

**Date: 20080417**

**Docket: A-286-07**

**Citation: 2008 FCA 144**

**CORAM: LÉTOURNEAU J.A.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**LINDA KIRKLAND**

**Respondent**

Heard at Toronto, Ontario, on April 16, 2008.

Judgment delivered at Toronto, Ontario, on April 17, 2008.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
TRUDEL J.A.**

**Date: 20080417**

**Docket: A-286-07**

**Citation: 2008 FCA 144**

**CORAM: LÉTOURNEAU J.A.  
SHARLOW J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**LINDA KIRKLAND**

**Respondent**

**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

[1] I am of the view that this application for judicial review must be allowed.

[2] The Pension Appeals Board (Board) determined that Ms. Kirkland, who has been self-represented throughout these proceedings, was incapable of forming the intention to apply for disability benefits prior to March 31, 2002. Yet, the uncontradicted evidence in the record shows that she signed her application for benefits on January 13, 2002.

[3] In addition, the Board ruled that her disability benefits be made retroactive to March 31, 1996.

[4] I agree with counsel for the applicant that these two conclusions are unexplained in the reasons, unsupported by and indeed contrary to the evidence. For example, in order for the respondent to be entitled to benefits as of March 31, 1996, this means that the Board would have had to find her disabled as of November 1995. Yet, she worked until December 1995.

[5] I also agree with the applicant that the reasons given by the Board for its conclusion on the respondent's incapacity to form an intention to apply for benefits do not adequately deal with the evidence that Ms. Kirkland had some decision-making capacity prior to March 2002.

[6] I note that the Board did not have, at the time, the benefit of the decisions of this Court in *Sedrak v. Canada (Minister of Social Development)*, 2008 FCA 86 and *Canada (Attorney General) v. Danielson*, 2008 FCA 78.

[7] One decision stands for the principle that the activities of a claimant during an alleged period of incapacity “may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered: see *Danielson, supra*, at paragraph 7. The other holds that the “capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant”: see *Sedrak, supra*, at paragraph 3.

[8] There was ample evidence of relevant activities of the respondent in this case that the Board either ignored or failed to consider.

[9] I should add that the issue in this case is not about whether the respondent is disabled or not. As we explained to her at the hearing when she appeared to be relitigating that issue, she has been found to be disabled and she is receiving disability benefits. Rather, it is about the extent of the retroactivity of these benefits and the time and length of the respondent's incapacity to apply for them.

[10] For these reasons, I would allow this application for judicial review, set aside the decision of the Board and refer back the matter for reconsideration by a differently constituted panel. The applicant did not seek costs and consequently no order as to costs will be issued.

“Gilles Létourneau”

---

J.A.

“I agree  
K. Sharlow J.A.”

“I agree  
Johanne Trudel J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-286-07

**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA v.  
LINDA KIRKLAND

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 16, 2008

**REASONS FOR JUDGMENT BY:** LÉTOURNEAU J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
TRUDEL J.A.

**DATED:** April 17, 2008

**APPEARANCES:**

Jacques-Michel Cyr

FOR THE APPLICANT

Linda Kirkland

ON HER OWN BEHALF

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE APPLICANT