Federal Court  Cour fédérale

Date: 20110614

Docket: T-658-10

Citation: 2011 FC 689

Ottawa, Ontario, June 14, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROBERT GEORGE LEE

and

MARIA JOSE LEE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a delegate of the Minister of Human Resources and Skills Development Canada (the Minister/HRSDC), dated 1 April 2010. The decision denied the Applicants' request for remedial action pursuant to subsection 66(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP) on the basis of erroneous advice or administrative

error in the determination of the Female Applicant's application for a Disabled Contributor's Child Benefit (DCCB).

BACKGROUND

[2] In March 1992, the Female Applicant applied for and was granted a CPP disability pension with an effective payment date of April 1991. On 23 June 1998, a daughter was born to the Male and Female Applicants. They claim that the Female Applicant made a direct call to the Oshawa branch office of the CPP disability program on or around late July or early August of 1998. The purpose of the call was to inquire if any supplements were available to provide them with financial assistance following the birth of their daughter.

[3] The Female Applicant claims that she does not know the name of the employee to whom she spoke at the Oshawa branch office, only that the employee was a woman and that she had a British accent. The employee allegedly took the Female Applicant's social insurance number, consulted the Female Applicant's file and replied, "Nothing else is available because you are at full benefits." The Applicants allege that this employee gave the Female Applicant erroneous advice about the child benefits available to their daughter in 1998.

[4] In 2008, the Male Applicant's father responded by letter to a phone call from the Applicants, inquiring as to whether he recalled their mentioning this telephone call to the Oshawa branch. The letter stated:

> I do remember a conversation that we had … during the summer of 1998. In that conversation, you said that you and Maria had contacted a couple of government offices to see if there was anything available too [*sic*] help you out with Nicole, but you were told that nothing else was available.

[5] The Female Applicant claims that it was not until 16 March 2004 that she first received written notification of benefits for children via the third edition of HRSDC's "Staying in Touch" newsletter, which had arrived in the mail with her T4A(P) slip. That same month, the Female Applicant applied for a DCCB on behalf of Nicole. She also submitted a letter, requesting that the child benefits be made retroactive to their daughter's birth date: 23 June 1998. The application for benefits was approved but was made only 11 months retroactive. This is the maximum retroactivity allowable under section 74 of the CPP. The Applicants' request that payment be made retroactive to 1998 resulted in a series of appeals and reconsiderations. The Applicants have been unrepresented by counsel throughout all of these proceedings.

[6] One such proceeding was a Review Tribunal hearing, which took place on 26 August 2004. After this hearing adjourned, the Minister's representative met with the Applicants. The Applicants claim that the Minister's representative admitted that an administrative error had taken place, that they should not have had to attend a hearing and that they should instead immediately contact their Member of Parliament, Peter Adams.

[7] In 2009 HRSDC began an investigation into the Applicants' allegations of erroneous advice and administrative error. On 1 April 2010, HRSDC concluded that, on a balance of probabilities, the Applicants' allegations were unfounded. This is the Decision under review.

[8] The Applicants claim that the entire matter has been stressful for their family. They say that employees of HRSDC tried to intimidate the Female Applicant during a phone conversation and called the Applicants "liars." Their daughter's teachers reported in February 2005 and October 2008 that this stress is affecting the child.

DECISION UNDER REVIEW

[9] In its Decision, HRSDC confirmed that, pursuant to subsection 66(4) of the CPP, the Minister shall take remedial action only if satisfied that erroneous advice has been given or an administrative error has occurred.

[10] HRSDC relied on the Federal Court decision in *Manning v Canada (Human Resources Development)*, 2009 FC 523 at paragraph 37, to find that, in a claim of this nature, the burden of proof lies with the person claiming erroneous advice or administrative error, and the standard of proof is a balance of probabilities.

[11] Based on its investigation, HRSDC was not satisfied on a balance of probabilities that the Applicants were denied a benefit as a result of erroneous advice provided by, or an administrative error committed by, HRSDC.

Applicants' Allegations

[12] The Decision summarized the Applicants' allegations as follows:

a. that HRSDC made an administrative error by not informing them about the availability of the DCCB earlier than March 2004, which is when the Female Applicant received the third edition of HRSDC's "Staying in Touch" newsletter mentioning the DCCB;

b. that HRSDC gave the Female Applicant erroneous advice by not informing her about the DCCB during a phone call that the Female Applicant says she made to HRSDC's Oshawa office in the summer of 1998 to enquire about additional benefits upon the birth of the Applicants' daughter; and

c. that the Minister's representative at the 26 August 2004 Review Tribunal hearing gave them erroneous advice that their Member of Parliament was Peter Adams.

Findings Regarding the First Allegation: Administrative Error

[13] With respect to the first allegation, the Decision states that HRSDC, in consultation with senior management, had examined the procedures used to mail out both the T4A(P) slips and the first and second editions of the "Staying in Touch" newsletter. HRSDC found that the newsletter has been sent along with the T4A(P) slips to all disability pension beneficiaries since 2002. Moreover, there was no record of mail being returned since January 2002, when the Applicants' address was updated to their current residence as listed in the Revenue Canada database.

[14] The Decision concluded that, given these procedures, it is highly probable that HRSDC mailed 2002 and 2003 T4A(P) slips, and accompanying newsletters, to the Applicants but it could not prove that the Applicants received them.

[15] HRSDC also located a copy of the Disability Kit from the year that the Female Applicant submitted her application for CPP disability benefits. This kit would have been sent to the Female

Applicant. It included instructions for completing the application and applying for benefits on behalf of dependent children.

[16] HRSDC also noted that the Male Applicant would have been provided information on the benefits available to the children of disability pension recipients as part of mass-mailing campaigns that took place four times between 1996 and 2002.

[17] With respect to the Female Applicant's affidavit evidence that in August 2004 the Minister's representative, Jeannette Cruikshank, admitted that an administrative error had been committed, HRSDC noted that the representative denied in a sworn affidavit that she ever made such a statement. For this reason, both affidavits would be given equal weight.

[18] Finally, the Decision noted that, as per *Le Corre v Canada (Attorney General)*, 2004 FC 155 at paragraph 42, there is no legal obligation on HRSDC to inform individuals of the availability of CPP benefits.

Findings Regarding the Second Allegation: Erroneous Advice Regarding Supplements

[19] With respect to the second allegation, HRSDC considered all of the documentation submitted by the Applicants as well as the information already on file. In particular, it considered the statements made by the Female Applicant, the Male Applicant and the Male Applicant's father. HRSDC also consulted a manager at HRSDC's Oshawa office, who was one of three staff members in the Oshawa office in 1998 who dealt solely with the CPP and Old Age Security cases. All three

agents were fully trained, none had a British accent, and none took telephone calls from the public; rather, they saw clients by appointment only in the office. HRSDC found that, on a balance of probabilities, HRSDC did not give the Female Applicant erroneous advice.

Findings Regarding the Third Allegation: Erroneous Advice Regarding Name of Member of Parliament

[20] With respect to the allegation that in August 2004 the Minister's representative, Jeannette Cruikshank, incorrectly advised the Applicants that their MP was Peter Adams, HRSDC acknowledged that the information was incorrect. However, this does not constitute erroneous advice under subsection 66(4) of the CPP because it was not as a result of that information that the Female Applicant or her daughter was denied a benefit. Moreover, the letter that the Applicants sent to Mr. Adams, addressed to the Honourable Ken Dryden, Minister of Social Development, was forwarded to the Minister and a response sent to the Female Applicant in November 2004. In consequence, HRSDC concluded that, on a balance of probabilities, HRSDC did not give the Applicants erroneous advice.

[21] Having considered all of the Applicants' evidence, HRSDC's documentation and procedures, and the Federal Court's jurisprudence, HRSDC was satisfied on a balance of probabilities that there was no erroneous advice provided and no administrative error made by HRSDC with respect to informing the Applicants of the CPP disabled contributor's child's benefit.

[22] The Decision concluded that, given that there has been no finding of erroneous advice or administrative error, HRSDC could not take remedial action under subsection 66(4) of the CPP.

ISSUES

[23] This application raises the following issue:

Did the Minister's delegate act reasonably in deciding that, with respect to the Applicants' situation, HRSDC did not provide erroneous advice or commit an administrative error and that, for this reason, he should not take remedial action under subsection 66(4) of the CPP?

STATUTORY PROVISIONS

[24] The following provisions of the CPP are applicable in these proceedings:

Where person denied benefit due to departmental error, etc.	**Refus d'une prestation en raison d'une erreur administrative**
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.

Persons by whom application may be made

74. (1) An application for a disabled contributor's child's benefit or orphan's benefit may be made on behalf of a disabled contributor's child or orphan by the child or orphan or by any other person or agency to whom the benefit would, if the application were approved, be payable under this Part.

Personnes admises à faire une demande

74. (1) Une demande de prestation d'enfant de cotisant invalide ou une demande de prestation d'orphelin peut être faite, pour le compte d'un enfant de cotisant invalide ou pour celui d'un orphelin, par cet enfant ou par cet orphelin, ou par toute autre personne ou tout autre organisme à qui la prestation serait, si la demande était approuvée, payable selon la présente partie.

Commencement of payment of benefit

(2) Subject to section 62, where payment of a disabled contributor's child's benefit or orphan's benefit in respect of a contributor is approved, the benefit is payable for each month commencing with,

Début du versement de la prestation

(2) Sous réserve de l'article 62, lorsque le paiement d'une prestation d'enfant de cotisant invalide ou d'une prestation d'orphelin est approuvé, relativement à un cotisant, la prestation est payable pour chaque mois à compter :

(*a*) in the case of a disabled contributor's child's benefit, the later of

a) dans le cas d'une prestation d'enfant de cotisant invalide, du dernier en date des mois suivants :

(i) the month commencing

(i) le mois à compter duquel

with which a disability pension is payable to the contributor under this Act or under a provincial pension plan, and	une pension d'invalidité est payable au cotisant en vertu de la présente loi ou selon un régime provincial de pensions,
(ii) the month next following the month in which the child was born or otherwise became a child of the contributor, and	(ii) le mois qui suit celui où l'enfant est né ou est devenu de quelque autre manière l'enfant du cotisant;
(*b*) in the case of an orphan's benefit, the later of	*b*) dans le cas d'une prestation d'orphelin, du dernier en date des mois suivants :
(i) the month following the month in which the contributor died, and	(i) le mois qui suit celui où le cotisant est décédé,
(ii) the month next following the month in which the child was born, but in no case earlier than the twelfth month preceding the month following the month in which the application was received.	(ii) le mois qui suit celui où l'enfant est né. Toutefois, ce mois ne peut en aucun cas être antérieur au douzième précédant le mois suivant celui où la demande a été reçue.

[25] The following provisions of the *Federal Courts Rules*, SOR/98-106, are applicable in these proceedings:

Form of affidavits	**Forme**
80. (**1)** Affidavits shall be drawn in the first person, in Form 80A.	**80**. **(1)** Les affidavits sont rédigés à la première personne et sont établis selon la formule 80A.
[…]	
Exhibits	**Pièces à l'appui de l'affidavit**
(3) Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or	**(3)** Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci est inscrite sur la pièce même

on a certificate attached to it, signed by the person before whom the affidavit is sworn.	ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] Previous jurisprudence has determined the appropriate standard of review. A ruling on the existence of administrative error or erroneous advice pursuant to subsection 66(4) of the CPP is a discretionary decision. It is therefore subject to the standard of reasonableness. See *Manning*, above, at paragraph 23; *Leskiw v Canada (Attorney General)*, 2004 FCA 177 [*Leskiw FCA*] at paragraph 9; and *Kissoon v Canada (Minister of Human Development Resources)*, 2004 FC 24 at paragraphs 4 and 5 (aff'd 2004 FCA 384).

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph

47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

The Decision Was Based on an Incomplete Investigation

[29] The Applicants say that, in 2007, prior to the investigation that led to the Decision under review, Lucy Fong, an officer with CPP Policy and Legislation, conducted an investigation into the Applicants' allegations of erroneous advice and administrative error. The Applicants submit that this investigation was incomplete because Ms. Fong failed to interview important witnesses, namely the Male Applicant and the Male Applicant's father, particularly considering that the latter witness recalled that the Applicants told him in 1998 that they had been advised that no benefits were available to them.

[30] The Applicants say that the same problem arose in the investigation leading to the Decision under review. Indeed, it was even more pronounced because even the Female Applicant was not interviewed.

HRSDC Has Impugned the Applicants' Family Name and Caused Them Stress, for Which They Deserve Compensation

[31] The Applicants claim that, in 2004, a representative from the office of MP Peter Adams telephoned HRSDC and was told that the Lees "were liars"; that they did not call HRSDC in 1998; and that the Minister's representative, Jeannette Cruikshank, would never apologize to them or give them direction. During the 2007 investigation noted above, Lucy Fong intimidated the Female Applicant and would not accept her responses.

[32] The Applicants argue that it is unfair for HRSDC to conclude, because the Oshawa office kept no record of their 1998 phone call, that the Applicants must not have made such a call.

Remedies

[33] The Applicants ask this Court to issue orders for the following:

i. a thorough investigation by and response from the Minister himself regarding the letter written by the Male Applicant's father concerning the Applicants' 1998 inquiry at the Oshawa office;

ii. retroactive benefits for their daughter from June 1998 to March 2003;

iii. interest on those retroactive benefits;

iv. costs, including fees, photocopies, transportation and courier costs; and

v. compensation for their stress, hardship, pain and suffering.

ARGUMENTS

The Respondent

Preliminary Matters

[34] The Respondent submits that, with the exception of the affidavit of service and affidavit of documents, the Applicants have filed seven affidavits (which are enumerated at paragraph 38 of the Respondent's Memorandum) to which are attached exhibits that are uncommissioned, contrary to Rule 80(3) of the *Federal Courts Rules*.

[35] In addition there are documents dated after the Decision under review that were not before the Minister's delegate. The Respondent submits that this Court cannot consider these documents. See *Swain v Canada (Attorney General)*, 2003 FCA 434 at paragraph 2.

[36] The Respondent requests that this Court strike both sets of these documents and all references to them in the Applicants' Record.

The Decision Is Reasonable

[37] The Respondent submits that the Minister has no obligation to inform individuals of the benefits for which they are eligible. See *Le Corre*, above, at paragraph 42. Nonetheless, notifications and frequent mailings are undertaken in connection with the CPP Disability Program to "get the word out." As the Decision is careful to demonstrate, the Applicants would have been a likely target for this information.

[38] The Respondent submits that the thoroughness of the investigation is evident. The Decision flows reasonably from the available evidence. What the Applicants wish is for this Court to re-weigh the evidence. However, that is not the function of the Court on judicial review.

The Applicants Lack Evidence of a 1998 Phone Call

[39] The Respondent submits that the evidence does not show, on a balance of probabilities, that the Female Applicant was given erroneous advice when she called the Oshawa office regarding available CPP supplements in 1998. The unsworn statement of the Male Applicant's father provides only a vague recollection of a conversation from ten years ago about the Applicants contacting "a couple of government offices."

[40] The Respondent also argues that, based upon the findings of the investigation conducted prior to the Decision, it was impossible for the Female Applicant to call the Oshawa office directly, as callers who dialled that office were instructed to call the "1-800" number.

[41] The Respondent submits that, given the absence of evidence, it was reasonable for the Minister's delegate to find that he was not satisfied that erroneous advice had been provided. See *Kissoon*, above, at paragraph 11. It is for the Applicants to prove that they were given erroneous advice, and they have failed to do so. See *Manning*, above, paragraph 37.

[42] The Respondent also observes that, since the Applicants' evidence was contradicted by other evidence, it was open to the Minister's delegate to find that the allegations were not credible. See *Leskiw v Canada (Attorney General)*, 2003 FCT 582 [*Leskiw FC*], at paragraph 23.

Providing the Wrong Name for the Applicants' MP Requires No Remedial Action

[43] The Respondent submits that the Female Applicant applied for child benefits in March 2004 and received the maximum retroactive period allowed under the Plan. She received 11 months of retroactive child benefit payments, which started in April 2003.

[44] In *Strezov v Canada (Attorney General)*, 2007 FC 417 at paragraphs 17-18, the Court stated: "Subsection 66(4) of the plan allows the Minister to take remedial action in some, but not all, cases where an individual has been provided with erroneous advice by department officials." The Court noted that, "in order to be entitled to Ministerial relief, it is not enough that the person was provided with erroneous advice. In addition, the person must also have been denied a benefit to which they were entitled …."

[45] Therefore, as confirmed by the Decision, whether or not the name of the Member of Parliament was correct did not result in denial of a benefit and, therefore, there is no remedy possible under subsection 66(4) of the CPP. In any event, the Applicants' correspondence that was sent to Peter Adams in error was subsequently forwarded to the Minister, and a response was provided.

Remedies

[46] The Respondent submit that this judicial review should be dismissed. However, in the event it is allowed, the appropriate remedy is to remit the matter to a different ministerial delegate for redetermination.

[47] The award of damages sought by the Applicants is outside the jurisdiction of this Court to award in a judicial review proceeding. See *Al-Mhamad v Canada (Canadian Radio-Television and Telecommunications Commission)*, 2003 FCA 45 at paragraph 3.

[48] In response to the claim for interest, the Respondent submits that the CPP is a complete code dealing with the payment of benefits. It imposes no obligation on the Minister to pay interest in addition to other benefits. In the absence of a specific provision allowing for payment of interest on benefits, such an obligation does not arise. See *Gladstone v Canada (Attorney General)*, 2005 SCC 21 at paragraph 12.

[49] Moreover, the language of subsection 66(4) of the CPP gives clear indication that any award of benefits is limited to the payment of benefits. That provision allows the Minister the discretion to take appropriate measures to place the Applicants in the position that they would have been in "under this Act", – as opposed to in any other respect – had erroneous advice not been given or administrative error not occurred. The authority to grant interest must be found in the CPP, and no such provision or authority is found therein.

ANALYSIS

Generally

[50] Revealingly, at the end of the hearing, Mr. Lee told the Court that he and his wife are honest people, so they just do not understand why they have been denied the benefit for their daughter when they have told the truth.

[51] This highlights, I think, the problem faced both by Mr. Williamson, who conducted the investigation and rendered the Decision, and by the Court in reviewing this matter. There is no evidence before the Court that people other than the Lees were not telling the truth and are not honest people.

[52] This means that, where evidence conflicts, a decision has to be made. Both Mr. Williamson and the Court have to resort to formal rules of evidence in order to decide whether or not the Applicants have been able to make their case.

[53] The Applicants appear to feel that because their version of events (which happened some time ago now) has not been accepted by Mr. Williamson, they are being labelled as liars. This is not the case. It is just that, given the evidence available to him, Mr. Williamson had to make a Decision either for or against the Applicants. It was his duty to investigate this matter and to come to a conclusion that took into account the evidence available on both sides. The fact that he was not able to find for the Applicants does not mean that they have been lying. All it means is that, given the evidence available, and bearing in mind the relevant onus and burden of proof, Mr. Williamson was

unable to find for the Applicants. It is my duty to decide whether or not, in reaching that conclusion, he proceeded in any way that was not procedurally fair or whether his conclusion was unreasonable in the sense of falling outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law," as stipulated in paragraph 47 of *Dunsmuir*, above.

[54] After reviewing the written materials submitted by the Applicants and hearing their oral presentation, their alleged grounds for review appear to be as follows:

a. Mr. Williamson acted in a procedurally unfair way by not conducting personal interviews with the Applicants and Mr. Samuel Lee, Mr. Robert Lee's father, to ascertain further information before rendering his Decision; and

b. The Decision is unreasonable.

The Statutory Scheme

[55] The decision under review was made pursuant to the erroneous advice or administrative error provision of subsection 66(4) of the CPP. Subsection 66(4) provides that:

(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	(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

[56] No procedures are prescribed for an investigation undertaken under subsection 66(4) of the CPP. Instead, subsection 66(4) simply requires that the Minister be "satisfied" that erroneous advice has been given or that an administrative error has occurred. The procedures are at the discretion of the Minister, consistent with the discretionary nature of the decision itself. See *Leskiw*, above, at paragraph 7; and *Raivitch v Canada (Minister of Human Resources Development)*, 2006 FC 1279 at paragraph 35.

[57] The duty to take appropriate remedial action arises only when the Minister is satisfied that such an error resulting in the denial of a benefit has occurred. As explained by this Court recently in *Jones v Canada (Attorney General)*, 2010 FC 740, and earlier in *Kissoon v Canada (Minister of Human Development Resources)*, 2004 FC 24 at paragraph 4:

> The requirement to take remedial action is conditional, and, therefore, does not fetter the Minister's discretion to first satisfy herself that an error has been made ….

[58] A decision made by the Minister under subsection 66(4) of the CPP is discretionary. As noted by this Court in *Graceffa v Canada (Minister of Social Development)*, 2006 FC 1513 at paragraph 7, subsection 66(4) extends to the Minister a wide discretion as to remedial action and to an informal determination of the facts.

[59] On an application for judicial review of a decision of a ministerial delegate under subsection 66(4), this Court has held that the evidence should not be re-weighed nor findings disturbed on the basis that the Court would have come to a different conclusion. See *Kissoon*, above.

[60] The Court must determine whether the decision of the Minister's delegate was reasonable based on the available evidence. The Court in *Raivitch*, above, stated:

> 18 I begin by reiterating that the role of this Court is not to re-weigh the evidence but rather to assess whether the proper factors and appropriate procedures were followed by the Minister in arriving at the decision in question: *Suresh*, [2002] 1 S.C.R. 3, above, at paragraph 34. As succinctly stated by my colleague Justice Judith A. Snider in relation to a CPP subsection 66(4) decision in *Kissoon*, supra, at paragraph 5:
>
> > A finding of erroneous advice or administrative error is one of fact, which also signals to a court that deference should be accorded to the Minister. Evidence should not be reweighed nor findings tampered with merely because this Court would have come to a different conclusion.

[61] In *Manning*, above, at paragraph 48, the Court focused the nature of the issue for the Court:

> The issue is not whether it was possible that erroneous advice had been given. Rather, did the facts satisfy the Minister that erroneous advice had been given.

Failure to Conduct Interviews

[62] At the outset of his investigation, Mr. Williamson, by letter dated 20 July 2009 asked the Applicants to provide him with the following:

> As I am conducting a fresh review, I ask that you submit all of the information, evidence and submissions that you believe are required to support your claim of erroneous advice and/or administrative error related to your application for the DCCB for Nicole Anne Lee. Please mail your response to my attention at the following address within 60 days of receipt of this letter.
>
> [emphasis added]

[63] Under cover of a letter dated 8 August 2009, the Applicants provided their response and provided Mr. Williamson with their information, evidence and submissions.

[64] Through their Member of Parliament, the Hon. Barry Devolin, by letter dated 18 December 2009 to the Hon. Diane Finley, the Minister of Human Resources and Skills Development, the Applicants requested that Mr. Williamson's Decision be expedited. That letter reads in relevant part as follows:

> I am writing on behalf of constituents in my riding, Robert and Maria Lee, who currently have a review underway with CPP Policy and Legislation Officer Andrew Williamson.
>
> …
>
> Mrs. Maria Lee has submitted all information and evidence as requested in a letter dated July 20, 2009 and is now awaiting a response from the review. The Lee family has requested careful consideration and that the review be expedited with the assistance of your office.
>
> [emphasis added]

[65] The evidence is clear that, at this stage prior to the rendering of the Decision on 1 April 2010, the Applicants were of the view that they had provided Mr. Williamson with "all of the information, evidence and submissions" that they believed were required to support their claim.

[66] Since the Decision was rendered, the Applicants have taken the position that Mr. Williamson failed to complete a full investigation. In particular, they now say that he should have asked them for more information and should have personally interviewed them and Mr. Samuel Lee before rendering a Decision.

[67] There is no set procedure for the kind of investigation that Mr. Williamson conducted under subsection 66(4) of the plan. As I noted above, subsection 66(4) simply requires that the Minister be "satisfied that erroneous advice has been given or that an administrative error has occurred. The procedures are at the discretion of the Minister, consistent with the discretionary nature of the decision itself." See *Leskiw FC*, above, at paragraph 7; and *Raivitch*, above, at paragraph 35.

[68] It seems to me that the Applicants were provided with an opportunity to provide, and were specifically asked to provide, "all of the information, evidence and submissions" that they wished to provide. What is more, they confirmed through their MP that they had provided all that they wanted to provide and even requested that Mr. Williamson be told to expedite matters based upon the fact that they had submitted all that was needed for him to make the Decision.

[69] There was no procedural unfairness here. Anything that the Applicants wanted to say or produce in a personal interview could easily have been said or produced in writing. In fact, through their MP, the Applicants confirmed that it had been.

[70] It is for this reason that the Court must now exclude from this review the additional documents set out in the Respondent's Memorandum of Fact and Law that were not before Mr. Williamson. Since receiving a negative decision, the Applicants have changed position and now say that Mr. Williamson did not have before him all of the evidence and information that was needed to make the Decision. They have attempted, through affidavit evidence rendered after the Decision, to bolster their claim before the Court. However, the Court is not making the decision afresh. Mr. Williamson's Decision must be reviewed on the basis of the information, evidence and submissions that were before him when the Decision is made. See *Khwaja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 522 at paragraph 14.

Was the Decision Reasonable?

1. Administrative Error: No Duty to Inform and No Error Based on Alleged Late Notification

[71] The Applicants claim that they did not know about the child benefits until 16 March 2004 when Mrs. Lee received from the Minister a "Staying in Touch" newsletter with her income tax return T4A(P) slip. The Applicants say that they received no prior notification.

[72] There is no legal obligation on the part of the Minister to inform all individuals eligible for a benefit of their entitlement to that benefit. See *Le Corre,* above, at paragraph 42.

[73] CPP places the onus on an applicant to apply for benefits. The Respondent submits that CPP cannot be construed so as to impose a positive obligation upon the Minister regularly to remind benefit recipients of their obligation to inform HRSDC about changes to their status. See *Mulveney v Canada (Minister of Human Resources Development),* 2007 FC 869 at paragraph 18. The Court agrees.

[74] However, in his investigation, Mr. Williamson obtained confirmation from senior management with CPP Disability Program Design and from Operational Delivery Services that the "Staying in Touch" newsletter is mailed out with clients' T4A(P) slips, with the first edition being issued November 2001. Mr. Williamson specifically detailed in his decision how the November 2001 edition, which was mailed out in early 2002, set out the purpose of the newsletter and provided information about the child benefits:

> This newsletter is one of the ways HRDC is providing clients with better service and information on the Canada Pension Plan (CPP) disability benefits. A 1999 survey told us that people who receive a CPP disability benefit want to hear from the department when there is new information on Canada Pension Plan disability benefits or new information for CPP disability clients…. The newsletter will be mailed out at least once a year, more often if there is news of special importance to you.
>
> **What other benefits are paid by CPP?**
> **Benefits for children**
>
> Children of a person getting a CPP disability benefit and children of a deceased person who paid into the CPP may qualify for a monthly benefit….

[75] In examining the Applicants' address history between 2001-2002, Mr. Williamson noted that, other than one letter that was remailed, there were no computer notes of returned mail; an updated address was provided in January 2002 by Revenue Canada, and it remains the Applicants' current address. Upon research into the mailing of the T4A(P) slips, Mr. Williamson received confirmation from management in the Minister's Scarborough office that any returned slips are reviewed to determine if there is an updated address to which they can be mailed.

[76] In addition to the November 2001 edition of the newsletter, Mr. Williamson reviewed the February 2003 edition which indicated that benefits are paid to the children of disability pension beneficiaries.

[77] Further to the "Staying in Touch" newsletters, in relation to which Mr. Williamson specifically noted "that it is highly probable, given the Department's procedures, that the Department mailed 2002 and 2003 T4A(P) slips, and accompanying newsletters, to you," he also retrieved archived departmental files and reviewed the information set out in the 1992 Disability Kit/CPP application. Mrs. Lee completed her CPP Disability application in 1992. It was found that the 1992 application package contained a Guide which specified the eligibility criteria for the child's benefit.

[78] Moreover, the Minister's delegate concluded that the Applicants would have been provided with information about the child benefits on other occasions, including Mrs. Lee's Notice of Entitlement of her disability amount and Mr. Lee's Statements of Contributions, with insert

describing the child benefits, which was mailed to him as part of a mass mailing campaign, all of which provided information about the child benefit.

[79] The Applicants' allegations that they were not properly informed of the child benefits before March 2004 was not proven, even if there had been a positive obligation on the Minister to inform individuals of their entitlement.

ii. No Erroneous Advice Given: Lack of Evidence to Substantiate Alleged 1998 Telephone Call

[80] The Applicants failed to adduce sufficient evidence to substantiate their allegations of erroneous advice or administrative error. In the absence of "satisfactory" proof that an administrative error occurred or that erroneous advice was provided, it was reasonable for Mr. Williamson to conclude that no such error had taken place and no such advice had been given. See *Kissoon*, above, at paragraph 11.

[81] This Court has confirmed that the onus is on the party claiming the erroneous advice to prove, on a balance of probabilities, that the advice was given. See *Manning*, above, at paragraph 37.

[82] In December 2008, Mrs. Lee alleged that she "phoned CPP Disability Oshawa office late July or early August: 'I spoke to a woman with a British accent in the Oshawa branch. I gave her my Social Insurance Number and asked her if any supplements were available to help us with our

new baby, she looked up my file on the computer, and she told me nothing else was available because I was at full benefits.'"

[83] Mr. Williamson reviewed the available evidence, including forms and procedures, letters and statements, including Mr. Lee's statement that Mrs. Lee did not call a standard 1-800 number but called the Oshawa branch directly. He also reviewed as part of the investigation an unsworn statement from Mr. Lee's father, which provides a vague recollection of a conversation 10 years earlier about contacting "a couple of government offices."

[84] In the detailed reasons provided by Mr. Williamson in his Decision, a number of inconsistencies and contradictions in the evidence were noted, including:

a. Although the Applicants' allegations lacked key details and there was no record of the call being made by Mrs. Lee, Mr. Williamson conducted further investigations and was informed by an employee working at the Oshawa office in 1998 that she was one of three fully trained staff members in that office in 1998 who dealt solely with all CPP and Old Age Security cases. These agents saw clients on an in-person appointment basis only. No client inquiries were to be answered by the Oshawa staff over the phone to avoid repeated interruptions. None of the agents had a British accent;

b. Contrary to the Applicants' claims that they called the Oshawa branch directly and not a 1-800 number, Mr. Williamson's investigation revealed that if a client called the Oshawa office directly the call was answered by an automated response that advised clients to call the 1-800 number. The office did not have the capability to

transfer the call directly, so a caller would have to hang up and dial the 1-800 number;

c. Based on 1998 operations manuals used by service delivery agents in administering the CPP, agents were provided specifically with information about the child's benefit legislation and eligibility requirements.

[85] In *Leskiw FC*, above, at paragraph 23, the Federal Court held that it was open to a Minister's delegate to find that no erroneous advice had been provided where there were contradictions in the allegations as to the receipt of the erroneous advice and a lack of specifics as to the date and source of such a device.

[86] Similarly, in this case, there were contradictions in the evidence before Mr. Williamson and, on the whole, no evidence to substantiate the allegations made by the Applicants. In short, the Applicants were unable to prove their case given the onus and burden of proof on them and given the contradictory evidence uncovered by the investigation. See *Kissoon*, above, at paragraph 11; and *Leskiw FC*, above, at paragraph 23.

[87] Based on the foregoing, it was reasonable for the Minister's delegate to conclude that there was no erroneous advice given.

iii. No Remedial Action Regarding Name of Member of Parliament

[88] At the hearing of this matter in Toronto the Applicants confirmed to the Court that this ground of complaint has no relevance for the Decision rendered by Mr. Williamson. They said that they raised it only to show that, from their perspective, they have been consistently mistreated by HRSDC. I am not reviewing the whole history of this case. However, I think it is worth pointing out that there was no mistreatment on this issue. Mrs. Lee applied for child benefits in March 2004 and received the maximum retroactive period allowed under CPP. In accordance with subsection 74(2) of CPP, she received 11 months of retroactive child benefit payments, which started in April 2003.

[89] By an undated letter, in response to Mr. Williamson's letter dated 16 September 2008, the Applicants claimed that a Minister's representative, after the Review Tribunal hearing held in August 2004, told them incorrectly that the name of their Member of Parliament was Peter Adams. They say this constitutes erroneous advice and supports their position that HRSDC gave them erroneous advice about the DCCB.

[90] As confirmed by the Minister's delegate in his Decision, whether or not the name of the Member of Parliament was correct did not result in denial of a benefit and, therefore, there is no remedy possible under subsection 66(4) of CPP. Mrs. Lee was already receiving the DCCB at this time. In any event, Mr. Williamson pointed out that the Applicants' correspondence sent to Peter Adams, MP, was forwarded to the Minister and a response provided.

[91] The Applicants may have been disappointed by the alleged incorrect information about their MP, but this did not result in the denial of the DCCB. Mrs. Lee received the maximum 11 months of retroactivity payable for her daughter, based on the date of her 16 March 2004 application. Subsection 74(2) of CPP stipulates that in no case can child benefits be paid for more than 11 months before the month in which the application was received.

[92] In *Strezov*, above, at paragraphs 17-18, the Court stated that "[s]ubsection 66(4) of the plan allows the Minister to take remedial action in some, but not all, cases where an individual has been provided with erroneous advice by department officials." The Court noted that, "in order to be entitled to Ministerial relief, it is not enough that the person was provided with erroneous advice. In addition, the person must also have been denied a benefit to which they were entitled …."

[93] Similarly in *Jones*, above, the Court dismissed an application for judicial review of a Ministerial decision on the basis of erroneous advice/administrative error. Jones had argued that he was denied a disability pension due to alleged erroneous advice. The Court confirmed, at paragraph 35, that

> … before taking remedial action, the Minister must be satisfied that the error resulted in the denial of the benefit the appellant was entitled to. Thus, there must be a causal connection, the absence of which is fatal.

Conclusion

[94] The Minister's delegate's determination, on a balance of probabilities, that there was no erroneous advice or administrative error is reasonable, based on the evidence. Similar to the findings

in *Raivitch*, above, the Minister's delegate conducted a thorough review of the available evidence and the Decision flows reasonably and inevitably from this evidence.

[95] Ultimately, what the Applicants are asking the Court to do is re-weigh the evidence in a manner more favourable to their position, which is not the function of this Court on judicial review.

[96] I understand the Applicants' frustration at what has transpired. They were entitled to claim the DCCB on behalf of their daughter in July 1998, but they did not discover this until March 2004. Even with the payments being made retroactive to April 2003, they feel that they have missed out on almost five years of benefits to which their daughter was entitled, and all because of a simple mistake.

[97] However, I think it is clear from the jurisprudence that the Minister had no obligation to inform the Applicants that their daughter was eligible for the DCCB. The government does send out information on the CPP disability program and child eligibility, but it is the responsibility of those who qualify to make the necessary inquiries, to seek out information and to apply.

[98] The Decision provides a thorough overview with respect to the provision of DCCB information to the Applicants. In addition to reviewing all of the information already on file, the Minister's delegate did his own digging. He looked at archived pamphlets and instructional kits, interviewed former employees and consulted managers within the department. He presented evidence that, four times prior to March 2004, information on the DCCB was sent to the Applicants

without them even asking for it. He also noted that HRSDC had the Applicants' correct mailing address and that no mail was recorded as returned.

[99] The Applicants insist that they made inquiries regarding available supplements and were told that none were available to them. The Male Applicant's father says that they should be taken at their word. That is not what the law says. The law governing CPP benefits says that, if the Applicants are to receive benefits back to 1998, they must prove—with witnesses or documents—that they were given incorrect advice or that there was an administrative error with respect to their application. The Applicants must convince the decision-maker that such an error has occurred. In this case, the standard of proof is the balance of probabilities. Therefore, the Applicants must show that their version of events is the more likely one. The Applicants did not meet this standard because they lack sufficient evidence to prove their case.

[100] The Applicants have no documentation to show that the Female Applicant called the Oshawa office. They are unable to provide the precise date on which she called or the name of the person to whom she spoke. With respect to the evidence of the Male Applicant's father, he is simply reporting what the Applicants told him: they had called a "couple of government offices" and were told that nothing could be done for them. That is all. The father cannot say that the Applicants called the correct office or understood correctly what they were told or the advice they were given.

[101] What is more, the investigation into the Applicants' allegations shows that their version of events could not have occurred. It was not possible for the Female Applicant to call the Oshawa office directly because that office was reachable only through a 1-800 number. It was not possible

that she spoke to a woman with a British accent because no such woman worked at the Oshawa office at that time.

[102] These contradictions do not necessarily mean that the Applicants are liars and that they are inventing this phone call. There are other explanations. We all are mistaken from time to time. Whatever the reasons for the differing versions of events, the law allows the Minister's delegate to doubt the accuracy of the Applicants' version of events when there is other evidence to contradict it.

[103] With respect to the provision of the incorrect name for the Applicants' MP, again the law is clear. The Applicants were in no way disadvantaged by this error. Their letter reached the person for whom it was intended and they received a reply. That is all they can expect.

[104] The Applicants' situation invites the Court's sympathy. However, they do not have sufficient convincing evidence to prove erroneous advice or administrative error on the part of HRSDC, and they have not demonstrated any procedural unfairness that occurred during the investigation or the decision-making process.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

2. No costs are asked for by the Respondent and none are given.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-658-10
STYLE OF CAUSE:	**ROBERT GEORGE LEE** **and** **MARIA JOSE LEE** **and** **THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 5, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	June 14, 2011

APPEARANCES:

Robert George Lee and Maria Jose Lee	FOR THE APPLICANTS Self-Represented
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