

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170711

Docket: A-124-17

Citation: 2017 FCA 150

**CORAM: WEBB J.A.
NEAR J.A.
RENNIE J.A.**

BETWEEN:

LINDA CARDIN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 11, 2017.

REASONS FOR ORDER BY:

NEAR J.A.

CONCURRED IN BY:

**WEBB J.A.
RENNIE J.A.**

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REASONS FOR ORDER

NEAR J.A.

I. Introduction

[1] The respondent Crown brings a Rule 369 motion seeking to strike the applicant Ms. Cardin's application for judicial review of a decision of the Social Security Tribunal – Appeal Division (SST-AD), dated March 7, 2017 (the Decision).

II. Background

[2] Ms. Cardin had sought leave to appeal a decision of the Social Security Tribunal – General Division (SST-GD) which determined that she was not eligible for CPP disability benefits.

[3] Pursuant to subsection 56(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c.34 (the Act), an appeal to the SST-AD may only be brought if leave to appeal is granted. Pursuant to subsection 58(1), the only grounds of appeal are that:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Pursuant to subsection 58(2), leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success.

[4] In her leave application, Ms. Cardin submitted that the SST-GD made five errors of law and an erroneous finding of fact. She also sought to rely on new evidence. On November 22, 2016, the SST-AD allowed leave to appeal “on all five grounds for which [Ms. Cardin] claimed the [SST-GD] erred in law” (emphasis added). In its leave decision, the SST-AD determined that there was no reasonable chance of success on the ground alleging an erroneous finding of fact

and that the SST-AD cannot consider the new evidence as it was prepared after the hearing before the SST-GD.

[5] On appeal, Ms. Cardin argued that the SST-AD was required to conduct a full appeal on all the evidence that was before the SST-GD as the SST-AD had determined, at the leave stage, that her appeal had a reasonable chance of success. The member of the SST-AD (the same member that rendered the leave decision) disagreed, determining that the leave decision had “explicitly and purposely restricted the grounds of appeal” to the five errors of law. The SST-AD ultimately concluded that Ms. Cardin’s appeal succeeded on the grounds that the SST-GD erred in law. On March 7, 2017, the SST-AD decided that “the matter be referred back to the [SST-GD] for a de novo hearing before a different [SST-GD] member” (emphasis added).

[6] Ms. Cardin seeks judicial review of the SST-AD’s analysis of the scope of the appeal and not the final decision granting the appeal. Ms. Cardin seeks an order that the SST-AD does not have the authority to limit the scope of the appeal once leave has been granted on any of the three grounds under subsection 58(1) of the Act.

III. Motion

[7] The Crown submits that Ms. Cardin’s application for judicial review should be dismissed as moot.

A. *Test on a Motion to Strike*

[8] In *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557, this Court held that it will only strike a notice of application for judicial review where it is “so clearly improper as to be bereft of any possibility of success”. There must be “an obvious, fatal flaw striking at the root of this Court’s power to entertain the application”: at para. 47. This high threshold for striking an application may be met where the application has been rendered moot: *Lukács v. Canada (Transportation Agency)*, 2016 FCA 227 at para. 6.

B. *Test for Mootness*

[9] The court may decline to decide a case when it merely raises a hypothetical question that will have no practical effect on the parties’ rights: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. Applying the doctrine of mootness involves a two-step analysis. First, the court must determine whether the concrete controversy between the parties has disappeared and the issues have become academic. If yes, the court must then decide whether it should exercise its discretion to hear the moot case.

C. *Should Ms. Cardin’s application be struck for mootness?*

[10] In my view, the motion to strike should be allowed. Whether Ms. Cardin’s appeal was inappropriately limited will have no bearing on her ultimate entitlement to CPP disability benefits as she has been granted a hearing *de novo* before the SST-GD. The issue of whether the

SST-AD had the authority to limit the scope of her appeal is purely academic. While this issue may recur, I find it would be preferable to determine the issue in a genuine adversarial context. In light of the referral back to the SST-GD, the lack of a live controversy between the parties that would affect Ms. Cardin's entitlement to benefits, and the academic nature of the relief sought, I am of the view that the matter is moot and that it would be an uneconomical use of judicial resources to allow Ms. Cardin's application for judicial review to proceed.

IV. Conclusion

[11] For these reasons I would allow the respondent's motion to strike the application for judicial review and the applicant's application for judicial review should be dismissed. In the circumstances, no costs will be awarded.

"David G. Near"

J.A.

"I agree.

Wyman W. Webb, J.A."

"I agree.

Donald J. Rennie, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-124-17

STYLE OF CAUSE: LINDA CARDIN v.
THE ATTORNEY GENERAL OF
CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: NEAR J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

DATED: JULY 11, 2017

WRITTEN REPRESENTATIONS BY:

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