Federal Court of Appeal | Cour d'appel fédérale

Date: 20120911

Docket: A-340-11

Citation: 2012 FCA 230

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

LINDA BARTLETT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 14, 2012.

Judgment delivered at Ottawa, Ontario, on September 11, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This concerns an appeal from a judgment of the Federal Court dated July 26, 2011, cited as 2011 FC 934, which dismissed the appellant's judicial review application challenging the decision made on July 21, 2010 on behalf of the Minister of Human Resources and Skills Development with responsibility for Service Canada (the "Minister"), denying the appellant's request for an award of interest or similar compensation on the disability pension benefits provided to her retroactively pursuant to subsection 66(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*CPP*"). The Minister held that she lacked the statutory authority to grant the request.

[2] For the reasons set out below, I would allow the appeal and return the matter to the Minister for a new determination. The Minister has the authority under subsection 66(4) of the *CPP* to take the remedial action she considers appropriate to place the appellant in the position she would have been in under the *CPP* but for an administrative error in the administration of that act. This includes the authority to award interest payments under that subsection.

The history of the litigation

The eligibility proceedings

[3] The appellant first applied for disability benefits under the *CPP* in December 1977. She was notified on May 29, 1978 that she did not have sufficient earnings to meet the minimum qualifying period for such benefits. The appellant needed to make valid contributions in at least five of the ten years included in the period between 1969 and 1978. An administrative review of her earnings and contributions revealed that she only made valid contributions in 1970, 1975, 1976 and 1977.

[4] In October of 2001, for reasons which are not disclosed in the record, the appellant applied a second time for disability benefits under the *CPP*. This was again refused on the ground of her ineligibility for benefits resulting from insufficient earnings and contributions in the appropriate periods. She then appealed to the Review Tribunal pursuant to section 82 of the *CPP*, which dismissed the appeal on December 27, 2002 on the ground that she had not made valid contributions under the *CPP* for a sufficient number of years. The Review Tribunal, however, noted that "[h]ad there been $65 more in contributions for 1973, Mrs. Bartlett would have met the requisite levels of

contribution required to have had valid contributions for that year". It also noted that "[i]t may very well be that Mrs. Bartlett had made sufficient contributions, but there will need to be some documentary evidence of this. This may require having to have her income tax return amended once additional evidence in support of her claim is obtained by her": Appeal Book at pp. 51-52.

[5] As a result of the Review Tribunal's decision, the appellant took two parallel actions. First, she appealed to the Pension Appeals Board; and second, she provided the Minister with additional information confirming that she had sufficient valid *CPP* contributions for 1973. In view of this information, the Minister conceded that sufficient valid contributions had indeed been made. As such, a minimum qualifying period had been established for the appellant. Consequently, upon a review of the medical evidence, the Pension Appeals Board, in its decision dated June 22, 2004, was satisfied that the appeal should be allowed and that the appellant be granted a disability pension in accordance with the terms of the *CPP*.

The retroactivity proceedings

[6] However, this was not the end of the matter. Although, pursuant to the decision of the Pension Appeals Board, the Minister approved the appellant's disability benefits on August 27, 2004, she did so retroactively to November 2000. This, in the Minister's view, was the maximum retroactive payment which could be made to the appellant: Affidavit of Leah Young sworn September 28, 2010 at para. 12, reproduced at p. 4 of the Appeal Book.

[7] Though the respondent has not identified in its memorandum the statutory basis for this retroactive benefit payment limit, it can be surmised that it results from the combined application of paragraph 42(2)(*b*) of the *CPP* defining disability, and section 69 setting out a waiting period for payments of disability pensions. Paragraph 42(2)(*b*) provides that "in no case shall a person…be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made", while section 69 provides that "where payment of a disability pension is approved, the pension is payable for each month commencing with the fourth month following the month in which the applicant became disabled". Consequently, it appears that the Minister determined that she was bound to limit the retroactive payments to November 2000, since the appellant's application for these benefits had been made in October, 2001.

[8] The appellant was dissatisfied with this decision since she was expecting retroactive payments of her disability benefits to 1977, when her disability first began. In the appellant's view, the denial of her disability benefits resulted from an administrative error for which she should not be penalized. She therefore sought reconsideration of the decision.

[9] The reconsideration was denied on November 2, 2004, on the ground that "[i]t is the onus and responsibility of our clients to provide us with missing information or documentation and it was not until August 2003, that you advised our office of missing T4's for the year 1973": Appeal Book at p. 63.

[10] Undeterred, in October 2005, the appellant sought a review of her file by the Minister under subsection 66(4) of the *CPP*. This subsection reads as follows:

66. (4) Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied	**66.** (4) Dans le cas où le ministre est convaincu qu'un avis erroné ou une erreur administrative survenus dans le cadre de l'application de la présente loi a eu pour résultat que soit refusé à cette personne, selon le cas :
(*a*) a benefit, or portion thereof, to which that person would have been entitled under this Act,	*a*) en tout ou en partie, une prestation à laquelle elle aurait eu droit en vertu de la présente loi,
(*b*) a division of unadjusted pensionable earnings under section 55 or 55.1, or	*b*) le partage des gains non ajustés ouvrant droit à pension en application de l'article 55 ou 55.1,
(*c*) an assignment of a retirement pension under section 65.1,	*c*) la cession d'une pension de retraite conformément à l'article 65.1,
the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	le ministre prend les mesures correctives qu'il estime indiquées pour placer la personne en question dans la situation où cette dernière se retrouverait sous l'autorité de la présente loi s'il n'y avait pas eu avis erroné ou erreur administrative.

[11] On January 19, 2006, the Minister denied the appellant's review under subsection 66(4) on the ground that no administrative error had occurred in the treatment of the appellant's file, concluding instead that the onus rested solely on the appellant to provide evidence of her 1973 earnings. The appellant was also notified that this denial could not be appealed, but that she could,

within 30 days, seek judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[12] The appellant consequently applied for judicial review before the Federal Court. Pinard J. granted the application on January 30, 2007 for reasons cited as 2007 FC 89. He found that, in 1978, the appellant had asked the Department concerned to verify her 1973 contributions with Revenue Canada. Instead, the Department concerned made a request for confirmation for the year 1972. As noted by Pinard J. at paragraph 23 of his reasons, "[m]aking a request for the wrong year is an administrative error." He further found, at paragraph 24 of his reasons, that the appellant's T4 statement of remuneration paid for 1973 had been "in the system" all these years, but it was not until August 2003 that a proper search was carried out by officials in order to locate it. Having made a finding of administrative error within the meaning of subsection 66(4) of the *CPP*, Pinard J. sent the matter back to the Minister for reconsideration.

[13] On August 28, 2007, after reconsidering the matter in view of the judgment of the Federal Court, the Minister, acting under subsection 66(4) of the *CPP*, recognized the appellant's entitlement to *CPP* disability benefits retroactively to 1978, and issued her payments for the retroactive benefits.

The indexation or interest proceedings

[14] The documentation provided to the appellant by the Minister was far from clear as to the manner in which the retroactive amounts had been calculated. It became subsequently apparent that

the Minister had provided the amounts which would have been paid to the appellant in each one of the concerned years from 1978 onward, without any adjustment for the loss of purchasing power of these amounts resulting from their late payment. Thus, the retroactive payments for 1978 and subsequent years were determined as the amounts which would have been paid to the appellant in each concerned year, irrespective of the fact that these amounts, when paid in 2007, had substantially less purchasing power than had they been initially paid out in a timely fashion.

[15] The appellant sought explanations as to the mode of calculation of the retroactive payments, first telephoning an agent on September 5, 2007 to seek information. On September 11, 2007, a Payment Service Agent sent her a letter providing general explanations as to the manner in which the payments had been calculated. This letter did not, however, address the specific concern of the appellant relating to the loss of purchasing power of the benefits as a result of their late payment.

[16] The appellant thus wrote to officials at her Regional Office on October 8, 2007, seeking a new review of her file. The appellant sought an adjustment to the retroactive payments in order to take into account the loss of purchasing power resulting from the inflation that occured between the time the benefits should have been paid to her under the *CPP* and their late payment in 2007.

[17] Some fifteen months later, on February 2, 2009, a Service Canada agent wrote the appellant to inform her that "in calculating the amount of this payment, your earnings were adjusted upward to reflect increases in average wages and your calculated benefit has been escalated each year since 1977 by the Consumer Price Index to reflect the increases in the cost of living", adding that "there is

no statutory provision in the CPP to pay interest on CPP payments": Appeal Book at p. 92. However, the appellant submits that she did not receive this letter since it was sent to her old address.

[18] The Service Canada agent also wrote to the appellant on October 29, 2009, and again on February 26, 2010, denying any adjustments to the retroactive *CPP* disability benefits provided to her. However, the appellant also submits that she did not receive these letters since they were also sent to her old address.

[19] In April 2010, the appellant asked her Member of Parliament to intervene on her behalf. This intervention resulted in a letter from Mr. Steven Risseeuw, Acting Director General Payments and Processing, CPP/OAS, reiterating that the amounts provided to the appellant had been correctly calculated. The appellant acknowledges receiving this letter on June 4, 2010: Affidavit of Linda Bartlett sworn August 31, 2010 at paras. 8 and 10, reproduced at pp. 147-148 of the Appeal Book.

[20] On June 14, 2010, the appellant sent a written request directly to the Minister, seeking consideration by the Minister of remedial action under subsection 66(4) of the *CPP* in the form of interest on the retroactive payments. Mr. Risseeuw responded to this request on July 21, 2010, in a letter which read as follows (Appeal Book at pp. 158-159):

> On behalf of the Honourable Diane Finley, Minister of Human Resources and Skills Development with responsibility for Service Canada. I am writing in response to your letter of June 14, 2010, in which you requested payment of retroactive cost-of-living increases and interest on your Canada Pension Plan (CPP) Disability benefit.

> As I wrote to you in May 2010, the calculation of the retroactive payment of your Disability benefit was correct and a payment of $51,300.22 that you were paid in 2007 already included the cost-of-living increases from 1978 to 2007. A copy of that letter is enclosed for your information. Please also find enclosed letters that were sent to you from a Service Canada Centre in Victoria, which further explains the calculation of the retroactive payment of your Disability benefit.
>
> With respect to your request for interest on the retroactive payment of your disability benefit, I must advise you that this is not possible. Unlike the *Income Tax Act*, which provides for the charging of interest on overdue taxes and which pays interest on refunds, the CPP legislation does not contain such provisions. Our policy is not to charge interest on overpaid benefits and, in the same way, interest is not paid on benefits owing.
>
> If you wish to pursue this matter further, you must apply for judicial review in the Federal Court of Canada. You may write to the local office in Vancouver at the following mailing address: Federal Court of Canada, Pacific Centre, PO Box 10065, 701 West Georgia Street, Vancouver, British Columbia, V7Y 1B6. You may also contact that office by calling 1-604-666-3232.
>
> I hope that the above information has clarified the Department's position in this matter.

[21] As invited to do so by Mr. Risseeuw, the appellant applied on August 19, 2010 for judicial review before the Federal Court.

The reasons of the Federal Court judge

[22] The Federal Court judge identified three issues: (a) whether the July 21, 2010 letter from Mr. Risseeuw was a "decision" subject to review before the Federal Court; (b) whether the application was out of time; and (c) whether the Minister had the authority to award interest pursuant to subsection 66(4) of the *CPP*.

[23] As to the first issue, the Federal Court judge ruled that the July 21, 2010 letter was not a new decision and did not constitute a new exercise by the Minister of the power granted to her under

subsection 66(4) of the *CPP*, but rather a "courtesy letter", one in a long series of letters explaining why no additional payments could be made to the appellant: Reasons at paras. 49 to 52.

[24] As a logical consequence of his qualification of the July 21, 2010 letter as a "courtesy letter", the Federal Court judge also concluded on the second issue that the application for judicial review was not brought within the 30 days provided for in subsection 18(2) of the *Federal Courts Act*: Reasons at para. 55. He rather found that the prior February 2, 2009 letter had addressed the issue of interest payments (Reasons at para. 58), and that consequently, "[a]t this point [February 2, 2009] the Minister's position regarding the quantum of the benefits, the cost-of-living indexing and the payment of interest had been fully confirmed and set out, yet the application was not commenced until approximately a year and a half later": Reasons at para. 59.

[25] Since the appellant had not sought an extension of time within which to bring her application for judicial review, the Federal Court judge thus concluded that the application had to be dismissed as being out of time.

[26] The Federal Court judge nevertheless decided to address the third issue he had identified, which pertained to the merits of the application, in case he had erred on the preliminary issues: Reasons at paras. 61, 64 and 65.

[27] Relying on the comments of Gauthier J. (as she then was) in *Jones v. Canada (Attorney General)*, 2010 FC 740, 373 F.T.R. 142 suggesting that this Court's prior decisions calling for

interest payments under subsection 66(4) of the *CPP* were *obiter* (which decisions are further discussed below), the Federal Court judge ruled that the Minister's power under that subsection was limited to taking appropriate measures in order to place a person in the position he or she would be "under the Act". Hence, in the Federal Court judge's view, the Minister had no authority to grant any relief through interest awards, since the *CPP* itself does not expressly so provide: Reasons at paras. 66 and 69.

[28] The Federal Court judge found support for his conclusion in the Ontario Court of Appeal decision of *Gorecki v. Canada (Attorney General)* (2006), 265 D.L.R. (4th) 206, 208 O.A.C. 368, and in the decision of this Court in *King v. Canada (Minister of Human Resources and Social Development)*, 2009 FCA 105, [2010] 2 F.C.R. 294 ("*King*"): Reasons at paras. 68, 70 and 71.

The Issues in Appeal

[29] This appeal raises two principal issues:

i. Did the Federal Court judge err in ruling that the judicial review application was late?

ii. In the affirmative, did the Federal Court judge err in ruling that the Minister had no remedial authority to award interest to the appellant under subsection 66(4) of the *CPP*?

Did the Federal Court judge err in ruling that the judicial review application was late?

[30] Determining whether a judicial review application is timely raises both factual and legal questions. Consequently, the decision of the Federal Court judge on this issue is to be reviewed in appeal on a standard of palpable and overriding error, unless an extricable question of law can be identified, in which case that question of law is to be reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[31] Though the Federal Court judge treated the issue of whether the application was late as a separate issue from the qualification of the July 21, 2010 letter as a "courtesy letter", both issues are inextricably intertwined. It was not disputed that the applicant applied for judicial review within 30 days of the receipt of that letter. Consequently, if the July 21, 2010 letter signed on behalf of the Minister by Mr. Risseeuw was a "decision", the appellant's judicial review application was timely.

[32] The respondent's position in this appeal, and before the Federal Court, is that the 30-day period set out in subsection 18(2) of the *Federal Courts Act* to initiate a judicial review challenging the decision of the Minister not to award interest on the retroactive payments runs from August 28, 2007, the date of the letter sent to the appellant informing her of the amount which would be paid to her as retroactive benefits. In the respondent's view, "[t]he [a]ppellant was provided with all the details regarding the amount of retroactive benefits she would be paid in the Minister's letter of August 28, 2007. If she disagreed with those calculations, her recourse was to apply for judicial review of that decision within thirty days": Respondent's memorandum at para. 49. I disagree.

[33] In many instances, determining the starting point of the 30-day period is easy, such as where the judicial review application concerns a decision of an adjudicative tribunal which provides dated reasons. In other circumstances, determining that starting point is more difficult, particularly where, such as in this case, the "decision" in issue is made by a civil servant acting for the Minister under a complex and multi-layered administrative decision-making process.

[34] In this case, on August 28, 2007, the appellant received the decision of the Minister resulting from the judgment of Pinard J. concerning the retroactive payments of her disability benefits. That decision provided for the payments, but did not provide for compensation for the delay in payments. However, it was not apparent from the August 28, 2007 letter what exactly had been included in, or excluded from, the retroactive payments. The payments explanation statement attached to that letter simply set out monthly benefit amounts without any calculation details, nor was it apparent from this schedule whether compensation for the long delay in receiving the benefits had been included or not. Moreover, this letter specifically instructed the recipient as follows: "[i]f you have any questions about this letter, you can contact us at the address provided below or by calling our toll free number…" (Appeal Book at p. 85). In such circumstances, it was reasonable for the appellant to follow these instructions and to contact, as she did, the Regional Office of Human Resources and Social Development Canada in order to obtain clarifications, rather than initiating a judicial review application.

[35] The response she received from a Payment Service Agent on September 11, 2007 set out general explanations in administrative technical language. In any event, that explanation did not

address the principal concern of the appellant relating to the loss of purchasing power of her disability benefits as a result of their late payment. It was therefore reasonable for the appellant to seek, as she did on October 8, 2007, a new administrative review of her file so that her specific concern could be addressed.

[36] A Service Canada agent sent a response some 15 months later, dated February 2, 2009, informing the appellant that the calculation of the retroactive benefits was correct, and adding that the *CPP* did not provide for interest payments. Since that letter addressed the issue of interest payments, the Federal Court judge was of the view that the 30-day period for initiating a judicial review application concerning this issue ran from that date.

[37] However, in so finding, the Federal Court judge did not consider the appellant's argument that the February 2, 2009 letter and subsequent letters had been mailed to her old address and, as a result, she did not receive these letters.

[38] At the hearing before the Federal Court, the appellant denied receipt of the February 2, 2009 letter and of the subsequent letters: "The letters he's [counsel for the respondent] referring to that supposedly I was supposed to have gotten, I never got. The first I knew of these letters was in – some in the respondent's record, and some were sent to me by Diane Finley's office": Transcript of the proceedings held on March 10, 2011, p. 59, lines 1 to 6. The appellant further explained at the hearing that (a) these letters were sent to the wrong address and (b) that her affidavit was consistent with her position that these letters had not been received by her: Transcript of the proceedings held

on March 10, 2011, pp. 59 to 61. Though the appellant – who represented herself – submitted a poorly drafted affidavit, the gist thereof is that she did not receive an answer to her request dated October 8, 2007 for a review of her file until May 26, 2010, and that answer (reproduced at pp. 96 and 97 of the Appeal Book) did not address the issue of interest payments: Affidavit of Linda Bartlett, sworn August 31, 2010 at paras. 4 to 9, and letter of February 26, 2010, reproduced at pp. 96, 97 and 147 of the Appeal Book.

[39] The Federal Court judge did not explain why he ignored the appellant's evidence and arguments concerning the late receipt of the letter. In my view, if the February 2, 2009 letter was to be held as the starting point for the appellant to initiate judicial review proceedings, it was then incumbent on the respondent to show that the letter was indeed received by the appellant, *i.e.* that the Minister's agent effectively communicated the decision to the appellant: *Atlantic Coast Scallop Fishermen's Assn. v. Canada (Minister of Fisheries and Oceans)* (1995), 189 N.R. 220 (Fed. C.A.). It was not the burden of the appellant to disprove receipt of the alleged decision; the burden was rather on the respondent to establish that it was effectively communicated to the appellant.

[40] In normal circumstances, the respondent may discharge this burden by showing that the letter was mailed to the appellant at the address to which prior correspondence had been delivered. When a government official sends a letter to the address to which prior correspondence has been successfully delivered, it seems logical to assume that the appellant received it. If, however, the appellant denies receiving it, then the whole of the circumstances should be examined to determine whether the allegation of non-receipt is credible. If it is, then that is the end of the matter as far as

that letter is concerned. In this case, it is not apparent from the judgment that this examination was carried out by the Federal Court judge.

[41] There are serious discrepancies in the evidence submitted which raise legitimate questions as to whether the appellant did, in fact, receive the February 2, 2009 letter and the subsequent letters sent to her old address. First, on September 8, 2009, the appellant wrote again to the regional office seeking a response to her request for interest, making no reference therein to the February 2, 2009 letter, and adding that her "letter dated October 8 of 2007 has not been answered": Appeal Book at p. 93. Second, in this September 8, 2009 letter, the appellant also set out her new address of correspondence, yet subsequent letters from Service Canada continued to be sent to her old address: Appeal Record at pp. 93, 94 and 96. Third, the gist of the appellant's affidavit is that she did not receive an answer to her request for interest payments under subsection 66(4) of the *CPP* until July 21, 2010: Appeal Book at pp. 147-148.

[42] Though I have formed the opinion, based on the evidence in the record, that the appellant did not receive the February 2, 2009 letter, I need not rely solely on this in order to find that the application for judicial review was timely. Indeed, even if this letter had been delivered to the appellant, in light of the special and particular circumstances of this case, the Minister nevertheless issued a decision subject to judicial review on July 21, 2010.

[43] In this case, the intervention of the appellant's MP on her behalf resulted in a letter (received by the appellant on June 4, 2010) from Mr. Risseeuw reiterating the correctness of the calculation of

the retroactive benefits, but not specifically addressing the issue of compensation for the late payment or the issue of interest payments. It was not unreasonable in these circumstances for the appellant to seek, as she did on June 14, 2010, a specific decision from the Minister concerning the award of interest under subsection 66(4) of the *CPP*.

[44] This, moreover, is also how Mr. Risseeuw, writing on behalf of the Minister, appears to have understood the request of the appellant. In his July 21, 2010 response to the appellant's June 14, 2010 request to the Minister,

i. Mr Risseeuw first addressed the issue of the calculation of the retroactive payment of benefits referred to in his prior correspondence, which he again viewed as "already includ[ing] the cost-of-living increases from 1978 to 2007". This, it is useful to note, concerned the cost-of-living adjustment to benefits provided under the *CPP*, and not any adjustment to compensate the appellant for the loss in the purchasing power of the benefits resulting from their late payment;

ii. he then addressed the interest claim as a separate issue, specifically denying that claim on the ground that the *CPP* does not provide for interest in such circumstances;

iii. he finally invited the appellant to initiate a judicial review application should she wish to pursue the matter further.

[45] In light of the points addressed therein, the July 21, 2010 letter is a fresh exercise of the Minister's discretion addressing directly the claim for interest payments made by the appellant. This letter specifically denied the interest payment request and further invited the appellant to initiate judicial review proceedings if she wished to pursue the matter further. The appellant responded by initiating such an application within 30 days. Consequently, the judicial review application challenging this decision was timely.

Did the Federal Court judge err in ruling that the Minister had no remedial authority to award interest to the appellant under subsection 66(4) of the CPP?

[46] Though initially taking the position that this issue of statutory interpretation should be reviewed on a standard of reasonableness, the respondent rightly conceded at the hearing of this appeal that a standard of correctness applied. Indeed, the interpretation of a statute by a minister responsible for its implementation is to be reviewed on a standard of correctness unless Parliament has provided otherwise: *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, 427 N.R. 110, at paras. 65 to 105; *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136, 2012 D.T.C. 5090 at para. 23.

The issue has already been decided by this Court

[47] In *Scheuneman v. Canada (Human Resources Development)*, 2005 FCA 254, 337 N.R. 307 at paras. 48 to 50 ("*Scheuneman*"), this Court decided that the authority to award interest is included in the power conferred by subsection 66(4) of the *CPP*. In reaching this conclusion, the Court in *Scheuneman* relied on the decision of Décary J.A. writing for the Court in *Whitton v. Canada*

(Attorney General), 2002 FCA 46, [2002] 4 F.C. 126 ("*Whitton"*). The remedial authorities at issue in *Whitton* were those set out in section 32 of the *Old Age Security Act*, R.S.C. 1985, c. O-9, which are the same as those found in subsection 66(4) of the *CPP*, and read as follows:

32. Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	**32.** S'il est convaincu qu'une personne s'est vu refuser tout ou partie d'une prestation à laquelle elle avait droit par suite d'un avis erroné ou d'une erreur administrative survenus dans le cadre de la présente loi, le ministre prend les mesures qu'il juge de nature à replacer l'intéressé dans la situation où il serait s'il n'y avait pas eu faute de l'administration.

[48] Décary J.A. ruled that section 32 of the *Old Age Security Act* required the Minister to "reinstate the pension forthwith and repay the benefits that were suspended, with interest": *Whitton* at para. 37, emphasis added.

[49] Contrary to what the respondent submits, the principle set out in *Whitton*, and confirmed in *Scheuneman*, was not questioned by this Court in *King*. What was at issue in *King* was whether a claimant was entitled to assert a claim to a ministerial remedy under subsection 66(4) of the *CPP* because he succeeded in obtaining a decision of the Pension Appeals Board reversing the initial refusal by the Minister. The Court held that a successful appeal to the Pension Appeals Board is not,

by itself, evidence that the initial denial of benefits was the result of "erroneous advice" under the meaning of subsection 66(4): *King* at para. 28.

[50] The Court in *King* also noted that the notion of "erroneous advice" found in subsection 66(4) of the *CPP* is of limited scope and only "refers to advice given by the Department of Human Resources and Skills Development to a member of the public, and not to any advice which, on occasion, may be given to the Minister by her officials in the course of deciding whether a pension should be awarded": *King* at para. 31.

[51] What must be kept foremost in mind when reviewing subsection 66(4), is that the remedial powers of the Minister under that provision rest on a different statutory foundation from those which may result in a reconsideration or appeal under Division F of Part II of the *CPP*.

[52] Subsection 66(4) was first introduced into the *CPP* in 1986 by *An Act to amend the Canada Pension Plan and the Federal Court Act*, 1985, c. 30 (2nd Supp.). At that time, the provisions of the *CPP* relating to reconsiderations and appeals were already in force. Consequently, the legislative intent behind subsection 66(4) was to provide the Minister with special authorities beyond those available under a reconsideration or appeal so as to remedy denials of benefits resulting from erroneous advice or administrative errors in situations where such errors could not otherwise be adequately remedied under the other provisions of the *CPP*.

[53] The case at hand is a good example of the distinction between redress through reconsiderations and appeals and redress through subsection 66(4). Here, the appellant did receive a favourable decision from the Pension Appeals Board on June 22, 2004. However, in light of the maximum 15-month retroactivity rule under paragraph 42(2)(*b*) of the *CPP*, combined with the 4-month waiting period set out under section 69, the appellant, pursuant to that decision, could not receive retroactive payments beyond November 2000 in relation to her disability application of October 2001[1]. Indeed, in light of paragraph 42(2)(*b*) and section 69, the Pension Appeals Board has found that it lacks jurisdiction to extend disability benefits beyond the periods set out in these provisions, even in circumstances where a prior application may have been wrongly rejected by the Minister: see notably *Minister of Social Development v. Kendall* (June 7, 2004) CP 21960; and *Whitter v. Minister of Social Development* (May 15, 2006) CP 23649.

[54] In this case, faced with this situation where an adequate remedy could not be provided through the reconsideration and appeal process, the appellant sought, and eventually obtained, additional retroactive payments back to 1978 through the operation of subsection 66(4) of the *CPP*.

[55] With respect to potential interest on retroactive payments, we can ask what is the legal mechanism that would allow for such payments? Indeed, it is worth answering this question as a distinction exists in the *CPP* such that persons obtaining retroactivity redress through reconsiderations and appeals are not in the same position as those whose available retroactivity redress is under subsection 66(4). Interest payments cannot be awarded as a remedy on

[1] Subparagraph 44(1)(*b*)(ii) of the *CPP* has not been raised in this appeal and is therefore not considered.

reconsideration or appeal, because there is no provision for them under the current legislative scheme. However, in cases such as here, where a person has been denied a disability pension for some 30-years as a result of a civil servant's administrative error, Parliament intended to empower the Minister under subsection 66(4) to take all appropriate remedial measures required to correct that error, including, in this case, providing both retroactive payments related to the period prior to November 2000 and related interest on those payments.

[56] What is important to note is that subsection 66(4) was not adopted in order to provide interest payments on awards resulting from reconsiderations and appeals, nor is it a substitute for these administrative processes. That being said however, subsection 66(4) does nevertheless provide for potential interest payments in appropriate circumstances where, such as in this case, reconsideration or appeal cannot otherwise adequately remedy the error.

[57] I need not speculate here on the other circumstances which could trigger subsection 66(4) of the *CPP*. These are to be reviewed by the Minister on a case by case basis, taking into account the intent of that legislative provision. However, once an administrative error has emerged and has been acknowledged by the Minister under subsection 66(4), the extensive remedial power of the Minister under that subsection applies, and it includes the authority, in appropriate circumstances, to compensate the aggrieved person for the late payment of the benefits which may be awarded under this subsection.

[58] In this case, it is not disputed that an administrative error contemplated by subsection 66(4) occurred, and that the retroactive payments resulting from the Pension Appeals Board decision were inadequate to fully compensate the appellant for the loss of her disability benefits. Hence, the Minister could take appropriate measures under subsection 66(4) in order to place the appellant in the position that she would have been under the *CPP* had the administrative error not occurred. This necessarily required the Minister to consider, as she did, whether, in the particular circumstances, it was appropriate to provide the appellant with additional retroactive payments. However, it also required the Minister to consider whether, in the circumstances at hand, it was also appropriate to compensate the appellant for the late payment of these benefits.

Textual, contextual and purposive analysis of the meaning of subsection 66(4) of the CPP

[59] Moreover, apart from the past jurisprudence of this Court, I would have come to the same conclusion by interpreting subsection 66(4) of the *CPP* according to the modern approach to statutory interpretation, which calls for a textual, contextual and purposive analysis to find a meaning that is harmonious with the legislation as a whole: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27. In addition, pursuant to section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 66(4) of the *CPP* must be deemed remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[60] It is common knowledge that the value of money decreases with the passage of time: *Bank of America v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 at paras. 21-22. Consequently, it cannot be doubted that the appellant was not made whole when she received in 2007 the same nominal dollar amount of disability benefits as she would have received in 1978 and each year thereafter; indeed, at the very least, the purchasing power of that amount would have considerably declined in the intervening years. The very purpose of subsection 66(4) is to allow the Minister to take all equitable remedial actions which will ensure that a person who has been denied a benefit as a result of an administrative error is provided with an appropriate remedy. A textual, contextual and purposive analysis of subsection 66(4) supports the view that this subsection seeks to remedy losses such as the decline in purchasing power of benefits paid with great tardiness, as has occurred in this case.

[61] Had the remedial action contemplated by subsection 66(4) been limited to the simple payment of the denied benefits, as the respondent submits, Parliament could have easily so provided. Rather, the subsection gives the Minister broad and unfettered authority to take "appropriate" "remedial action" in order to ensure that the aggrieved person is made whole under the *CPP* as if "the administrative error [had] not been made." Surely this includes remedial action to compensate for the loss of purchasing power of the benefits resulting from their late payment in circumstances where the delay resulting from the administrative error has been extensive.

[62] This is a case where a person has been denied a benefit for close to 30-years as the result of an administrative error. It is difficult to understand how such a person can be placed in the same

position under the *CPP* as if the error had not been made if she is not compensated, at the very least, for the loss in purchasing power of the erroneously withheld benefit payments resulting from inflation. It is generally appropriate to quantify such compensation in the same way as interest.

[63] The respondent nevertheless submits that this textual, contextual and purposive interpretation of the subsection should not be followed on the ground that the subsection does not specifically provide for the payment of interest. The respondent further submits that in the absence of a specific statutory provision allowing for the payment of interest, the Minister has no authority to award interest under subsection 66(4) of the *CPP* no matter how broadly her remedial powers are drafted under that subsection.

[64] I agree with the respondent that the *CPP* is a complete code governing the payment of benefits, and that in the absence of a statutory authority to do so, the Minister does not have the power to award interest on benefits payable under the *CPP*: *Gorecki v. Canada (Attorney General)*, above, at paras. 5 and 14.

[65] That being said, however, the issue in this appeal is not whether the Minister can award interest in the absence of a statutory authority. Rather, the issue here is whether subsection 66(4) of the *CPP* is a statutory authority empowering the Minister to compensate a person for the late payment of benefits through interest payments. In my opinion, it is such a statutory authority.

[66] Subsection 66(4) provides the Minister with a large and unfettered authority to take such remedial action as she considers appropriate to place the appellant in the position that she would be under the *CPP* had the administrative error committed in her case not been made. This authority is broad enough to allow the Minister to consider whether, in the circumstances of the appellant, remedial action to compensate for the late payment of the benefits is appropriate or not. In exercising her authority under the subsection, the Minister must act reasonably, but she is nevertheless afforded a large degree of discretion in determining how the appellant could be placed in the position she would have been had the error not been committed.

[67] For example, the Minister could decide to compensate the appellant for the loss of purchasing power of the payments resulting from the inflation which ensued from the time the payments should have been made. Alternatively, the Minister could decide to apply an interest calculation based on the formula set out in paragraph 36(2)(*b*) of the *Canada Pension Plan Regulations*, C.R.C. c. 385, or use any other reasonable interest or compensation formula appropriate in the circumstances.

Conclusions

[68] For the reasons set out above, I would allow the appeal and set aside the judgment of the Federal Court. Giving the judgment which should have been given, I would allow the judicial review application, quash the decision of July 21, 2010 made on behalf of the Minister, and order

the Minister to determine anew the appellant's request for interest in accordance with these reasons.

Since no costs were sought by the appellant, I would make no award as to costs.

"Robert M. Mainville"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A- 340-11
(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE RUSSEL DATED JULY 26, 2011, DISMISSING AN APPLICATION FOR JUDICIAL REVIEW IN FILE T-1353-10)	
STYLE OF CAUSE:	**Linda Bartlett v. The Attorney General of Canada**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 14, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW J.A. PELLETIER J.A.
DATED:	September 11, 2012

APPEARANCES:

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