

**Date: 20070719**

**Docket: T-961-06**

**Citation: 2007 FC 758**

**Ottawa, Ontario, July 19, 2007**

**PRESENT: The Honourable Madam Justice Hansen**

**BETWEEN:**

**ROBERT GEORGE LEE and  
MARIA JOSE LEE FOR NICOLE ANNE LEE**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA,  
HUMAN RESOURCES DEVELOPMENT CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

Introduction

[1] The Applicants allege their daughter, Nicole Anne Lee, was wrongfully denied a Disabled Contributor's Child's Benefit (DCCB) from the date of her birth in June 1998 to March 2003 due to erroneous advice or administrative error provided by the Minister in August 1998.

[2] The Applicants seek an order requiring the Minister to pay their daughter's DCCB from the date of her birth in June 1998 to March 2003. In addition, the Applicants are seeking interest on the denied benefits and the costs associated with this proceeding.

#### Background

[3] In March 1994, the Minister of Human Resources Development Canada (the Minister) approved Ms. Lee's disability benefit application entitling her to a disability pension under the Canada Pension Plan, R.S.C. 1985, c. C-8 (CPP or Plan) effective April 1991. Her daughter, Nicole, was born on June 23, 1998.

[4] In her affidavit, Ms. Lee states that in early August 1998 she telephoned the local Human Resources Development Canada (HRDC) office in Oshawa, Ontario to ask whether she was entitled to any additional benefits to help provide for her newborn child. She deposes that she was told there was "nothing more available because you are at full benefits."

[5] In March 2004, Ms. Lee received a newsletter called "Staying in Touch" in the mail. The Minister publishes this newsletter for people receiving a CPP disability benefit. Although there had been two previous issues of the newsletter, Ms. Lee says this was the first one she received. On page 4, the newsletter explains that children of the recipients of a disability benefit may also be eligible for a benefit, that the benefit is not automatic, and that the recipient or the child must apply for the benefit.

[6] Ms. Lee states that she immediately telephoned the Income Security Program upon receipt of the newsletter to inquire if the information was “true”. Upon receiving an affirmative answer, she asked whether the program was available in 1998 to which she also received an affirmative answer. The individual to whom she spoke asked her why she had not applied sooner to which she replied that she had been informed that nothing was available. Ms. Lee states she was told to put everything in writing, request retroactive benefits to 1998 for her daughter and that there was a good chance it would be granted.

[7] On March 19, 2004, Ms. Lee submitted an “Application for Benefits for Under Age 18 Children of Disabled Contributor” and requested retroactive benefits to Nicole’s birth date.

[8] On March 30, 2004, the Minister approved a DCCB for Nicole retroactive to April 2003. The Minister advised Ms. Lee that subsection 74(2) of the CPP precluded the retroactive payment of a benefit for more than 11 months prior to the month in which the application was received. As the application was received in March 2004, the earliest start date for Nicole’s DCCB was April 2003.

[9] In response to Ms. Lee’s request for a reconsideration of the decision limiting the period of the retroactive payments to eleven months, the Minister reaffirmed the earlier decision.

[10] By letter dated May 3, 2004, the Applicants appealed the Minister’s decision to the Office of the Commissioner of Review Tribunals on the ground that the Minister had failed to notify them of their daughter’s eligibility for a benefit.

[11] The Review Tribunal heard the Applicants' appeal on August 26, 2004. In its September 22, 2004 decision dismissing the appeal, the Review Tribunal concluded that the Applicants had received the maximum allowable payment under the legislation and that it did not have the jurisdiction to determine whether the Applicants were denied a benefit due to erroneous advice or administrative error.

[12] In her affidavit, Ms. Lee states that at the Review Tribunal hearing, the Minister's Representative apologized to the Applicants on behalf of the Minister's office and told them they had been given erroneous advice in 1998 and more recently and informed the Chairperson that she would speak to the Applicants following the hearing. Ms. Lee states that they did speak after the hearing at which time the Minister's Representative apologized again.

[13] In her March 2005 affidavit, the Minister's Representative states that she met with the Applicants after the Review Tribunal hearing at the Chairperson's request to discuss the issue of erroneous advice and administrative error with them. However, in the same affidavit she denies telling the Applicants they had received erroneous advice or that an administrative error occurred. She says she informed them of the process to initiate a review of an allegation of erroneous advice or administrative error under subsection 66(4) of the CPP.

[14] The Applicants wrote to the Minister in September 2004 asking him to give further consideration to their request for benefit payments retroactive to June 1998. The Minister

responded in early November 2004 reiterating that they had been granted the benefit as of the earliest date possible. Further, since an internal review of their account on the basis of erroneous advice or administrative error did not disclose evidence of either, no remedial action could be taken.

[15] The Applicants sought leave to appeal the Review Tribunal decision to the Pension Appeals Board. Their leave request was denied for lack of jurisdiction in mid-January 2005. The Applicants filed a Notice of Application for judicial review that was scheduled to be heard on November 15, 2005.

[16] In a letter dated November 10, 2005, the Minister's Delegate (the Delegate) agreed to reconsider the Applicants' allegations that they were given erroneous advice and invited the Applicants to submit additional evidence. With the consent of the parties, the judicial review was adjourned *sine die*.

[17] The Delegate reviewed the file and considered the following:

- the steps taken by the Minister to ensure disability benefit recipients and the public generally were aware of CPP benefits and, in particular, the DCCB;
  - the March 16, 2004 letter accompanying the application for DCCB;
  - the history of the Applicants' allegation of erroneous advice or administrative error;
- and

- the circumstances surrounding the allegation that at the Review Tribunal hearing the Minister's Representative advised the Applicants they had been given erroneous advice in 1998 and 2004 and the affidavit of the Minister's Representative denying the allegation.

[18] In her April 5, 2006 decision, the Delegate stated she was satisfied that every effort was made to ensure that the Canadian public and the Applicants were informed of the available benefits under the CPP. She concluded that she was not satisfied on a balance of probabilities that erroneous advice or administrative error occurred in the administration of Nicole's DCCB. In her conclusion, the Delegate observed the following:

- at the time of the application for benefits for her daughter in March 2004, Ms. Lee stated that they did not have prior notification of the DCCB;
- the issue of erroneous advice or administrative error had not "surfaced" until the Review Tribunal hearing;
- the issue of erroneous advice or administrative error is mentioned in Ms. Lee's post-hearing notes of August 26, 2004;

- the first time that erroneous advice or administrative error is indicated in a letter to the CPP is September 27, 2004 after the topic was introduced at the Review Tribunal hearing;
- the Minister's Representative denied the allegation of having told the Applicants they had been given erroneous advice.

This is the decision at issue in this proceeding.

#### Standard of Review

[19] The Applicants, who are not represented by counsel, did not make any submissions regarding the standard of review. I accept the Respondent's submission that the applicable standard of review of the finding that there had been no erroneous advice or administrative error is patent unreasonableness (*Leskiw v. Canada (Attorney General)*, 2004 FCA 177 at para. 9 and *Kissoon v. Canada (Minister of Human Development Resources)*, 2004 FC 24 at paras. 4-5, aff'd at 2004 FCA 384).

#### Analysis

[20] In both the written and oral submissions, the Respondent stressed the extensive steps taken to ensure public awareness of the various CPP benefits and the absence of any statutory obligation on the part of the Minister to inquire whether there are potential new beneficiaries of a disabled contributor. Although the Delegate set out an extensive review of these steps in her decision, the

issue before the Delegate did not concern notification of entitlement to benefits but whether there had been erroneous advice or administrative error in the administration of the file.

[21] In this regard, the Delegate's decision is grounded on the negative inference drawn from the fact that erroneous advice or administrative error was not mentioned at the time of the original application for the benefit in 2004 and that the Applicants only raised the matter of the 1998 telephone call to HRDC after being made aware of the potential relief under subsection 66(4) of the Plan at the Review Tribunal hearing.

[22] In my opinion, the decision is based on an erroneous finding of fact made without regard to the evidence. The Delegate found that the first time the Applicants alleged erroneous advice or an administrative error was after they were told about this potential avenue of relief at the Review Tribunal hearing. This is only partly true. According to the affidavit of the Minister's Representative present at the Review Tribunal hearing, in response to a question from the Chairperson regarding whether any attempts had been made to contact the Respondent to inquire about the availability of benefits before submitting the initial application the Applicants stated they had contacted the Respondent but were informed that no benefits were available. The Chairperson then raised the matter of erroneous advice or administrative error and asked the Minister's Representative to speak to the Applicants after the hearing. Based on this evidence, it is clear that the Applicants spontaneously raised the fact of the 1998 telephone call prior to finding out about the possible relief that could be sought under subsection 66(4). This account of what transpired at the hearing undermines the negative inference drawn by the Delegate.

[23] Further, the fact that the Applicants framed their initial written request for retroactive benefits on the failure of the government to notify them is entirely consistent with initially having been told that there were no additional benefits available and not having been notified to the contrary subsequently.

[24] It is clear that the Applicants only became aware of the relief available under subsection 66(4) at the Review Tribunal hearing. As well, it was only after the Review Tribunal hearing that the Applicants started to use the language “erroneous advice or administrative error”. However, this does not detract from the fact that the Applicants raised the matter of the 1998 telephone call when they were asked in March 2004 why they had not applied earlier and later at the Review Tribunal hearing.

[25] For these reasons, I conclude that the erroneous finding of fact renders the decision patently unreasonable. Accordingly, the decision will be set aside and the matter remitted for reconsideration by a different ministerial delegate. At the judicial review hearing, the scope of the available relief on judicial review was explained to the Applicants. In particular, I explained to the Applicants that it was beyond the jurisdiction of the Court to grant the specific relief set out in the introduction of these reasons.

[26] The Applicants also ask for costs to compensate them for the disbursements they have incurred in relation to this judicial review. The Respondent shall pay the Applicants costs for the disbursements incurred which the Court fixes at \$750.00.

[27] Finally, an order will issue in Court file T-245-05 dismissing the judicial review.

### **JUDGMENT**

#### **THIS COURT ORDERS AND ADJUDGES that:**

1. The judicial review is allowed, the decision dated April 5, 2006 is set aside and the matter is remitted for reconsideration by a different ministerial delegate.
2. The Respondent shall pay the Applicants costs in the amount of \$750.00.

“Dolores M. Hansen”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-961-06

**STYLE OF CAUSE:** ROBERT GEORGE LEE and  
MARIA JOSE LEE FOR NICOLE ANNE LEE  
Applicants  
and  
ATTORNEY GENERAL OF CANADA,  
HUMAN RESOURCES DEVELOPMENT CANADA  
Respondent

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 27, 2007

**REASONS FOR :** HANSEN J.

**DATED:** July 19, 2007

**APPEARANCES:**

MR. ROBERT LEE FOR THE APPLICANTS  
MS. MARIA LEE

MS. PATRICIA HAREWOOD FOR THE RESPONDENT  
MR. JAMES GRAY

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