Date: 20080527

Docket: T-2167-06

Citation: 2008 FC 676

Ottawa, Ontario, May 27, 2008

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

STANLEY COHEN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Stanley Cohen is a lawyer who, during the period from 1985 to 1992 was engaged with the Law Reform Commission of Canada. That Commission wound up in 1992 at which time the Applicant resumed employment with the Canadian Department of Justice, where he remains to this day. The Applicant has sought to purchase his period of service with the Commission for purposes of the Public Service Superannuation Plan. The Applicant's quest has been unsuccessful, hence this judicial review. For the reasons that follow, I find that the application is dismissed with costs.

FACTS

[2] The relevant facts are:

1. The Applicant graduated from law school, was called to the bar in Manitoba and worked there as a lawyer and taught law part-time until 1977.

2. In 1978-79, the Applicant was a special advisor to the federal Department of Justice and in 1979 became a visiting professor at McGill Law School.

3. On September 1, 1980, the Applicant was engaged as a "contractor" with the Law Reform Commission and worked full time in that position until December 31, 1981 at which time he returned to McGill Law School as an Associate Professor. He continued to provide advice to the Commission for a *per diem* fee.

4. The Applicant entered into two written contracts of engagement with the Commission, the first dated 31 December 1981 for a term of one year expiring December 31, 1982 and the second dated 30 September 1982, which terminated the first contract early. The second was for a term from October 1, 1982 until September 30, 1983.

5. The first agreement that of December 31, 1981, stated that the Applicant was to provide "advice and consultation in matters related to research in law, and attendance at the Commission's premises". A *per diem* fee of $250.00 was

stipulated to a maximum of $3,750.00 plus expenses. Paragraph 7 of the Agreement provided:

> *7. It is understood and agreed that this Agreement is a contract for the performance of a service and that the Consultant is engaged as an independent contractor and he is not, nor shall he be deemed, an employee or servant of the Commission.*

6. The second agreement, that of September 30, 1982 was essentially identical. It provided for a *per diem* rate of $250.00 but to a maximum of $6,250.00, plus expenses. Clause 8 of that agreement contained wording identical to that of Clause 7 (quoted above) of the first agreement.

7. The Applicant, in paragraph 5 of his affidavit filed in these proceedings, describes his position with the Commission in the period from 1981 to 1983 as "*an external consultant*". He does not seek to acquire pension benefits for this period.

8. The Applicant continued as a Professor at McGill Law School until August 1985.

9. In August 1985, the Applicant returned to the Law Reform Commission this time to work full-time with the Commission. He was a member of the Commission's senior managerial ranks. He worked at their premises, supervised many staff members and engaged external consultations. He remained in that position without interruption until the Commission was wound up in 1992. The Applicant testifies in paragraph

13 of his affidavit that he signed a number of written contracts between himself and the Commission in respect of this period of engagement with the Commission. His understanding, which is not contradicted by the Respondent, was that the contracts would be renewable and that his tenure would remain uninterrupted and indefinite. He testifies in his affidavit that the contracts were different from those signed as of December 31, 1981 and September 30, 1982, previously referred to, and different from that referred to as Appendix "D" to the Treasury Board's letter of November 9. 2006 to be referred to later. Neither the Applicant nor the Respondent has been able to furnish any of these written contracts in evidence. The Court was advised (as is clearly apparent) that during the relevant period, the Applicant made no payments related to pension benefits.

10. The Applicant was re-employed by the federal Department of Justice on September 23, 1992 at which time he made a request that he purchase for pension purposes, called the Public Service Superannuation Plan, his period of service with the Law Reform Commission. He was advised by the Supply and Services Canada Superannuation Branch in a memorandum prepared on a standard form with handwritten insertions dated January 11, 1993:

> *Period of pensionable employment with **Law Reform Contract Basis** from **1981** to **1982** and with **Law Reform** from **1985** to **1992** is employment during which the contributor was not subject to a pension plan. Ref.: clause 2(1) of the P.S.S.A.*
> (handwritten insertions in bold)

11. The Applicant did nothing in response to this advice until 2001. In his affidavit the Applicant says at paragraph 16:

> *I relied upon that advice and took no further steps to purchase my Law Reform Commission service until 2001.*

In his lawyer's letter dated March 17, 2006 to Public Works it is stated:

> *It is clear that Mr. Cohen was not properly advised in 1993 when he first enquired about purchasing this service.*

12. For motivations that are not set out in the evidence the Applicant renewed his quest to purchase his Commission service time for pension purposes in March 2001. In paragraph 17 of his affidavit the Applicant says he diligently pursued this quest. A letter from his lawyer to Public Works dated March 17, 2006, Mr. Cohen again made enquires about his Law Commission service. He was again advised that purchase of pension benefits was not possible.

13. Although not put in evidence directly, there is mention in the Applicant's lawyer's letter of March 17, 2006 of an e-mail , the full text of which is not in evidence, from Linda Belliveau of the Superannuation Directorate to the Applicant on January 6, 2003 stating:

> *Contract employment is not countable for pension purposes under the Public Service Superannuation Act (PSSA); however, if after reviewing the contract, it is determined that the contract is a contract of service and an employer-employee relationship existed, the service is no longer considered contract*

> *employment for PSSA purposes but rather Public Service.*

The e-mail itself and any related correspondence is not in evidence.

14. As noted above, the Applicant retained a lawyer, Mr. Brown, who was also his counsel at the hearing, sometime in early 2006. His lawyer wrote to Public Works the letter of March 17, 2006 providing two Declarations. One was from Allen Linden, currently a supernumerary judge of the Federal Court of Appeal and President of the Law Reform Commission from 1983 to 1990, the other was from Gilles Létourneau, currently a judge of the Federal Court of Appeal and Vice-President of the Law Reform Commission from 1985 to 1990 and President from 1990 to 1992. Both Declarations address the Applicant's engagement and tenure with the Commission describing him as having the position of Co-ordinator of the Commission's Criminal Procedure Project. He was described as an integral member of the management team with supervisory responsibilities. Two points of particular importance were made in similar wording in each Declaration:

> - *While Mr. Cohen's engagement with the Commission was formalized by his entering into a series of written contracts with the Commission it was on the understood (sic) that these contracts would be renewable and, indicative of this arrangement, Mr. Cohen's tenure with the Commission was uninterrupted during the entire period of my appointment to the Commission.*
>
> - *Mr. Cohen was not regarded as a temporary employee; indeed it would have been impossible for*

> *him to fulfill his duties and discharge his responsibilities with the Commission on a temporary basis.*

15. The Applicant's lawyer's letter of March 17, 2006 ended with a paragraph stating:

> *I would like to ask you to give this matter your early attention. If we have not heard from you by April 15, 2006, we will formally ask the President of the Treasury Board to consider the matter. If necessary, we are prepared to pursue the matter in the Federal Court.*

16. The ensuing dialogue is set out in another letter from the Applicant's lawyer to Public Works dated October 26, 2006, which letter requested a decision by November 30, 2006 failing which legal proceedings would be taken. The text of that letter says:

> *I wrote to you by letter dated March 17, 2006, in connection with Mr. Cohen's entitlement to purchase service covering the period from August 1985, to September, 1992, when he was employed by the Law Reform Commission of Canada.*
>
> *On May 18, 2006, I provided you with a copy of my letter of May 5, 2006, to the President of the Treasury Board formally requesting a decision. I also provided you with a copy of signed statements by two former Presidents of the Law Reform Commission setting out the circumstances of Mr. Cohen's employment with the Commission from 1985 to 1992.*
>
> *On June 8, 2006, a letter from you to Ms. D.M. Gushta of the Department of Justice was provided to Mr. Cohen. That letter requested that Mr. Cohen submit all contracts for your review for the 1985 to 1992 period and for an earlier period in 1978.*
>
> *Mr. Cohen had made a search of his files and papers and he is unable to find any agreements for the 1985*

> *to 1992 period. He was able to locate two earlier agreements with the Law Reform Commission, one dated December 31, 1981 [sic], and another dated September 30, 1982. Copies of both of these agreements are enclosed. Both of these contracts were for a specified number of days over a period of several months. At the times in question, Mr. Cohen was teaching at McGill. These arrangements differed substantially from the working arrangements during the 1985 to 1992 period when Mr. Cohen worked on a full-time continuous basis in Ottawa as Coordinator of the Commission's Criminal Procedure Project under the conditions described in the statements from Mr. Linden and Mr. Letourneau.*
>
> *Given the length of time that has elapsed, I would appreciate receiving an early decision on the issue of Mr. Cohen's entitlement to purchase the 1985 to 1992 service.*
>
> *If we do not have a response by November 30, 2006, from Treasury Board (or from you as the authorized delegate of Treasury Board), we will treat that as a decision denying entitlement. In such case, it is Mr. Cohen's intention to bring an application under s. 18.1 of the Federal Court [sic] Act so that the question of his entitlement can be resolved.*

17. The Applicant received a letter dated November 9, 2006 from Phil Charko of the Treasury Board of Canada Secretariat stating that in respect of the period of time that the Applicant was engaged with the Law Reform Commission such period was not countable for pension purposes under the *Public Service Superannuation Act* (PSSA). That letter stated:

> *Thank you for your correspondence of November 6, 2006 regarding your client, Mr. Stanley Cohen, and his desire to bring certain periods of time spent with the Law Reform Commission of Canada, to his credit as pensionable service under the Public*

Service Superannuation Act (PSSA). A review of Mr. Stanley Cohen's file has been completed and I would like to inform you of the results.

In your letter dated March 17, 2006, you allege that Mr. Cohen had been appointed pursuant to s. 7(1) of the Law Reform Commission Act, R.S.C. 1985, c. L-7, which states: "A secretary of the Commission, and such other officers and employees as are necessary for the proper conduct of the work of the Commission, shall be appointed in accordance with the Public Service Employment Act."

If Mr. Cohen had been appointed pursuant to subsection 7(1), he would be deemed, as you suggest, to be a person employed in the Public Service for the purpose of the Public Service Superannuation Act (PSSA) pursuant to section 8 of the Law Reform Commission Act.

A careful review of the file revealed no evidence that supported your contention that Mr. Cohen was appointed pursuant to subsection 7(1) of the Law Reform Commission Act.

However, the file review did reveal evidence suggesting that Mr. Cohen, was engaged pursuant to subsection 7(2) of the Law Reform Commission Act, which states "The Commission may engage on a temporary basis or for specific projects the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission, to advise and assist the Commission in the performance of its duties under this Act, and, with the approval of the Minister, may fix and pay the remuneration and expenses of such persons."

There are two pieces of evidence referencing subsection 7(2), consisting of memoranda dated May 20, 1980 and February 5, 1982.

The first memorandum (Appendix A) seeks the approval of the Deputy Minister to engage the services of Mr. Cohen from September 1, 1980 to

August 31, 1982 to do research in the field of criminal law. To help justify recommending remuneration of $42,500 per annum, it advises that, if Mr. Cohen were an officer of the Department of Justice, he, "…might well be paid $37000 per annum…". The memorandum continues, "It is customary to add 15% in the case of contract personnel, and if 15% were added to the $37000 the result would be $42,550 per annum."

The second (Appendix B) seeks to engage Mr. Cohen's services for a maximum of 15 days during the period January 1, 1982 to December 31, 1982 at the rate of $250 per day and the usual expenses.

I attach copies of the memoranda for your review. You will note that they both specifically reference subsection 7(2) of the Act as the authority to engage Mr. Cohen.

Although, the two memoranda are not for the period your client wishes to elect for under the PSSA – August 1985 to September 1992 – they indicate that his earliest appointments as a contractor for the Law Reform Commission made under subsection 7(2).

We also offer other documents from those years suggesting he was an independent contractor. These include a 1988 document listing Mr. Cohen as a Researcher with the Commission (Appendix C), a copy of the standard contract offered to full-time Researchers (Appendix D), and an organization chart (Appendix E) showing that Researchers were contractors.

If you consult the standard contract, you will notice that section 10 stipulates that the Researchers were independent contractors and not employees of the Commission. Since Mr. Cohen was a Researcher he would have been engaged under the standard contract. Given his legal background, it is reasonable to expect that he read the clause and understood its legal ramifications.

> *All of the above suggests that Mr. Cohen was engaged by the Law Reform Commission under subsection 7(2) as an independent contractor. I therefore cannot find that the period of his engagement with the Commission is countable for pension purposes under the PSSA.*
>
> *If you are able to demonstrate that he was engaged under contracts differing from the standard contract, we would be happy to give further consideration to this case.*

18. It must be remembered that the Applicant was not seeking pension benefits for the periods covered by the contracts referred to in the memoranda discussed in the letter [at Appendices A and B]. This fact is recognized in the November 9, 2006 letter. Further the evidence of the Applicant but only submitted by way of affidavit to this Court, not to Mr. Charko, is that the draft "standard contract" of Appendix D is <u>not</u> representative of any written contact that the Applicant entered into with the government. It seems that neither party can locate or produce any written contract or contracts for the period from 1985 to 1992.

19. The Applicant by Notice of Application filed December 8, 2006 sought judicial review of what is set out in the letter of November 9, 2006.

ISSUES

[3] There are three issues for determination in this application:

1. Is the letter of November 9, 2006 a "decision" that may be the subject of the judicial review under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In particular is the Applicant precluded from seeking judicial review having regard to a memorandum dated January 11, 1993 stating that he was not subject to a pension plan? (DELAY)
2. What is the standard of review applicable if there is a "decision" to be reviewed? (STANDARD OF REVIEW)
3. If the Applicant is not barred from seeking judicial review, and the letter of November 9, 2006 is a "decision" within the meaning of section 18.1 of the *Federal Courts Act*, should that decision be set aside on judicial review? (MERITS)

ISSUE #1 - DELAY

[4] Section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provides that an application of this kind must be brought within 30 days from the time that the decision was first communicated to the party directly affected unless the Court otherwise Orders. To recap briefly, the Applicant's request to purchase pension benefits was turned down in 1993, in 2001, in 2003 and finally on November 9, 2006. If November 9, 2006 is the operative date then this application has been brought in a timely way. If the decision date is any of the earlier dates, then the application is well out of time. No application has been made by the Applicant for an extension of time to bring this application. He says the operative date is November 9, 2006.

[5] Respondent's counsel argues that the letters written by Applicant's lawyer beginning in March 17, 2006 are simply an attempt to resuscitate a matter that had terminated several years earlier in an endeavour to provoke a response from the government. Reliance is placed on the statement of McKeown J. of this Court in *Dhaliwal v. Canada (MCI)*, [1995] F.C.J. No. 982 at paragraph 2:

> *As Wetston J. said in Wong v. The Minister of Citizenship and Immigration, May 5, 1995, Court File IMM-1338-93 (F.C.T.D.) [Please see [1995] F.C.J. No. 685], counsel cannot extend the date of decision by writing a letter with the intention of provoking a reply.*

[6] Respondent's counsel says that the matter was decided in 1993 and apart from attempts in 2001 and 2003 which are poorly evidenced in the record, the matter was allowed to rest. The 2006 letters were simply a bold attempt to provoke the government into re-opening a dead file.

[7] Applicant's counsel argues that there was nothing improper in making an attempt to have the matter re-opened and, if the government did re-open the matter, which it arguably did, then November 9, 2006 is the operative date. Reliance placed on the decision of Noel J. of this Court in *Dumbrava v. Canada (MCI)*, (1995), 101 F.T.R. 230 at paragraph 15:

> ***15*** *I find this reasoning compelling. Whenever a decision-maker who is empowered to do so agrees to reconsider a decision on the basis of new facts, a fresh decision will result whether or not the original decision is changed, varied or maintained.*[4] *What is relevant is that there be a fresh exercise of discretion, and such will always be the case when a decision-maker agrees to reconsider his or her decision by reference to facts and submissions which were not on the record when the original decision was reached.*

[8] I am satisfied, in looking at the letter of November 9, 2006, that the decision-maker did engage in a re-consideration of the matter. We do not know what facts were before the decision-maker in 1993 or 2001 or 2003 but we do know from the letter of November 9, 2006 that a "*careful review of the file*" was undertaken. Reference was made to the contracts and a related memorandum, of 1981 and 1982. New evidence in the form of Appendixes C, D and E is referred to. Appendix C is a listing of persons engaged with the Commission, Appendix D is said to be a "*standard contract offered to full-time researchers*", Appendix E is an organizational chart. The letter ends with an invitation to the Applicant to submit evidence as to any different contracts that may have existed. No reply of any kind was forthcoming. The application for this judicial review was filed December 8, 2006.

[9] Therefore, I find that the letter of November 9, 2006 is the operative decision and that this application was filed in a timely manner.

ISSUE #2 – STANDARD OF REVIEW

[10] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, there has been a necessity to take a fresh approach to the issue as to what standard of review is applicable to any particular decision under review. The decision of the majority of the Supreme Court at paragraph 45 states that there are now only two standards of review, reasonableness and correctness:

> ***45*** We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

[11] As to "reasonableness" the majority in *Dunsmuir* at paragraph 47 said that it is a deferential standard and that tribunals must be afforded a range of acceptable and rational solutions:

> ***47*** *Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[12] Further light as to "*reasonableness*" can be derived from the more recent decision of the Supreme Court in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23. The unanimous decision of the Court was delivered by LeBel J. At paragraph 41 he says that a Court must determine if the decision falls within a range of reasonable outcomes:

> ***41*** *Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection*

> *afforded by the* Charter. *It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.*

[13] As to "correctness", the majority in *Dunmuir* at paragraph 50 stated that this standard must be maintained in respect of jurisdictional questions and some other questions of law:

> ***50*** *As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.*

[14] In determining the appropriate standard of review, the majority in *Dunsmuir* at paragraphs 51 to 65 gave guidance which is best summarized at paragraphs 55 and 56 and 62 to 64:

> ***55*** *A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:*
>
> - *A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.*
>
> - *A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).*

- *The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (Toronto (City) v. C.U.P.E., at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.*

56 *If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.*

…

62 *In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.*

63 *The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.*

64 *The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and;*

> *(4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.*

[15] In the case at hand, the decision of November 9, 2006 involved an analysis of evidence as to the nature of the engagement of the Applicant with the Law Reform Commission and applying those facts to the *Law Reform Commission Act*, R.S.C. c. 23 (1st Supp.); the *Public Service Employment Act*, R.S., c. P-32, and the *Public Service Staff Relations Act*, R.S. c. P-35. It is a question of mixed fact and law.

[16] There is no privative clause in any relevant statute. No particular expertise as to the decision-maker is in evidence although it can be inferred that he has some expertise in the matter. There is no formal "court-like" structure, the decision making process is more of an administrative one in its nature. Respondent's counsel refers to three decisions of this Court which, in more or less analogous circumstances, a standard or review was determined.

[17] In *Estwick v. Canada (Attorney General)*, 2007 FC 894 a decision of an adjucator acting pursuant to the *Public Service Staff Relations Act, supra* was afforded a standard of patent unreasonableness by Justice Heneghan of this Court at paragraph 80. This decision preceded that of *Dunsmuir, supra*.

[18] In *Public Service Alliance of Canada v. Canada (Attorney General)*, 2008 FC 474, Deputy Justice Frenette of this Court, at paragraphs 17 and 18, afforded a decision of a Policy Officer acting under the *Public Service Superannuation Act, supra* a standard of correctness as to decisions solely

related to questions of law, and, in respect of questions of mixed fact and law, a standard of reasonableness.

[19] In *Burley v. Canada (Attorney General)*, 2008 FC 525, Justice Dawson of this Court had under consideration a decision of an Assistant Deputy Minister in request of the employment or not of a person undergoing language training having regard to the *Public Services Superannuation Act*, *supra*. At paragraphs 21 to 26, Justice Dawson considered the issue of standard of review and determined that it did not need to be determined since the decision withstood scrutiny even under the less deferential standard of correctness.

[20] Having regard to all of the foregoing, I find that the appropriate standard of review in respect of the decision at issue here is that of reasonableness. The question for determination was one of mixed fact and law made in circumstances where some expertise has been brought to bear.

ISSUE #3 - MERITS

[21] On its merits, therefore, was the decision of November 9, 2006 "reasonable"?

[22] The decision-maker, Mr. Charko had before him evidence which consisted of:

- contracts between the Applicant and the government in 1981 and 1982 which clearly described the Applicant as an independent contractor, not a consultant, and memoranda (Appendix A and B) referring to these contracts. The decision-maker in the letter of November 9, 2006

acknowledges that these contracts did not cover the period of concern but stated that they indicate that the contract engagement of the Applicant in that period was under section 7(2) of the *Law Reform Commission Act, supra* (to be discussed more fully later).

- a listing of persons engaged by the Commission (Appendix C) which in 1988 listed the Applicant as one of the "*Researchers of the LRCC*"
- an organizational chart (Appendix E) listing various positions within the Commission including that of Researchers indicating that, unlike other positions, Researchers have no internal classification alpha-numeric designation assigned to them
- a copy of a "*standard contract*" (Appendix D) offered to Researchers. The decision-maker makes the inference that, since the Applicant was a Researcher, this represents the operative contract. The letter of November 9, 2006 ends with the clear undertaking that if the Applicant could demonstrate that he was engaged under contracts differing from the standard contract, the matter would be given further consideration.

The Applicant does not appear, from the evidence, to have responded to the invitation to distinguish his circumstances from those of the "*standard contract*". Instead this application was commenced. In his affidavit filed in this application the Applicant says, at paragraph 13, that he signed a number of written contracts, none of which can be found, but they were different from the "standard contract" and from the 1981 and

1982 contracts. This evidence, however, was not before the decision-maker, notwithstanding the invitation to comment upon the very point. We are left to puzzle why no further discussion with the decision-maker was entered into raising the point now sought to be determined by the Court for the first time. Evidence of this kind cannot now be received (*Kante v. Canada (MPSEP)*, 2007 FC 109 at paras. 9 and 10). A determination of the "*reasonableness*" of the decision must be made on the basis of the evidence before the decision-maker.

- declarations from each of Linden and Létourneau, aforesaid, which describe the Applicant as an integral member of the Commission's management team working on a full-time basis and clearly not a temporary employee.

The decision-maker does not mention those declarations although the evidence indicates that they were clearly before him at the time. The declarations clearly evidence the nature of the Applicant's engagement in a full-time exclusive capacity and not in a capacity that would normally be associated with that of a contract researcher.

Failure to mention those declarations and how they influenced the decision expressed in the letter of November 9, 2006 does give rise to concern as to the thoroughness of the decision-making process. However, the letter of November 9, 2006 does end with the invitation to the Applicant to make

further submissions and here was an opportunity to emphasize these declarations and how they would enlighten the view of the nature of the relationship.

[23] The decision-maker had to make a determination in applying the evidence to the legal framework as set out in sections 7 and 8 of the *Law Reform Commission Act, supra* which state:

7. (1) A secretary of the Commission, and such other officers and employers as are necessary for the proper conduct of the work of the Commission, shall be appointed in accordance with the Public Service Employment Act.	*7. (1) Le secrétaire de la Commission et les autres fonctionnaires et employés nécessaires à la bonne marche des travaux de la Commission sont nommés conformément à la Loi sur l'emploi dans la fonction publique.*
(2) The Commission may engage on a temporary basis or for specific projects the services of persons having technical or specialized knowledge of any matter relating to the work of the Commission, to advise and assist the Commission in the performance of its duties under this Act, and, with the approval of the Minister, may fix and pay the remuneration and expenses of such persons.	*(2) La Commission peut, à titre provisoire ou pour des projets déterminés, retenir les services de personnes possédant des connaissances techniques ou spécialisées sur toute question relative à ses travaux, pour la conseiller et l'aider à remplir les fonctions qui lui attribue la présente loi, et, avec l'approbation du ministre, elle peut fixer et payer la rémunération et les frais de ces personnes.*
8. Except in the case of a member of the Commission in receipt of a salary under the Judges Act, or unless in the case of any other member of the Commission, the Governor in Counsel otherwise directs, the members of the Commission and the persons appointed under subsection 7(1) shall be	*8. Les membres de la Commission dont le traitement n'est pas régi par la Loi sur les juges ou qui n'ont pas fait l'objet d'une décision contraire du gouverneur en conseil, ainsi que les personnes nommées conformément au paragraphe*

deemed to be persons employed in the Public Service for the purposes of the Public Service Superannuation Act and to be employed in the public service of Canada for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act	*7(1), sont réputés faire partie de la fonction publique pour l'application de la Loi sur la pension de la fonction publique, et de l'administration publique fédérale pour l'application de la Loi sur l'indemnisation des agents de l'État et des règlements pris en vertu de l'article 9 de la loi sur l'aéronautique.*

[24] Applicant's counsel argues that a proper interpretation of these sections is to read them in their entire context. As instructed by the Supreme Court in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paragraph 21, these provisions are to be read in accordance with the object and intention of Parliament. Thus, Applicant's counsel argues results in a construction whereby Parliament intended that persons, other than temporary workers or those engaged on specific projects as defined in subsection 7(2), engaged by the Law Reform Commission, are to be afforded pension benefits under the *Public Service Superannuation Act*. Thus, it is argued, with the specific exemption of subsection 7(2) all others engaged by the Law Reform Commission are entitled to pension benefits.

[25] Applicant's counsel argues that the words "*…shall be appointed in accordance with the Public Service Employment Act*" are to be read in context of section 7(2) which "*…deems persons to be employed*" and thus does not require the rigours of an actual "*appointment*". Alternatively, Applicant's counsel argues that the requirement to "*appoint*" a person is a duty that falls on the Commission and failure to do so does not affect the status of the Applicant as a person defined in subsection 7(1).

[26] Respondent's counsel argues that subsection 7(1) does require a person to be "*appointed in accordance with the Public Service Employment Act*" with all that this entails such as contesting for the position, appeals and so forth. Counsel argues that unless a person is so "*appointed*", that person, by default, falls under subsection 7(2) and therefore is not offered pension benefits. Several other federal statutes with like provisions are referenced. None seem to have been judicially considered.

[27] The wording of sections 7(1) and (2) and 8 of the *Law Reform Commission Act*, *supra* are not happily worded. It seems to leave a "*one or the other*" option in interpretation, the Applicant's view or the Respondent's view. These provisions do not appear to offer an alternative or middle ground. The most authoritative decision is the decision of the Supreme Court in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 (sometimes referred to as "*Econosult*") which in the majority decision given by Sopinka J. adopted at paragraph 26 the summary of Marceau J.A. of the Federal Court of Appeal:

> ***26*** *In short, the situation is aptly summed up by Marceau J.A. speaking for the majority of the Court of Appeal when he states (à la p. 643):*
>
> > *There is quite simply no place in this legal structure for a public servant (that is, an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.*

[28] Applicant's counsel, while acknowledging that they were distinguished and to some extent overruled in *Econosult*, cites earlier decisions of the Supreme Court in *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489 and *Doré v. Canada*, [1987] 2 S.C.R. 503, and argues that those two earlier decisions illustrates that a contextual analysis of the relevant statutes is required in each circumstance in order to arrive at the correct interpretation.

[29] Here we are faced with two differing interpretations of the statute, sections 7(1), 7(2) and of 8 of the *Law Reform Commission Act*. If this were a pure question of law, the Court would have to arrive at one interpretation that was correct. However, the issue is not a pure question of law but a question of mixed fact and law, in respect of which, given the evidence before the decision maker, the Court must determine whether the decision arrived at was "*reasonable*". By "*reasonable*" it is meant is the decision within the range of decisions that could reasonably be made in the circumstances of this case. I find that it is. Given the evidence before the decision-maker and notwithstanding the lack of mention of the two declarations, it was reasonable to make a determination that the circumstances of the Applicant best fit within what is contemplated by section 7(2) of the *Law Reform Commission Act*, *supra*.

[30] Having so decided, I must add that were I to have approached this review on the basis of correctness, I would have preferred the Applicant's counsel's interpretation of sections 7(1), 7(2) and 8 of the *Law Reform Commission Act*. That view is more in accord with the spirit of the legislation which appears to be intended to provide all but those rendering specific limited services to the Commission with the same pension benefits as if they had been appointed to the public

service. I would have viewed the "*deeming*" provisions of section 8 to inform the "*appointed*" provisions of section 7(1) such that any person not clearly within section 7(2) is "*deemed*" to have been "*appointed*" within the meaning of section 7(1).

[31] *Dunsmuir* followed by *Lake* as recently decided by the Supreme Court of Canada does more than just collapse three standards of review, patent unreasonableness, reasonableness and correctness into two, reasonableness and correctness, but also directs a Court of review to consider whether the decision under review is within a "*range of reasonable decisions*". Thus, if the decision is within the "*range*" even if the Court would not have made the same decision, that decision cannot be set aside. This is the case here.

SUMMARY AND COSTS

[32] In summary:

1. The relevant decision is that of November 9, 2006 and this application was made in a timely manner
2. The standard of review to be applied is that of reasonableness;
3. The decision of November 9, 2006 was reasonable.

[33] As a result, the application is dismissed with costs. The parties are agreed that the level of costs should be the usual level, middle of Column III.

JUDGMENT

For the Reasons given:

THE COURT ORDERS THAT:

1. The application is dismissed;

2. The Respondent's is entitled to costs to be assessed at the middle of Column III.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2167-06
STYLE OF CAUSE:	Stanley Cohen v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	Thursday, May 22, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Mr. Justice Hughes
DATED:	Tuesday, May 27, 2008

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