

Date: 20081203

Docket: A-530-08

Citation: 2008 FCA 380

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

GREGORY BURNHAM

Respondent

Dealt with in writing without appearance of parties.
Judgment delivered at Ottawa, Ontario, on December 3, 2008.

REASONS FOR JUDGMENT BY:

SHARLOW J.A.

CONCURRED IN BY:

**EVANS J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The parties have consented to a judgment allowing this application for judicial review in part. Although the parties have not followed the correct procedure to obtain the judgment, I would grant the requested relief because it is justified on the merits and because it would be wasteful at this stage to require a correction to a procedural error.

[2] There is no doubt that a judgment disposing of an appeal or an application for judicial review may be made on consent without a hearing. The correct way to request a consent judgment is by filing a notice of motion in proper form, in a motion record, with one or more supporting

affidavits containing the information that is required to demonstrate that the judgment should be made. The motion may be made jointly by the parties, or by one party with the consent of the other party signified in writing.

[3] In this case, the parties jointly filed a document entitled “consent” in which they recited that they had consented to an order in the attached form. The attached form of order contained lengthy recitals, a legal conclusion, and a disposition. There are three problems with the “consent” document.

[4] First, the information required to dispose of the judgment is not found in a properly sworn affidavit, but in a draft order. I have disregarded that irregularity because both parties are represented by counsel and I have no reason to doubt that the facts are correctly stated.

[5] Second, the record contains no request for a judgment. The request must be inferred from the fact that the “consent” document was filed. The inference is an obvious one to make in this case, but it may not always be so. A notice of motion is essentially a request to the Court to take specified action. The advantage of using a prescribed form such as a notice of motion is that it provides useful guidance as to the information required to enable the Court to consider the request. In this case, the absence of a notice of motion is an irregularity that I will disregard.

[6] Third, the judgment is based on an analysis of a number of provisions of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, that were not reproduced (although a number of helpful cases

were). It is generally advisable, when a request for a consent judgment is submitted, to include in the motion record a copy of all applicable statutory provisions.

[7] I turn now to the merits of the request for a consent judgment.

[8] The application was commenced by the Crown to seek judicial review of an order made by the Pension Appeals Board for the payment of costs upon the adjournment of a hearing. The order is found in paragraph 3 of the decision of the Pension Appeals Board dated September 18, 2008 in Appeal CP25096, and reads as follows (my emphasis):

[3] After hearing submissions from counsel for both parties, it is ordered that

- (1) the hearing is adjourned to the soonest of hearings by the Pension Appeals Board at Kitchener, London, Brantford or Woodstock;
- (2) the Minister is to pay forthwith out of pocket expenses incurred by counsel for the Respondent, the Respondent and his two witnesses;
- (3) two of the witnesses for the Respondent have lost money by reason of taking time off work to appear. They are to be reimbursed immediately for their lost income by reason of absence from work.

[9] In the proceedings before the Pension Appeals Board, the appellant was the Minister and the respondent was Gregory Burnham. The parties have agreed that the underlined portions of the order cannot stand because the Pension Appeals Board does not have the legal authority to require the

Minister to reimburse any person other than Mr. Burnham for expenses incurred or income lost as a result of attending a hearing of the Pension Appeals Board, or as a result of an adjournment.

[10] The matter of costs in proceedings before the Pension Appeals Board is governed by section 86 of the *Canada Pension Plan*, which reads as follows:

86. (1) Where on an appeal to the Pension Appeals Board from a decision of a Review Tribunal, an appellant is requested by the Board to attend before it on the hearing of the appeal and so attends, the appellant is entitled to be paid such reasonable travel and living expenses incurred in Canada and compensation for loss of remuneration as are fixed by the Minister.

(1.1) Notwithstanding subsection (1), where an appellant is successful, the appellant is entitled to be paid such reasonable travel and living expenses in connection with the hearing of the appeal and compensation for loss of remuneration as are fixed by the Minister.

(1.2) Where on an appeal to the Pension Appeals Board from a decision of a Review Tribunal, a respondent or other party to the appeal is requested by the Board to attend before it on the hearing of the appeal and so attends, the respondent or other party shall be paid such reasonable travel and living expenses and compensation for loss of remuneration as are fixed by the Minister.

(2) Where

(a) on an appeal by the Minister to the Pension Appeals Board from a decision

86. (1) Lorsque, sur appel d'une décision d'un tribunal de révision interjeté devant la Commission d'appel des pensions, l'appellant est invité par la Commission à assister à l'audience de l'appel et y assiste, il a le droit d'être indemnisé des frais raisonnables de déplacement et de séjour faits au Canada, y compris une indemnisation pour perte de rémunération, fixés par le ministre.

(1.1) Malgré le paragraphe (1), dans le cas où l'appel est accueilli, l'appellant est indemnisé des frais raisonnables de déplacement et de séjour, y compris une indemnisation pour perte de rémunération, fixés par le ministre, entraînés par l'audition de l'appel.

(1.2) Dans le cas où, dans le cadre d'un appel à la Commission d'appel des pensions d'une décision d'un tribunal de révision, la présence d'un intimé ou d'une autre partie est requise par la Commission et où ils y assistent, cette personne est indemnisée des frais raisonnables de déplacement et de séjour, y compris une indemnisation pour perte de rémunération, fixés par le ministre, entraînés par l'audition de l'appel.

(2) Dans les cas où :

a) au cours d'un appel d'une décision d'un tribunal de révision interjeté par le

of a Review Tribunal, a person who benefits by the decision from which the Minister is appealing, or a person added as a party pursuant to subsection 83(10), is represented by counsel on the hearing of the appeal, or

(b) on an appeal by a person other than the Minister to the Pension Appeals Board from a decision of a Review Tribunal, that person, or a person added as a party pursuant to subsection 83(10), is represented by counsel on the hearing of the appeal and is successful at the appeal,

that person is entitled to be paid such legal expenses as may be approved by the Minister.

(3) Where any travel and other allowances, including compensation for loss of remuneration, may be paid to any person under subsection (1) or any legal expenses may be paid to any person under subsection (2), those allowances, including compensation, or those expenses may, in lieu of being paid to that person, be paid, subject to the regulations, to any person acting on his behalf.

ministre auprès de la Commission d'appel des pensions, une personne qui bénéficie de la décision au sujet de laquelle le ministre interjette appel ou une personne mise en cause conformément au paragraphe 83(10), est représentée par un avocat lors de l'audition de l'appel;

b) au cours d'un appel d'une décision d'un tribunal de révision interjeté par une personne autre que le ministre auprès de la Commission d'appel des pensions, cette personne ou une personne mise en cause conformément au paragraphe 83(10), est représentée par un avocat lors de l'audition de l'appel et a gain de cause lors de cet appel,

la personne en question a droit au remboursement des frais judiciaires qu'autorise le ministre.

(3) Dans les cas où le paragraphe (1) prévoit le paiement de frais de déplacement et autres indemnités, y compris l'indemnisation pour perte de rémunération, et où le paragraphe (2) prévoit le remboursement des frais judiciaires, les indemnités, frais et remboursements peuvent, sous réserve des règlements, être versés aux représentants des personnes qui y ont droit.

[11] In my view, the parties are correct in their interpretation of section 86. For that reason, I agree with them that the Minister's application for judicial review should be allowed. As this is an application for judicial review and not an appeal, this Court cannot simply make the order the Pension Appeals Board should have made, but it is appropriate to set aside the order that is the

subject of this application for judicial review, and direct the Pension Appeals Board as to the order that it should make.

[12] I note that Mr. Burnham is represented by counsel in the proceedings before the Pension Appeals Board. Nothing in this decision should be interpreted as limiting the right of Mr. Burnham to claim reimbursement of his legal expenses as contemplated in subsection 86(2), including legal expenses in the form of charges for disbursements made by his counsel, to the extent such disbursements are properly billed to Mr. Burnham.

“K. Sharlow”

J.A.

“I agree.

John M. Evans J.A.”

“I agree.

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-530-08

STYLE OF CAUSE: Attorney General of Canada
v. Gregory Burnham

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: EVANS J.A.
TRUDEL J.A.

DATED: December 3, 2008

WRITTEN REPRESENTATIONS BY:

Daniel K. Willis

FOR THE APPLICANT

Richard J.T. Shaheen

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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

FOR THE APPLICANT

Nesbitt Coulter Law Firm
Woodstock, Ontario

FOR THE RESPONDENT