

Date: 20090120

**Dockets: A-329-08
A-372-08**

Citation: 2009 FCA 14

**CORAM: DESJARDINS J.A.
BLAIS J.A.
RYER J.A.**

BETWEEN:

**MINISTER OF HUMAN RESOURCES
AND SOCIAL DEVELOPMENT CANADA**

Appellant

and

MARLENE LAYDEN

Respondent

Heard at Ottawa, Ontario, on January 20, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on January 20, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

DESJARDINS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 20, 2009)

DESJARDINS J.A.

[1] These two appeals have been consolidated by order of Sexton J.A. These reasons for judgment shall therefore be filed in both A-329-08 and A-372-08.

[2] Appeal A-329-08 is an appeal of a decision of an applications judge (Mactavish J.), [2008] F.C.J. No. 783, allowing the respondent's application for judicial review of the decision of a

member of the Pension Appeals Board, who granted the Minister leave to appeal a decision of the Review Tribunal granting the respondent's disability pension.

[3] At issue in this appeal is whether the applications judge erred in her articulation of the duty of disclosure required in an *ex parte* application for leave to appeal to the Pension Appeals Board (rule 7 of the *Pension Appeals Board Rules of Procedure (Benefits)*) (C.R.C., c. 390).

[4] At issue in appeal A-372-08, being an order by Mactavish J. dated Jan 26, 2008 is whether the Court should intervene in the applications judge's discretionary order as to costs.

[5] The Minister has conceded that appeal A-329-08 should be dismissed because of two factual misrepresentations that were correctly found by the applications judge to have been made in the application for leave.

[6] In determining that this appeal should be disposed of on the basis of these factual errors, we specifically take no position as to the correctness of the observations of the applications judge with respect to the extent of the duty of disclosure upon any party – the Crown or the individual claiming benefits or other rights under the *Canada Pension Plan*, R.S. 1985, c. C-8 – who seeks leave to appeal from a decision of the Review Tribunal.

[7] The determination of this issue is not necessary for the disposition of this appeal, as it was similarly unnecessary for the disposition of the application before the applications judge. In short, this is an issue that is best left for determination in another case at some future time.

[8] With respect to the matter of costs, given that there was material non-disclosure on two factual matters, we find that the order of costs should not be disturbed.

[9] The respondent requests that this Court decide the application for leave to appeal on the basis of the record before it, rather than having the matter referred back to the Chairman or Vice-Chairman or a designated member of the Pension Appeals Board.

[10] On an application for judicial review, the reviewing court can only exceptionally decide a case on the merits. In *Wiebe Door Services Ltd. V. Canada (Minister of National Revenue – M.N.R.)*

[1986] 3 F.C. 553 at paragraph 19, MacGuigan J. for the Court wrote that:

This Court cannot on a section 28 application engage in an examination of the evidence as such, unless a particular result is so inevitable on the facts that any other conclusion would be perverse.

[11] This case was later followed by Robertson J. for the Court in *872538 Ontario Inc. v. Canada (Minister of National Revenue)* [1994] F.C.J. No. 235 at paragraph 3.

[12] Where an application is successful, the matter must then be referred back to the deciding authority with a direction (see paragraph 18.1(3)(b) of the *Federal Courts Act* R.S.C. 1985, c. F-7)

(see also *Jada Fishing Co. Ltd. and Evco Fishing Ltd. and The Minister of Fisheries and Oceans and The Pacific Region Licence Appeal Board – Groundfish Panel*, 2002 FCA 103).

[13] In the case at bar, the record does not allow for one conclusion which would be inevitable on the facts.

[14] For these reasons, both appeals will be dismissed with costs.

"Alice Desjardins"

J.A.

"I agree.
Pierre Blais J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-329-08
A-372-08

STYLE OF CAUSE: MINISTER OF HUMAN
RESOURCES AND SOCIAL
DEVELOPMENT CANADA
and
MARLENE LAYDEN

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 20, 2009

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS J.A.
BLAIS J.A.
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DELIVERED FROM THE BENCH BY: DESJARDINS J.A

APPEARANCES:

Dale L. Noseworthy FOR THE APPELLANT

Loreen Irvine FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. FOR THE APPELLANT
Deputy Attorney General of Canada

Howard Ryan Kelford Knott & Dixon FOR THE RESPONDENT
Smiths Falls, Ontario