

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100513**

**Docket: A-327-09**

**Citation: 2010 FCA 122**

**CORAM: SHARLOW J.A.  
DAWSON J.A.  
TRUDEL J.A.**

**BETWEEN:**

**DANIEL KING**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on May 5, 2010.

Judgment delivered at Ottawa, Ontario, on May 13, 2010.

**REASONS FOR JUDGMENT BY:**

**DAWSON J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
TRUDEL J.A.**

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**BETWEEN:**

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

[1] By order dated August 4, 2009, a judge of the Federal Court dismissed the appellant's motion for an order that the underlying application for judicial review be certified as a class proceeding. The motion was dismissed on the ground the pleadings did not disclose a reasonable cause of action. The reasons for the Court's order are reported as *King v. Canada*, 2009 FC 796, [2009] F.C.J. No. 953.

[2] The issue on this appeal is whether the Judge erred in finding the appellant's pleading did not disclose a reasonable cause of action. For the reasons that follow, I would dismiss the appeal.

### Facts and Procedural History

[3] The facts and procedural history are undisputed and fully described in the reasons for the order under appeal. The following brief summary is sufficient for the purpose of this appeal:

1. After suffering a workplace injury in May, 1996, the appellant applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (Plan).
2. The application was denied at all levels, including the Review Tribunal level, until in November, 2002, the Pension Appeals Board ordered that the appellant be paid a disability pension retroactive to February, 1995.
3. The appellant received \$109,869.49, which was the total of each of the monthly benefit payments he would have received had the disability benefits been paid from February, 1995. No allowance was included for interest.
4. The appellant requested that he be paid interest, but was advised that it was not departmental policy to pay interest.
5. The appellant then sought relief under subsection 66(4) of the Plan. Subsection 66(4) provides:

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

(a) a benefit, or portion thereof,  
to which that person would have  
been entitled under this Act,

personne, selon le cas :  
a) en tout ou en partie, une  
prestation à laquelle elle aurait  
eu droit en vertu de la présente  
loi,

[...]

[...]

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.

6. This request for remedial action was denied in July, 2009, on the ground the Minister of Human Resources and Social Development Canada (Minister) found no evidence of any administrative error or erroneous advice.
7. The appellant then commenced, in the Federal Court, an application for judicial review of the decision denying him a remedy under subsection 66(4) of the Plan.
8. A certified tribunal record was filed in that proceeding. The appellant says that such record disclosed that at both the initial and reconsideration stages the Minister considered medical information obtained from the Workers' Compensation Board, without allowing the appellant to review and comment on the medical information.
9. During the judicial review proceeding, the Court stated the following legal question for determination on a preliminary basis:

Does the decision of the Pension Appeals Board that the applicant is entitled to a disability pension mean the initial decision of the minister of Human Resources and Social Development denying him a disability pension was based

on “erroneous advice” within the meaning of subsection 66(4) of the Canada Pension Plan?

10. While the stated question was originally answered in the affirmative by the Federal Court, that decision was reversed by this Court in reasons reported as *King v. Canada (Minister of Human Resources and Social Development)*, 2009 FCA 105, (2009), 392 N.R. 227. At paragraph 31 of its reasons, this Court wrote:

I am of the view that "erroneous advice", as it appears in subsection 66(4) of the CPP, refers to advice given by the Department of Human Resources and Skills Development to a member of the public, and not to any advice which, on occasion, may be given to the Minister or her officials in the course of deciding whether a pension should be awarded. The CPP is one of the largest social benefit schemes in the country. The statute and its regulations are complex, and many applicants are not represented by counsel. As such, department officials sometimes provide summary information over the phone or in person at local offices concerning eligibility for benefits, deadlines for filing, and so forth. Where an official gives a member of the public incorrect information, resulting in the denial of a benefit, the Minister may decide to provide a remedy. This has been the situation in all of the previous decisions of this court and the Federal Court relating to subsection 66(4) (see *Pincombe v. Canada (Attorney General)* (1995), 189 N.R. 197 (F.C.A.); *Leskiw v. Canada (Attorney General)*, 233 F.T.R. 182, 2003 FCT 582, aff'd 320 N.R. 175, 2004 FCA 177, leave to appeal denied [2004] S.C.C.A. No. 317; *Cowton v. Canada (Human Resources Development)*, 2004 FC 530; *Graceffa v. Canada (Minister of Social Development)*, 306 F.T.R. 193, 2006 FC 1513). [Emphasis added.]

11. On the motion to have the application for judicial review certified as a class proceeding, three causes of action were asserted by the appellant:
- (i) The cause of action dealt with in the primary question of law.
  - (ii) An alleged misinterpretation by the Minister of the statutory definition of "disability" found in the Plan.

- (iii) An alleged breach of procedural fairness. The Minister did not provide the appellant with all the medical or other information received from the Workers' Compensation Board that was before the Minister at both the initial application and reconsideration stages of the disability claim process.

[4] The appellant states the latter two "objectionable practices and procedures constitute both erroneous advice and administrative errors" within the meaning of subsection 66(4) of the Plan, and so disclose a reasonable cause of action.

#### Standard of Review

[5] The parties agree the alleged errors involve questions of law that are reviewable on the standard of correctness. I agree.

#### Application of the Standard of Review

[6] For the following reasons, the Judge did not err in deciding the pleading did not disclose a reasonable cause of action.

[7] Sub-rule 334.16(1)(a) of the *Federal Courts Rules*, SOR/98-106, requires an applicant who seeks certification of a class proceeding to demonstrate that the pleadings disclose a reasonable cause of action. To determine whether the pleadings demonstrated a reasonable cause of action, the Federal Court applied the test used when striking out applications for judicial review: is the alleged cause of action so clearly improper as to be bereft of any possibility of success?

[8] Turning to the three asserted causes of action, the Federal Court Judge noted that the parties had conceded that no valid cause of action existed alleging the Minister's decision refusing a disability pension was based on erroneous advice. This was because this Court's decision on the preliminary question of law was dispositive of this cause of action. On this appeal no challenge was made to the correctness of this finding.

[9] The second asserted cause of action is the alleged error of law touching on the definition of disability. During the oral argument of this appeal, counsel for the appellant conceded that such an error of law on the part of the Minister would not constitute either "erroneous advice" or "administrative error" within the scope of subsection 66(4) of the Plan. This is dispositive of the second cause of action.

[10] The third cause of action is the alleged breach of procedural fairness arising out of the Minister's failure to provide the appellant with medical information obtained from the Workers' Compensation Board. This is said to be an administrative error. However, it is not obvious that any such duty to disclose arose at what appears to be an administrative stage of the proceeding. Notwithstanding, for the purpose of this appeal I assume, without deciding, that such a duty existed.

[11] That said, for subsection 66(4) of the Plan to have any application, the alleged administrative error must have resulted in the denial of a benefit the appellant was entitled to. This requires the pleadings to assert a factual foundation for the allegation the administrative error is

what led the Minister to reach the wrong conclusion about the appellant's entitlement to remedial action. However, there is no allegation the failure by the Minister to disclose documents led to an erroneous conclusion by the Minister. The appellant does not point to any document or thing in the previously non-disclosed Workers' Compensation Board material that is said to be material to the Minister's decision under subsection 66(4) of the Plan. The failure to properly plead a causal connection is fatal to the third cause of action.

Conclusion

[12] For these reasons, I would dismiss the appeal. Costs were not sought by the respondent. Therefore, I would not award costs.

“Eleanor R. Dawson”

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J.A.

“I agree.

K. Sharlow J.A.”

“I agree.

Johanne Trudel J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-327-09

**(AN APPEAL FILED ON AUGUST 26, 2009 AGAINST A DECISION OF THE  
FEDERAL COURT, DATED AUGUST 4, 2009 FROM FEDERAL COURT FILE  
T-1361-07 WITH MOTION DOC. 20)**

**STYLE OF CAUSE:** DANIEL KING v.  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** May 5, 2010

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
TRUDEL JA

**DATED:** May 13, 2010

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