Federal Court of Appeal  Cour d'appel fédérale

Date: 20140730

Docket: A-374-13

Citation: 2014 FCA 187

CORAM: **DAWSON J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

KRISTINE ATKINSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 6, 2014.

Judgment delivered at Ottawa, Ontario, on July 30, 2014.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DAWSON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

I. Introduction

[1] This is an application for judicial review of a decision of the Social Security Tribunal, Appeal Division (SST) dated October 15, 2013 (CP 28929 [SST Decision]), dismissing Mrs. Kristine Atkinson's (the applicant) appeal and confirming that she no longer qualifies for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). Paragraph

70(1)(*a*) of the CPP provides that a disability pension ceases to be payable with the payment "for the month in which the beneficiary ceases to be disabled". In turn, paragraph 42(2)(*a*) of the CPP explains that an individual will be considered disabled "only if he is determined…to have a severe and prolonged mental or physical disability" and that "a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation". The SST found that the Minister of Human Resources and Skills Development Canada (the Minister) had met the burden of proving that Mrs. Atkinson had regained a capacity for gainful employment and was therefore not disabled pursuant to paragraph 42(2)(*a*) as of January 2011.

[2] After careful consideration of the parties' written and oral submissions, I propose to dismiss the application for judicial review. The applicant has failed to convince me that the SST committed a reviewable error in applying paragraph 42(2)(*a*) to the facts at hand, and in determining that Mrs. Atkinson no longer qualifies for disability benefits. The SST interpreted paragraph 42(2)(*a*) in a manner consistent with prior jurisprudence and I have not found that the SST's decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47 [*Dunsmuir*]).

[3] The CPP's definition of disabled is highly restrictive; the focus is on those physical and mental limitations that affect a claimant's capacity to work. Thus, individuals who experience significant and prolonged health challenges may nonetheless not qualify for a disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation. The

record before our Court demonstrates that Mrs. Atkinson is a remarkable individual who has managed to pursue substantially gainful employment since 2009 despite her significant physical limitations. As a result, although I am sympathetic to the applicant's situation, I am unable to conclude that the SST's decision to deny her disability benefits was unreasonable.

II. Factual Background and Procedural History

[4] Mrs. Atkinson was born in 1967. At around age 12, she started experiencing progressive difficulties using her arms and, to a certain extent, her legs as well. She had impaired sensation in both arms with worse symptoms on the right side. In 1993, she was found to have a tumour in her cervical cord associated with a large cyst. She underwent surgery during which the tumour was partially removed (respondent's record, volume 1 at pages 209-210). This operation resulted in a spinal fluid leak that caused further damage. She now suffers from paresis and atrophy of her right arm and right leg and has limited use of her left hand. She walks with a spastic gait and is unsteady on her feet. She also suffers from Crohn's disease but this medical condition does not form the basis of her disability claim.

[5] In 1993, Mrs. Atkinson applied for and was granted disability benefits pursuant to paragraphs 44(1)(*b*) and 42(2)(*a*) of the CPP. Paragraph 44(1)(*b*) provides, *inter alia*, that in order to qualify for disability pension, an individual must be under the age of 65, not be in receipt of CPP retirement pension, have made valid contributions to the CPP for not less than the Minimum Qualifying Period and must be disabled within the meaning afforded to this term under the CPP. Paragraph 42(2)(*a*), in turn, provides the CPP's definition of disabled.

[6] It reads:

(2) For the purposes of this Act,	(2) Pour l'application de la présente loi:
(*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	*a*) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death;	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[7] The Government of Canada's website also sets out a "Canada Pension Plan Adjudication Framework" in order to assist CPP decision-makers interpreting and applying subsection 42(2) of the CPP. Importantly for the purposes of this case, this document explains that individuals who are working for a "benevolent employer" could still be considered severely disabled under subparagraph 42(2)(*a*)(i), even if they work regular hours and receive income that is considered "substantially gainful." It defines "benevolent employer" as follows :

> A "benevolent employer" is someone who will vary the conditions of the job and modify their expectations of the employee, in keeping with her or his limitations. The demands of the job may vary, the main difference being that the performance, output or product expected from the client, are considerably less than the usual performance output or product expected from other employees. This reduced ability to perform at a competitive level is accepted by the "benevolent" employer and the client is incapable regularly of pursuing any work in a competitive workforce. Work for a benevolent employer is not considered to be an "occupation" for the purposes of eligibility or continuing eligibility for a CPP

disability benefit
(http://www.esdc.gc.ca/eng/disability/benefits/framework.shtml).

[8] Between 1993 and 2009, Human Resources and Skills Development Canada (HRSDC) reassessed Mrs. Atkinson's eligibility for disability benefits five times. In 2001 and 2005, HRSDC initially discontinued her benefits, as it found that her employment rendered her ineligible (applicant's record at pages 29 and 43). However, in both instances the applicant appealed these decisions to the Review Tribunal and, prior to her appeal being heard, her benefits were restored (applicant's record at pages 37 and 45).

[9] In 2009, she began her current employment as the Restorative Justice Coordinator with the Royal Canadian Mounted Police Detachment in the City of Campbell River, British Columbia. Her position involves reviewing emails and police records to determine whether offenders are suitable for restorative justice, interviewing offenders and victims, and arranging and facilitating forums in which the offender and victim agree how the wrong committed might be remedied. She has earned approximately $43,000 to $45,000 per year from this employment between 2009 and 2012 as compared to earnings ranging from $0 to $19,144 between 2000 and 2008.

[10] Mrs. Atkinson has received a number of accommodations from her current employer. For instance, she is permitted to park in the fire lane, 20 steps from the door to her office building; her meetings and forums are held exclusively within the building where she works; she wears a headset when using the telephone; her husband or another employee sets up furniture for each forum she conducts and her husband purchases and carries refreshments for these forums; her co-

workers assist her by doing up her zippers or buttons and by lifting and carrying binders and other items for her. As well, while her employment contract states that she is required to work six hours a day for a total of 30 hours per week, she is not required to record or account for her hours each week like other employees. Aside from a few months, she has worked over 70% of the hours required of her.

[11] In December 2010, HRSDC reassessed Mrs. Atkinson and found that she no longer qualified for disability benefits on account of her current employment (applicant's record at page 51). Mrs. Atkinson requested a reconsideration of that decision; however, in March 2011 Service Canada confirmed that her benefits could not be reinstated. It explained that part-time work, even on a flexible schedule, is considered regular work for the purposes of CPP disability benefits. It also explained that while her employer was providing her with accommodations, it was not a benevolent employer as she was receiving a substantial salary and it found no evidence that her employer had lowered expectations of her productivity or work performance. Service Canada also noted that she has been able to maintain her position for several years and that her benefits had been continued in 2009 because it was believed that she would be unable to sustain her work as she would be undergoing surgery (applicant's record at pages 54-55).

[12] Mrs. Atkinson appealed this decision before the Review Tribunal, which dismissed her appeal. The Tribunal found that the Minister had "met the burden of proof in demonstrating that the Appellant has shown her capacity to regularly pursue substantially gainful employment within her limitations and that the accommodations provided by her employer can reasonably be expected in any competitive work environment" (Review Tribunal Decision at paragraph 13).

[13] The applicant then sought leave to appeal to the Pension Appeals Board (PAB) pursuant to subsection 83(1) of the CPP. In a decision dated October 31, 2012, a member of the PAB granted leave to appeal, finding that Mrs. Atkinson had established an arguable case.

[14] On April 1, 2013, the SST replaced the PAB and thus Mrs. Atkinson's appeal was set down for hearing before the new SST. Because the applicant had a legitimate expectation that the PAB would conduct a *de novo* appeal, the SST explained that "the appeal determination will be made on the basis of an appeal de novo in accordance with subsection 84(1) of the CPP as it read immediately before April 1, 2013" (SST Decision at paragraph 6).

[15] The SST ultimately dismissed the appeal, finding that the applicant is not currently disabled within the meaning of the CPP and has not been since 2011, as she "has obtained substantially gainful work within her limitations, and maintained it at least since she began her current job in January 2009" (SST Decision at paragraph 45). The SST explained that the respondent met the burden of proving, on a balance of probabilities, that Mrs. Atkinson had ceased to be disabled under the CPP. The SST found that while Mrs. Atkinson's employer accommodated her needs, it was not a benevolent employer and her employment was substantially gainful as "she is paid well for valuable work, and her income is not nominal" (SST Decision at paragraph 36). Moreover, it explained that she is able to complete the essential tasks of her job without assistance and has been able to attend work regularly and predictably.

[16] The applicant now seeks judicial review to our Court.

III. Applicant's Position

[17] The applicant argues that the SST erred in interpreting and applying paragraph 42(2)(*a*) and advances three primary arguments to support this claim.

[18] First, Mrs. Atkinson argues that the SST erred in finding that she was capable regularly of pursuing a substantially gainful occupation. She maintains that the term "regularly" connotes that an individual must be capable of being able "to come to the place of employment whenever and as often as is necessary" and that "predictability is the essence of regularity" (applicant's memorandum at paragraph 69). She explains that since she was unable to predict when she could attend work and how long she could stay, she was not capable *regularly* of pursuing an occupation and thus ought to still be entitled to receive benefits.

[19] Second, she maintains that the SST misapplied the concept of "benevolent employer" and erred in finding that her current employer is not benevolent. The applicant explains that this concept is "part of the scheme" of what amounts to being disabled under paragraph 42(2)(*a*). She also asserts that the evidence before the SST – regarding her employer's accommodations, the assistance she received from her co-workers and husband, and the fact that she was paid for full attendance despite working 70% of her required hours – demonstrates that her employer was benevolent and that she therefore remained disabled under the CPP, despite her employment.

[20] Finally, she argues that the SST erred by shifting the burden onto the applicant to demonstrate that her employer was benevolent. In support of this argument, she cites to a

passage of the SST's decision in which it states that the "appellant provided no evidence that these accommodations are beyond what is required of an employer in the competitive marketplace" (SST Decision at paragraph 35). She argues that the onus was on the Minister to show that the employment was not benevolent in order to demonstrate that she no longer qualified for disability benefits.

IV. Analysis

[21] This case requires our Court to determine two primary issues. First, what is the appropriate standard of review for the SST's Decision? Second, whether the SST erred in finding that the applicant was no longer disabled according to paragraph 42(2)(*a*) of the CPP and thus no longer qualified for disability pension pursuant to paragraph 70(1)(*a*).

A. *Standard of Review*

[22] On an application for judicial review, courts must first consider whether prior jurisprudence has established the appropriate standard of review to be applied to the issue or category of question at hand (*Dunsmuir* at paragraph 62). If this first inquiry is "unfruitful, or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review" then the court must engage in a contextual standard of review analysis to determine the applicable standard (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 48 [*Agraira*]). This second contextual inquiry involves considering the factors set out at paragraphs 51 to 61 of *Dunsmuir* – *i.e.* the presence or absence of a privative clause; the purpose of the tribunal in view of its

enabling legislation and the tribunal's expertise; and the nature of the question at issue – and examining whether these factors point towards a standard of reasonableness or correctness in the case at hand. I note that no argument was made that the SST's *de novo* determination of Mrs. Atkinson's appeal affects the standard of review analysis.

[23] Prior jurisprudence demonstrates that our Court afforded deference to the PAB when reviewing its decisions as to whether an individual is disabled within the meaning of paragraph 42(2)(*a*) (see e.g. *Farrell v. Canada (Attorney General)*, 2010 FCA 181, [2010] F.C.J. No. 895; *Kaminski v. Canada (Social Development)*, 2008 FCA 225, leave to appeal to S.C.C. refused, 32807 (October 22, 2009)) but that the PAB's interpretation of paragraph 42(2)(*a*) was subject to a correctness standard of review (*Canada (Minister of Human Resources Development) v. Scott*, 2003 FCA 34, 120 A.C.W.S. (3d) 310 [*Scott*]; *Villani v. Canada (Attorney General)*, 2001 FCA 248, [2002] 1 F.C. 130 [*Villani*]).

[24] However, our Court is now reviewing, for the first time, a decision of the new SST, not the PAB. As a result, I conclude that prior jurisprudence has not adequately established the standard applicable to the issue at hand and that I must turn to a contextual analysis to determine the appropriate standard of review anew. For the reasons that follow, I find that the SST's interpretation and application of paragraph 42(2)(*a*) of the CPP are reviewable on a standard of reasonableness.

[25] The Supreme Court of Canada has clarified that there exists a presumption that the standard of review is reasonableness where an administrative decision-maker is interpreting its

"home statute" (*i.e.* its enabling statute) or a statute "closely connected to its function and with which it will have particular familiarity" (*Dunsmuir* at paragraph 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 30 and 34 [*Alberta Teachers*]; *Agraira* at paragraph 50). This presumption, however, is not absolute. For instance, it may be rebutted if the "interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply" (*Alberta Teachers* at paragraph 30). These exceptional categories include "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, …[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or vires" (*Ibidem*). This presumption may also be rebutted through a contextual analysis, and, more specifically, in cases where tribunals and courts may both be tasked with considering the same legal question at first instance (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 238 at paragraph 16; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraphs 22-24). Our Court, in turn, has also found that the presumption may be rebutted if the *Dunsmuir* factors point towards a correctness standard of review (*Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85, [2014] F.C.J. No. 322 at paragraphs 38-45; *Takeda Canada Inc. v. Canada (Health)*, 2013 FCA 13, leave to appeal to S.C.C. refused, 35276 (June 13, 2013) at paragraphs 28-29).

[26] In the present case, the SST is interpreting and applying its home statute and I find that the presumption of a standard of reasonableness is not rebutted. The alleged legal errors do not

fall within any of the recognized exceptional categories, this is not an instance in which tribunals and courts may be called upon to determine the same issue at first instance and the *Dunsmuir* factors, considered together, do not weigh in favour of a correctness standard.

[27] The *Department of Employment and Social Development Act*, S.C. 2005, c. 34 [DESDA], which created the SST, contains a privative clause at section 68 which states: "The decision of the Tribunal on any application made under this Act is final and, except for judicial review under the Federal Courts Act, is not subject to appeal to or review by any court." Typically a privative clause points towards a standard of reasonableness; however, this privative clause explicitly enables our Court to review the SST's decisions. Therefore, the existence of this privative clause does not support a deferential standard of review.

[28] With regard to the SST's expertise and mandate, one might suggest that the SST's membership, composition and legislative powers indicate that it has less expertise than the PAB in interpreting the CPP, and thus that our Court owes even less deference to the SST than it did towards the PAB. Subsection 83(5) of the former version of the CPP required that the PAB be partially composed of judges of the Federal Court of Appeal, the Federal Court or a superior court of a province. In turn, subsection 82(3) also used to require that the Review Tribunal's membership contain twenty-five percent lawyers and twenty-five percent doctors. By contrast, the DESDA does not require that any of the SST's members be judges, lawyers or doctors. Rather, subsection 45(1) of this statute states that the SST will be composed of no more "than 74 full-time members to be appointed by the Governor in Council" while subsection 45(2) states

that the Governor in Council will also designate one of the full-time members as the Chairperson, and three as Vice-chairpersons.

[29] In addition, whereas the PAB was tasked with hearing appeals specifically relating to the interpretation or application of the CPP, the SST's Appeal Division currently has a broader mandate. The General Division of the SST (the first level of appeal) is divided into the Employment Insurance Section, which hears appeals of reconsideration decisions made by the Canada Employment Insurance Commission, and the Income Security Section, which hears appeals from reconsideration decisions regarding CPP or Old Age Security Pension/Benefits (DESDA at section 44). The Appeal Division of the SST, in turn, hears appeals from both sections of the General Division. Thus one might suggest that the Appeal Division of the SST has less expertise than the PAB, as it does not hear appeals exclusively relating to the CPP.

[30] The creation of the SST represents a major overhaul of the appeal processes regarding claims for employment insurance and income security benefits. It was intended to provide more efficient, simplified and streamlined appeal processes for Canada Pension Plan, Old Age Security and Employment Insurance decisions by "offering a single point of contact for submitting an appeal" (online: Social Security Tribunal – Canada.ca http://www.canada.ca/en/sst/). The changes made are not limited to the composition and structure of the SST, but also to the rules of practice (see the *Social Security Tribunal Regulations*, SOR/2013-60).

[31] In my view, the differences between the SST and the PAB's structure, membership and mandate do not diminish the need to apply a deferential standard in reviewing the SST's decisions. One of the SST's mandates is to interpret and apply the CPP and it will encounter this legislation regularly in the course of exercising its functions. Moreover, subsection 64(2) of the DESDA also restricts the type of questions of law or fact that the Tribunal may decide with respect to the CPP, presumably in order to better ensure that the SST is only addressing issues that fall within its expertise. These factors suggest that Parliament intended for the SST to be afforded deference by our Court, as it has greater expertise in interpreting and applying the CPP.

[32] Finally, with regard to the nature of the legal questions raised on this application, these are not questions of central importance to the legal system as a whole nor do they fall outside the specialized expertise of the SST. They are also not constitutional questions or jurisdictional questions. With regard to the alleged factual errors or errors made in applying the law to the facts at hand, these are also reviewable on a standard of reasonableness (*Dunsmuir* at paragraph 53).

[33] Having concluded that the standard of review is reasonableness, I now turn my analysis to whether the SST's interpretation and application of paragraph 42(2)(*a*) was reasonable.

B. *Paragraph* 42(2)(*a*)

[34] The purpose of the CPP is to assist Canadians who experience a loss of earnings as a result of retirement, disability or the death of a wage earning family member by providing them with social insurance. However, as the Supreme Court of Canada has pointed out, the CPP "is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the

benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution" (*Granovsky v. Canada (Minister of Employment & Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703 at paragraph 9).

[35] As mentioned previously, paragraph 42(2)(*a*) clarifies the conditions under which an individual will qualify for disability benefits and restricts the receipt of these benefits to individuals whose disability is "prolonged" and "severe". To qualify for benefits under this provision, individuals must provide medical evidence showing that their "disability is likely to be long continued and of indefinite duration or is likely to result in death" (subparagraph 42(2)(*a*)(ii)) as well as evidence, with regard to their employment efforts or possibilities, that demonstrates that they are "incapable regularly of pursuing any substantially gainful occupation" (subparagraph 42(2)(*a*)(i)). In the present case, only the latter requirement is at issue.

[36] Mrs. Atkinson has failed to convince me that the SST committed any reviewable errors in finding that she no longer qualifies for disability benefits.

[37] The SST did not err in its interpretation of what qualifies as incapable "regularly" of pursuing employment. Our Court has held that in interpreting paragraph 42(2)(*a*) it is not the employment that must be "regular," but rather the incapacity to work. In other words, in order to constitute a severe disability, an individual needs to regularly be incapable of pursuing a substantially gainful occupation (*Scott* at paragraph 7). In turn, in *Villani* our Court explained that paragraph 42(2)(*a*) does not require that "an applicant be incapable at all times of pursuing any conceivable occupation" [emphasis in the original] (at paragraph 38). Rather, an individual

needs to be "incapable of pursuing with consistent frequency any truly remunerative occupation" (*ibidem* at paragraph 38).

[38] The SST explained that "predictability is the essence of regularity within the CPP definition of disability" and assessed whether Mrs. Atkinson was capable of working predictably. The SST also provided ample support for its conclusion that she was regularly capable of working. It noted that she attends work at least 70% of the time and that there was no evidence of any complaints or disciplinary action because of missed time. It also pointed out that while she receives some help from her co-workers and husband, she is able to perform the essential tasks of her job without assistance.

[39] I am also not persuaded that the SST erred in its discussion of what constitutes a benevolent employer or who bears the burden of demonstrating that an employer is benevolent. There is no requirement under the CPP that the respondent prove that an employer is not benevolent in order to cease benefits. Rather, the SST explained correctly that the burden lies on the respondent to "prove on a balance of probabilities that the Appellant has ceased to be disabled" and thus that the requirements of paragraph 42(2)(*a*) were no longer met. Whether an individual's employer is benevolent is but one factor that the SST can consider in determining whether or not an individual is "incapable regularly of pursuing any substantially gainful occupation."

[40] The SST also pointed out that the term benevolent employer is not used or defined in the CPP, and explains that counsel has provided a definition of this term on the basis of Service Canada's policy documents (SST Decision at paragraph 35). While this definition is not binding on our Court, the SST's application of this definition nonetheless provides insight into the factors that contributed to the SST's Decision, and enables us to assess whether its application of paragraph 42(2)(*a*) was reasonable. The SST recognized the accommodations that Mrs. Atkinson has received from her employer; however, it found that these accommodations did not go "beyond what is required of an employer in the competitive marketplace" (*Ibidem*). It held that Mrs. Atkinson's work is productive and there is no evidence to suggest that her employer was dissatisfied with her work performance or experienced hardship from the accommodations made. In short, therefore, it found that her employer was not benevolent as she did have the ability to perform at a competitive level and the SST did not find evidence that the work expected from her was considerably less than the work expected from other employees.

[41] Jurisprudence establishes that in a case like this which is primarily fact driven, "the range of defensible and acceptable outcomes available […] is relatively wide" (*Gaudet v. Canada (Attorney General),* 2013 FCA 254, [2013] F.C.J. No. 1189 at paragraph 9). I find that it was open to the SST to conclude that Mrs. Atkinson is capable regularly of pursuing substantially gainful employment on the basis of the evidence on the record.

V. Proposed Disposition

[42] I propose to dismiss the application for judicial review with costs.

"Johanne Trudel"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

F. Kenneth Walton	FOR THE APPLICANT KRISTINE ATKINSON
Carole Vary	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

F. Kenneth Walton Law Corporation Victoria, British Columbia	FOR THE APPLICANT KRISTINE ATKINSON
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA