request to schedule a Review Tribunal for the appeal, explaining that an appeal hearing "would be an exercise in futility as the Review Tribunal would only be able to confirm that the maximum period of retroactive benefits permitted by law has already been paid to the estate of Ms. Stevens."

[15] Ms. Taylor applied for judicial review of the Commissioner's decision not to convene a Review Tribunal to hear the appeal. She submits that the decision to close the appeal was not justice. She reiterated her submission that her late mother was entitled to OAS pension benefits and contended that the government was aware Ms. Stevens was entitled to a pension since 1997. Although not explicitly stated, Ms. Taylor seeks granting of judicial review.

[16] The Respondent supports granting judicial review. The Respondent takes the position that the Commissioner was required by statute to choose three members to constitute a Review Tribunal to hear the appeal made once the Minister has refused a request on reconsideration. The Respondent submits the Commissioner exceeded his jurisdiction by refusing to convene a Review Tribunal hearing and thereby committed a reviewable error. The Respondent thus concurs with Ms. Taylor, albeit on jurisdictional grounds.

[17] The Office of the Commissioner of Review Tribunals applied for intervener status in this judicial review application. It contends that the Commissioner was performing a case management function and acting within his jurisdiction when he decided to close the Applicant's appeal without convening a Review Tribunal to hear the appeal.

Decision Under Review

[18] Ms. Stevens received two letters from the Commissioner, Mr. Philippe Rabot: the first on June 5, 2008 and the second on July 21, 2008. The first is the substantive decision with respect to the Applicants' case. The second reaffirmed the Commissioner's decision.

[19] In the June 5, 2008 letter, the Commissioner writes:

> I have decided not to schedule a hearing for this appeal, as a Review Tribunal would not have the jurisdiction to grant the relief that you are seeking. The maximum period of retroactivity allowed by the legislation has already been recognized by having payments effective from 2006.

[20] The Commissioner provides something akin to a finding where he writes:

> I understand that the purpose of your appeal is to have the *Old Age Security* pension payments made retroactive to the date of Violet Stevens' 65th birthday in August 1985, due to the fact she had been unaware of her entitlement to apply for *Old Age Security* benefits. However, the Government of Canada was under no legal obligation to notify her that she could apply for this benefit. Hence, the absence of such notice is not a factor that a Review Tribunal is entitled to consider. As well, it would not be permitted to base its decision on compassionate grounds.

[21] The Commissioner stated the Review Tribunal can only do what the law permits. He expressed his regrets about the outcome and concludes by advising "Your appeal file will be closed and we will be taking no further action with respect to this matter."

Legislation

[22] The *Old Age Security Act*, R.S.C., 1985, c. O-9 (OAS) provides:

27.1 (1) A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to the person, or respecting the amount of a benefit that may be paid to the person, may, within ninety days after the day on which the person is notified in writing of the decision or determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.	27.1 (1) La personne qui se croit lésée par une décision de refus ou de liquidation de la prestation prise en application de la présente loi peut, dans les quatre-vingt-dix jours suivant la notification par écrit de la décision, ou dans le délai plus long que le ministre peut accorder avant ou après l'expiration du délai de quatre-vingt-dix jours, demander au ministre, selon les modalités réglementaires, de réviser sa décision.
28. (1) a person who makes a request under the subsection 27.1(1) or (1.1) and who is dissatisfied with the decision or the Minister in respect of the request, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal under section 82 of the Canada Pension Plan.	28. (1) L'auteur de la demande prévue aux paragraphes 27.1(1) ou (1.1) qui se croit lésé par la décision révisée du ministre — ou, sous réserve des règlements, quiconque pour son compte — peut appeler de la décision devant un tribunal de révision constitué en application de l'article 82 du Régime de pensions du Canada.

(emphasis added)

[23] Section 82 of 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,	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

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:

(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

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 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

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.	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.

(emphasis added)

[24] 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	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

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;
(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;

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. DORS/96-523, art. 4.

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 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

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.	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

[25] In this matter, the relevant question is not whether a Review Tribunal had the jurisdiction to hear the matters raised by the Applicant, but whether the Commissioner has the jurisdiction to refuse to convene a Review Tribunal to hear the Applicant's appeal.

[26] Accordingly, 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?

And alternatively,

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

Standard of Review

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

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

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

[30] 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.

[31] The Supreme Court found 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. This and the companion proceeding are the first applications before this Court involving a review of the Commissioner's refusal to schedule a Review Tribunal hearing.

[32] 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.

[33] The Supreme Court characterized true jurisdiction as a question of law requiring a standard or 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)

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

[35] 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.

[36] 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.

[37] This application and the companion application raise for the first time the jurisdiction for the Commissioner to close an appeal without convening a Review Tribunal. It therefore invites a standard of review analysis as being a case of first impression.

[38] The standard of review analysis as considered in *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 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.

[39] 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 section 28 of the OAS has a privative clause and 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 toward less deference for the Commissioner's decisions.

[40] 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.

[41] The OAS provides pensions and supplements to individuals who meet the eligibility requirements. That benefit extends to the estates of such individuals. Those individuals have 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.

[42] 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.

[43] 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 an OAS appeal is one of correctness. The Commissioner will be afforded no deference with respect to his determination he has jurisdiction to refuse to convene a Review Tribunal.

[44] On questions of procedural fairness, the standard or 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

[45] The Applicant submits that the Commissioner's decision to close the appeal was not justice. The Applicant reiterates that Mrs. Stevens had been a good citizen and did not receive the OAS benefits she was entitled to. The Applicant strongly protests the eleven month limit to the retroactive payment. The Applicant does not make any representation on the jurisdictional issue.

[46] The Respondent submits that a *de novo* right of appeal exists before the Review Tribunal with respect to reconsideration decisions by the Minister regarding prescribed matters under the OAS. The Respondent submits that once the statutory requirements for an appeal are satisfied, the Commissioner is required by statute to choose three Review Tribunal members to hear the

Applicant's appeal. By refusing to convene a hearing, the Respondent submits the Commissioner exceeded his jurisdiction and, as well, breached the natural justice principle of a right to be heard.

[47] The Intervener submits the Commissioner has the jurisdiction to close an appeal file where a Review Tribunal does not have the jurisdiction to decide the appeal. This jurisdiction arises by consideration of the relevant statutory provisions. Central to the Intervener's submission is the case management system the OCRT has implemented for OAS Review Tribunal appeals.

[48] I note that the Intervener also argues the Commissioner's jurisdiction arises by necessary implication in oral and written argument in relation to the companion case, *Lambie*. Since the Intervener did not advance this argument in its written submission in this case, I will address the question of jurisdiction by necessary implication in my decision in *Lambie*.

The Case Management System

[49] The Intervener has led evidence about its case management system. The Intervener explains that, in an attempt to provide service appropriate to the appellant populations who are predominantly self-represented senior citizens with a diversity of needs and backgrounds, the OCRT implemented a pre-hearing case management system. This case management system was initially delivered by the legal unit in 1998 but later was transferred to an administrative unit in 2002. The Intervener states that the development of the case management process can be generally summarized as relating to fairness and efficiency considerations.

[50] The OCRT receives almost two hundred OAS Notices of Appeal each year. A considerable number of those appeals raise issues that are not within a Review Tribunal's jurisdiction to decide including:

> Determination of income: subsection 28(2) of the OAS requires such determination to be referred to the Tax Court of Canada;
>
> Erroneous Advice/Administrative Error: a Review Tribunal does not have jurisdiction to review determinations under section 32 of the OAS, 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;
>
> 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
>
> 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.

[51] The Intervener states that the very high number of OAS appellants raising issues that are not within a Review Tribunal's jurisdiction has been a challenge for the OCRT since the late 1990's. These members include appellants requesting relief from the statutory limit on retroactive OAS pension payments.

[52] For instance, the Intervener reports that OAS Notices of Appeal received in the month of May 2009 is illustrative of the OAS case management challenge. Of the 22 OAS Notices of Appeal:

a) 5 (22%) raised as the sole ground of appeal compassionate circumstances or allegations that the Department provided erroneous advice;
b) 3 (18.1%) raised no ground of appeal or at all;
c) 7(31.8%) required clarification before grounds of appeal, if any, could be identified;
d) 6 (27.2%) provided adequate information to ascertain grounds of appeal, but varied widely.

[53] The Intervener estimates the average direct cost of a Review Tribunal hearing is $1,747 and the average indirect cost is $1,719. For the same year as the present matter, 2007-08, a total of 69 appeals were closed by the Commissioner because they were considered to either fail to raise an issue that a Review Tribunal is authorized to decide or failed to raise a statutory ground of appeal. The estimated cost of sending these 69 appeals to a review Tribunal would had totalled approximately $239, 154.

[54] The Intervener submits that its case management process attempts to balance the fairness with efficiency concerns of a modern, high volume administrative tribunal and reduces hearing wait times for those whose notices of appeal meet the requirements of section 3(1) of the *Rules* as well as freeing up resources for improved client service at the pre-hearing stage.

Statutory Authority

[55] The Intervener submits the Commissioner's jurisdiction may be derived from statutory interpretation of the legislative framework within which the Commissioner operates. There is nothing in the OAS, the CPP or the Rules that prohibit establishment of a case management process for the Review Tribunals. The legislation and the regulations do not answer every procedural question and there is no general procedure statute to guide federal administrative tribunals such as the Review Tribunals. In such circumstances, the Intervener submits tribunals are entitled to establish their own procedure subject to the duty to act fairly.

[56] The language of subsection 3(1) of the *Rules* specifically requires an appellant to provide, *inter alia*, the grounds for the appeal and a statement of the facts, issues, statutory provisions, reasons and documentary evidence the appellant intends to rely on. The Intervener emphasises that

subsection 3(2) of the *Rules* authorizes the Commissioner may do what is necessary to obtain the information that will rectify any failure by an appellant to comply with subsection 3(1).

[57] The Intervener says that the mandatory provisions of the *Rules*, section 4 and subsequent procedural provisions make sense only after the requirements of subsection 3(1) are met. The Intervener submits that the language of section 3 makes it clear that it is the Commissioner's responsibility, not a Review Tribunal's, to decide when a notice of appeal satisfies those requirements.

[58] The Intervener therefore submits the Commissioner may close an appeal file where it is unlikely that a notice of appeal can be made to meet the requirements of section 3 either because the proffered reason for the appeal is precluded by statute or by binding jurisprudence. The Intervener submits the Commissioner is not assessing an arguable case; he is determining whether an appellant has raised grounds within a Review Tribunal's jurisdiction to decide.

[59] The Intervener concludes this line of argument by contending that sending every appeal to a Review Tribunal regardless of the governing legislation would defeat the purpose of section 3 of the *Rules.*

[60] The first difficulty with the Intervener's submission that the Commissioner has a statutory ground for asserting jurisdiction to close an appeal is that the Commissioner's powers are circumscribed by the statutory provisions. The Commissioner is responsible for overseeing the convening of Review Tribunals and providing administrative services for Review Tribunals.

Subsections 82(7), 82(8) and 82(11) all employ mandatory language “must” or “shall” in setting out the Commissioner’s duties.

[61] An ordinary reading of section 82 of the CPP reveals that a Review Tribunal hearing must be scheduled. The use of the word “shall” indicates the requirement is mandatory. There is no ambiguity in the statutory language to displace the ordinary meaning of the mandatory language in section 82: Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto and Vancouver: Butterworths, 1994), pp. 369-370.

[62] Similarly, section 7 of the *Rules* also employs the same mandatory language: “The Commissioner shall, on receipt of the documents referred to in section 5...select the members to hear the appeal in accordance with subsection 82(7) of the Act; and... fix the place, in accordance with subsection 82(8) of the Act, and time for the hearing of the appeal.”

[63] The only provision that provides the Commissioner with discretionary authority is subsection 3(2) of the *Rules* which provides that the Commissioner may take steps to obtain information an applicant failed to provide in order to rectify the failure to comply with section 3(1) of the *Rules*. In my view this discretionary authority to take steps to remedy subsection 3(1) deficiencies does not displace the mandatory requirements of section 82 of the CPP and the *Rules.*

[64] More importantly, I would hold that the discretionary provision in subsection 3(2) of the *Rules*, which is merely a procedural regulation, cannot be interpreted to defeat a right of appeal given to a person by express statutory language in section 28 of the OAS and subsection 82(1) of the CPP.

[65] I also come to my conclusion that the Commissioner does not have the jurisdiction to close an appeal file, not only because of the greater import of statutory language, but also because of the *de novo* nature of the Review Tribunal hearing.

De Novo Hearing

[66] In its submissions, the Respondent asserts that an appellant has a *de novo* right of appeal from reconsideration decisions by the Minister before the Review Tribunal. Although the Respondent does not cite any support for this in its overview, I believe the Respondent is correct.

[67] None of the provisions in the OAS, CPP or the *Rules* expressly specify a Review Tribunal hearing is a *de novo* hearing. However, the statutory provisions leave little doubt the hearing is to be conducted *de novo*.

[68] Subsection 28(1) of the OAS indicates that a person may appeal the decision to a Review Tribunal established under section 82 of the CPP. The right to appeal by right is reiterated in section 82 of the latter act. A Review Tribunal may exercise all the powers the Minister has. These powers are set out in section 11:

> (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.

[69] Subsection 84(1) provides that a Review Tribunal may decide questions of law or fact, based on the evidence and, significantly, subsection 84(2) provides that a Review Tribunal may make findings based on new evidence in a subsequent rehearing:

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

[70] Further, the *Rules* provide for witnesses to be examined orally, as would be expected in *de novo* hearings:

> 11.1 Witnesses shall be examined orally under oath at the hearing of an appeal, but, before the hearing or at any time during the hearing, any party to the appeal may apply to the Tribunal for an order permitting that all facts or any particular fact or facts may be proven other than by oral evidence and the Tribunal may make any order that in its opinion the circumstances of the case require.

[71] In *Canada (Minister of Human Resources) v Chhabu*, 2005 FC 1277 at para. 17 the Court refers to and accepts a Review Tribunal hearing as a hearing *de novo*: "The parties agree that the appeal before the Review Tribunal is a *de novo* hearing." Similarly, other cases dealing with Review Tribunal hearings treat Review Tribunal appeals as *de novo* hearings: *Khota v Canada (Minister of Human Resources and Skills Development)*, 2007 FC 805 and *McDonald v Canada (Minister of Human Resources and Skills Development)*, 2009 FC 1074.

[72] I conclude that a Review Tribunal hearing on an OAS reconsideration appeal is a *de novo* hearing. Accordingly, an appellant may introduce new issues in the Review Tribunal appeal hearing.

[73] In turning to the facts of this application, neither the case management officer nor the Commissioner made reference to an exception to the statutory limit on retroactive OAS payments, the incapacity provision, notwithstanding the Minister's delegate's consideration of that issue. Given the *de novo* nature of the appeal, it would be open for the Applicants to revisit that issue.

[74] Because an appellant has a right to introduce a new issue in a *de novo* at Review Tribunal hearing, the Commissioner is in no position to conclusively determine beforehand an appeal is not within the Review Tribunal's purview.

[75] The Commissioner may not close an appeal file and deny an appellant's opportunity to a *de novo* hearing. Indeed, it is my view the purpose of subsection 3(2) is to enable the Commissioner to facilitate the preparation of a proper appeal for the Review Tribunal's consideration. This may involve inquiry to identify proper grounds and factual evidence required for a Review Tribunal if an appellant does not articulate as such.

Procedural Fairness

[76] The Respondent further submitted that the Commissioner's refusal to convene a Review Tribunal's hearing constituted a breach of procedural fairness because the Applicant's had a statutory right to a Review Tribunal hearing.

[77] In *Baker*, the Supreme Court of Canada underlined the key values relating to procedural fairness at para. 28:

> 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.

[78] The Supreme Court set out a non-exhaustive list of factors to consider in determining the degree of procedural fairness:

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.

[79] The OAS/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 a receiving full hearing upon filing an appeal.

[80] It is also apparent that the OAS 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 about the requirements of subsection 3(1) of the *Rules*. This is the very reason given for the introduction for the case management process adopted by the OCRT.

[81] Subsection 3(2) of the *Rules* provides that the Commissioner "may take such steps to obtain the information as are necessary to rectify the failure." The Commissioner did not make any effort to address the perceived deficiency in the Applicant's appeal before the June 5, 2008 decision or the July 11, 2008 reconfirmation closing the Applicant's appeal file.

[82] I find that by deciding on June 5, 2008 not to convene a Review Tribunal hearing without first alerting the Applicant to any perceived deficiency in its Notice of Appeal, the Commissioner denied the Applicant access to a Review Tribunal hearing.

[83] It is no answer for the Commissioner to point to his reconsideration decision on July 11, 2008 since there was no offer to reconsider. Instead it was merely a confirmation of a previously made decision in response to the Applicant's relayed request to reopen its appeal.

[84] I find the Commissioner breached procedural fairness in closing the appeal without affording the Applicant's the right to be heard by a Review Tribunal.

Conclusion

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

[86] The application for judicial review is granted.

[87] 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 these reasons.
3. No order for costs is made.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1883-08
STYLE OF CAUSE:	ESTATE VIOLET STEVENS & JUNE TAYLOR EXECUTOR 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

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