

CANADA / JUDGMENT

Kenny v. Canada (Attorney General)

2004 FC 460

COURT

Federal Court

DECIDED

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Kenny v. Canada (Attorney General)

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Decision Content

Date: 20040325

Docket: T-314-03

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BETWEEN:

CARL KENNY,

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

- [1] Mr. Kenny, after nine years, succeeded in his efforts to obtain Canada Pension Plan (CPP) disability benefits. He claims to be financially worse off as a result. He seeks judicial review of the decision of the Minister of Human Resources Development Canada (the Minister) dated January 24, 2003, wherein \$50,134.01 was deducted from Mr. Kenny's disability benefits for payment to the Province of New Brunswick pursuant to subsection 65(2) of the Canada Pension Plan, R.S.C. 1985, c. C-8.

FACTS

- [2] Mr. Kenny applied for CPP disability benefits in April, 1995. He had previously granted an irrevocable assignment of any CPP disability benefits to the Minister of Social Services of the Province of New Brunswick (Social Services). The assignment was required as a condition for payment of welfare benefits to Mr. Kenny's wife. Mr. Kenny signed two "Consent to Deduction and Payment" forms in favour of Social Services. The first was signed on January 10, 1994 and the second, while date-stamped November 18, 1994, was allegedly signed on May 29, 1995. Both documents were forwarded to and received by HRDC. HRDC could not, at the time, act on the documents because disability benefits were not being paid to Mr. Kenny. HRDC so informed Social Services by correspondence dated August 9, 1995.
- [3] During this time, Mr. Kenny's request for disability benefits was being processed. His claim was denied on August 3, 1995. At the request of Social Services, Mr. Kenny unsuccessfully appealed that decision through three levels (reconsideration, review tribunal and pension appeals board). On December 17, 1998, Mr. Kenny applied to the Federal Court of Appeal for judicial review of the pension appeals board's decision. On August 3, 2001, the reasons for judgment in *Villani v. Canada (Attorney General)*, [2002] 1 F.C. 130 (F.C.A.) (*Villani*) were released. *Villani* resulted in a restatement of the approach to disability and required a more lenient "real world" test than had been applied in a line of pension appeals board decisions.
- [4] On November 29, 2001, the Federal Court of Appeal issued an order, on the consent of the parties, allowing Mr. Kenny's application for judicial review and referring the matter back for redetermination. The respondent, on September 15, 2002, offered to settle on the basis that Mr. Kenny would receive the maximum benefits permissible under the provisions of the CPP. He was to be granted retroactive benefits to May, 1994. Mr. Kenny accepted the offer and a Consent to Judgment was filed with the pension appeals board. On September 30, 2002, Mr. Kenny informed Social Services of his success and requested that it suspend payments. Social Services complied and requested reimbursement for an overpayment of \$1,777.89. On October 4, 2002, the pension appeals board issued an order allowing the appeal in accordance with the Consent to Judgment.

- [5] In addition to future monthly disability benefits, Mr. Kenny was entitled to an award of \$54,444.39 representing the retroactive payment of owed benefits. Of that amount, \$50,314.01 was determined to be assigned to Social Services pursuant to subsection 65(2) of the CPP. When Mr. Kenny learned of the deduction, he requested an accounting and clarification as to why Social Services demanded reimbursement of \$1,777.89, but CPP was paying out a much larger amount.
- [6] The ministerial delegate's response of January 24, 2003 provided general information regarding disability benefits as well as information specific to Mr. Kenny including a table illustrating a yearly breakdown of disability benefits and a statement of the total to which Social Services was entitled.

ISSUE

- [7] The issue is whether the Minister properly deducted \$50,134.01 from Mr. Kenny's benefits for payment to Social Services.

THE RELEVANT STATUTORY PROVISIONS

Canada Pension Plan, R.S.C. 1985, c. C-8

65. (1) A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.

Régime de pension du Canada, L.R. 1985, ch. C-8

65. (1) Une prestation ne peut être cédée, grevée de privilège, saisie, escomptée ou donnée en garantie. Toute opération qui vise à céder, grever, saisir, escompter ou donner en garantie une prestation est nulle.
- (1.1) A benefit is exempt from seizure and execution, either at law or in equity.
- (1.1) Les prestations sont, en droit ou en equity, exemptes d'exécution de saisie et de saisie-arrêt.
- (2) Notwithstanding subsections (1) and (1.1), where any provincial authority or municipal authority in a province pays a person any advance or assistance or welfare payment for a month or any portion of a month that would not be paid if a benefit under this Act had been paid for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister may, in accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the provincial authority or municipal authority, as the case may be, an amount not exceeding the amount of the advance or assistance or welfare payment paid.
- (2) Dans les cas où une autorité provinciale ou municipale verse, pour un mois ou une fraction de mois, une avance ou une prestation d'aide sociale - qui ne sont données qu'en l'absence des prestations prévues par la présente loi -, le ministre peut, en conformité avec les

modalités réglementaires et malgré les paragraphes (1) et (1.1), retenir sur le montant des prestations qui deviendraient payables à l'intéressé pour cette période le montant de l'avance ou du paiement et verser les sommes retenues à l'autorité provinciale ou municipale selon le cas.

- (3) Notwithstanding subsections (1) and (1.1), where an administrator of a disability income program who is approved by the Minister makes a payment under that program to a person for a month or any portion of a month that would not have been made if a benefit under paragraph 44(1)(b) had been paid to that person for that period and subsequently a benefit becomes payable or payment of a benefit may be made under this Act to that person for that period, the Minister may, in accordance with any terms and conditions that may be prescribed, deduct from that benefit and pay to the administrator an amount not exceeding the amount of the payment made under that program.
- (3) Malgré les paragraphes (1) et (1.1), lorsqu'une personne reçoit de la part de l'administrateur, agréé par le ministre, d'un régime ou programme d'assurance-invalidité, pour un mois ou une partie d'un mois, un paiement qui ne serait pas versé si une prestation en vertu de l'alinéa 44(1)b) avait été versée pour cette période et que, subséquemment, une prestation devient payable à cette personne pour cette période, le ministre peut, conformément aux modalités prescrites, retenir sur cette prestation et payer à l'administrateur en cause une somme ne dépassant pas le montant du paiement fait en vertu de ce programme.

Canada Pension Plan Regulations

76. (1) In this section,

"authority" means any provincial authority or municipal authority in a province that pays any advance or assistance or welfare payment to a person in the province.

"excess payment" means the amount of any advance or assistance or welfare payment that was paid by an authority to a person for a month or any portion thereof and that would not have been paid if the benefit that was subsequently payable under the Act to that person in respect of that period had in fact been paid during that period.

- (2) Subject to subsections (3) to (6), the Minister may, where an authority satisfies him that an excess payment has been paid to a person, authorize
- (a) the deduction from the one sum amount payable to that person in accordance with subsection 62(1) of the Act in respect of the period for which the excess payment was paid, and
- (b) the payment to the provincial authority or municipal authority in the province in which the excess payment was paid,

of an amount equal to the amount of the excess payment.

Règlement sur le Régime de pensions du Canada

76. (1) Dans le présent article,

« *_autorité_* » Toute *autorité provinciale ou municipale d'une province qui verse à une personne dans la province une avance ou un paiement d'assistance ou d'aide sociale.*

« *paiement excédentaire* » désigne le *montant de l'avance ou du paiement d'assistance ou d'aide sociale ayant été versé à une personne par une autorité, pour un mois ou une partie de mois, et qui ne l'aurait pas été si la prestation subséquemment payable selon la Loi pour la période concernée avait effectivement été versée au cours de cette période.*

- (2) Sous réserve des paragraphes (3) à (6) et pourvu qu'une autorité établisse, à la satisfaction du ministre, qu'un paiement excédentaire a été versé à une personne, ce dernier peut autoriser
- a) la déduction, sur le montant payable en une seule somme selon le paragraphe 62(1) de la Loi pour la période pour laquelle le paiement excédentaire a été versé,
 - b) le versement, à l'autorité provinciale ou municipale de la province où le paiement excédentaire a été versé,

d'une somme égale à ce paiement excédentaire.

- (3) An authority referred to in subsection (2) shall, before any deduction and payment from a benefit payable under the Act to any person is authorized under subsection (2), certify, in a form satisfactory to the Minister,
- (a) the effective date of commencement and the effective date of termination, if applicable, of the advance or assistance or welfare payment;
 - (b) the amount that was paid to the person by the authority for the period during which the excess payment occurred or the amount that the authority applies to have reimbursed, whichever is the lesser; and
 - (c) the Social Insurance Number of the contributor as a result of whose participation under the Act the benefit is payable.
- (3) Une autorité visée au paragraphe (2) doit, avant que la déduction et le paiement provenant d'une prestation payable en vertu de la Loi, ne soient autorisés en vertu du paragraphe (2), attester, à la satisfaction du ministre,
- a) la date d'entrée en vigueur et, le cas échéant, la date de cessation d'une avance ou d'un paiement d'assistance ou d'aide sociale;
 - b) le montant versé à la personne par l'autorité pour la période où a été effectué le paiement excédentaire ou le montant pour lequel l'autorité fait une demande de remboursement, en prenant la moins élevée des deux sommes; et
 - c) le numéro d'assurance sociale du cotisant auquel la prestation est payable en vertu de sa participation selon la Loi.

- (4) No deduction and payment in respect of an excess payment shall be authorized pursuant to subsection (2) unless
 - (a) the Minister and the appropriate provincial official have concluded an agreement in writing authorizing the deduction and payment;
 - (b) the certification required by subsection (3) has been received by the Minister;
 - (c) the irrevocable written consent of the person to the deduction and payment by the Minister and the written request for access to information under subsection 104.01(2) of the Act have been received before the expiry of one year after the date of their signature; and
 - (d) the amount of the excess payment is greater than \$50.
- (5) [Repealed, SOR/96-522, s. 18]
- (4) Aucune déduction et aucun versement ne peuvent être autorisés selon le paragraphe (2), sauf si, à la fois :
 - a) le ministre et le représentant provincial compétent ont conclu un accord écrit autorisant la déduction et le versement;
 - b) le ministre a reçu l'attestation exigée au paragraphe (3);
 - c) le consentement irrévocable écrit de la personne à l'égard de la déduction et du versement par le ministre et la demande écrite visant à permettre l'accès aux renseignements visés au paragraphe 104.01(2) de la Loi ont été reçus dans l'année suivant la date de leur signature;
 - d) le paiement excédentaire dépasse 50_\$.
- (5) [Abrogé, DORS/96-522, art. 18]
- (6) If, for any reason, no deduction has been made under subsection (2) in respect of an excess payment or a deduction and payment have been made in respect of an excess payment in an amount less than the amount that might have been paid in respect thereof under subsection (2), the Minister shall not authorize the deduction and payment of any other amount in respect of that excess payment.
- (6) Lorsque, pour un motif quelconque, aucune déduction n'a été faite selon le paragraphe (2) ou qu'une déduction et un paiement ont été faits pour un montant moindre que celui qui aurait pu être payé selon le paragraphe (2), le ministre ne peut pas autoriser une déduction et un paiement pour aucun autre montant relativement à un paiement excédentaire.

THE STANDARD OF REVIEW

- [8] The purpose of the CPP is to confer financial benefits, as of right, based upon the contributions of individuals and their employers. It is social legislation. The specific provision of concern here is designed to prohibit double-dipping. The Minister's decision to pay monies to Social Services involves two determinations. The first is to confirm that the applicable conditions set out in subsection 65(2) of the CPP and section 76 of the regulations

passed pursuant thereto have been met. The second is to determine whether the discretion conferred by subsection 65(2) of the CPP and subsection 76(2) of the regulations will be exercised to authorize payment to a province. There is no appeal or review provision in either case.

- [9] The first determination is administrative in nature and requires no particular expertise. The court is as well-positioned as the Minister to determine whether the prescribed requirements have been met. This determination calls for little deference and the applicable standard of review is correctness. The second determination is vested exclusively with the Minister and lies within the Minister's discretion. The Minister has considerable expertise in the administration of the CPP and in federal-provincial relations and arrangements - matters of which the courts have little knowledge. The determination involves policy considerations associated with the rights of the individual and the rights of governments. The discretionary decision invites a high degree of deference and the applicable standard of review is patent unreasonableness.

ANALYSIS

- [10] Mr. Kenny argues that the agreement he made, embodied in the Consent to Judgment of September 16, 2002, makes no mention that he will not receive full pension benefits. He accuses the respondent of concealing this information from him, knowing that he would not agree to a settlement that deprived him of substantial back benefits. The settlement, he says, was an "escape" that alleviated the necessity for the respondent to address those issues that Mr. Kenny proposed to argue before the pension appeals board. He attaches no significance to the fact that the maximum benefits permissible under the legislation were awarded because that is not what he received.
- [11] As I indicated to Mr. Kenny during the hearing, the application before me is one for judicial review of the Minister's decision dated January 24, 2003. If Mr. Kenny wishes to attack the settlement, he cannot do so by way of this application. I appreciate his position that he has little education, little money and is not a lawyer. Such is often the situation with self-represented litigants who, otherwise, would retain counsel. Notwithstanding, my jurisdiction is constrained by the provisions of the Federal Courts Act, R.S.C. 1985, c. F-7 as amended. My powers on judicial review applications are delineated in subsection 18.1(3) of the Federal Courts Act. I can deal only with the decision under review - the January 24, 2003 decision to pay, out of Mr. Kenny's retroactive disability benefits, the sum of \$50,134.01 to Social Services.

- [12] Mr. Kenny also suggests that I take Social Services to task for the manner in which it has handled this matter. Several documents attached to Mr. Kenny's affidavit were copies of communications between Mr. or Mrs. Kenny and officials or employees of Social Services and were irrelevant to the issue that is before me. Again, I turn to the Federal Courts Act. My jurisdiction does not extend to the Crown in Right of the Province of New Brunswick and I have no power to review the acts or omissions of its officials or employees.
- [13] The next arguments advanced are more directly related to the issues at hand. Mr. Kenny submits that the first "Consent to Deduction and Payment" form is invalid because it referred to a repealed section of the CPP. Moreover, it is invalid because it was signed in January, 1994, and he did not apply for disability benefits until April, 1995. He contends that the second "Consent to Deduction and Payment" form is either invalid because it was backdated or, should be deemed to be effective as of May 29, 1995 (the date that he signed it).
- [14] Mr. Kenny is correct that the January, 1994 form erroneously referenced subsection 64(2) of the CPP. I regard that reference as a typographical error of no consequence to the substance of the form. The content of the form authorizes the deduction, from CPP benefits, and payment of the deduction to Social Services with respect to assistance or welfare payments made by it during a period when CPP benefits are paid. Mr. Kenny acknowledges that he knew what the form was, that he understood its contents and that he signed it.
- [15] The second form was signed at the request of the province apparently because the earlier form had been revised. I accept Mr. Kenny's evidence that he signed the second form on May 29, 1995, notwithstanding that it was date-stamped November 18, 1994. While I question the propriety of such a practise, again I find that it is of no consequence in this matter.
- [16] The wording contained in the second form was changed (and improved) to some extent, but the substance was unaffected. The second form contained, in more precise detail, the same authorization for the same purpose. The purpose was evident - to ensure that Social Services was reimbursed for assistance payments made by it during any period (subsequent to execution of the consent) that the beneficiary was in receipt of CPP disability benefits. The safety net to prevent double-dipping was cast wide. Mr. Kenny need not have been in receipt of, or even have applied for receipt of disability benefits at the time the consent was signed. The authorization attached any disability benefits paid subsequent to execution.
- [17] The result for Mr. Kenny is that the "Consent to Deduction and Payment" form signed by him on January 10, 1994, is not invalid by reason of the reference to an incorrect subsection of the CPP and is not invalid because he had not yet applied for his disability benefits.
- [18] I turn now to the first determination of the Minister. The specific conditions that must be satisfied to enable the Minister to exercise the discretion in favour of payment to Social Services are provided in section 76 of the regulations. The term "excess payments" includes an assistance or welfare payment made by an authority (including a provincial authority) to a person that would not have been paid if the disability benefits had been paid to the person. Under subsection 76(2), the Minister may authorize a payment to the provincial authority of

an amount equal to the amount of the excess payment, by way of deduction, for the period for which its excess payment was made. A number of conditions must be met before payment will be made to the provincial authority.

- [19] Social Services must supply the Minister with Mr. Kenny's social insurance number and the effective dates of commencement and termination of its payments as well as the amount that was paid by the province for the period during which the excess payment occurred or, the amount that Social Services applies to have reimbursed, whichever is the lesser. (Regulations, paragraphs 76 (3) (a), (b) and (c)). Mr. Kenny argues that Social Services did not submit that information until requested to do so by HRDC. Thus, it is contended, the conditions of the regulations were not met.
- [20] This argument is misconceived. HRDC was in possession of the executed "Consent to Deduction and Payment" forms. The Minister could not have known the amount of the payments made by Social Services for the relevant time frame without asking. The Minister rightly requested quantification of the amount and cannot be faulted for so doing.
- [21] Subsection 76(4) mandates that no deduction and payment shall be authorized unless: the Minister is in receipt of certification, from the provincial authority, regarding the above-noted information; the irrevocable written consent of the person and the written request for access to information under subsection 104.01(2) of the Act have been received before the expiry of one year after the date of their signature; the amount of payment to the provincial authority is greater than \$50; and the Minister and the appropriate provincial official have concluded an agreement in writing authorizing the deduction and payment.
- [22] The evidence discloses that the first three prerequisites for deduction and payment have been met. However, having carefully reviewed the contents of the records, I can find no evidence of a written agreement between the Minister and the appropriate provincial official authorizing the deduction and payment with respect to Mr. Kenny. The respondent's memorandum of fact and law (which is not evidence) at paragraph 24 refers to an arrangement "between the Minister of HRDC and the New Brunswick Minister of Social Services regarding the procedure to be followed by the authority seeking a deduction and payment to be authorized". This statement falls far short of compliance with the mandatory requirement of "an agreement in writing authorizing the deduction and payment". Whatever the arrangement, it must comply with the provisions of the statute and the regulations.
- [23] It may well be that there is a written agreement. However, if there is, it is not before me and there is no evidence regarding its existence. Nor is there anything in the records from which I could infer a written agreement. The language of paragraph 76(4)(a) is unequivocal and bears repeating:

No deduction and payment in respect of an excess payment shall be authorized pursuant to subsection (2) unless

- (a) the Minister and the appropriate provincial official have concluded an agreement in writing authorizing the deduction and payment ...

Subsection 65(2) of the CPP provides that the Minister may, in accordance with any terms and conditions that may be prescribed, deduct and pay. Thus, before the Minister could consider whether to exercise discretion, the Minister had to ensure compliance with respect to the prescribed conditions set out in section 76 of the regulations. Since there is nothing before me establishing or indicating compliance with the above-referenced legislated condition, the ministerial delegate's decision of January 24, 2003 must be quashed as requested.

[24] The application for judicial review will therefore be allowed with costs to the applicant and the matter will be remitted to the Minister for redetermination in accordance with the statute and regulations. An order will so provide.

Judge

Ottawa, Ontario

March 25, 2004

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-314-03

STYLE OF CAUSE: Carl Kenny and The Attorney General for Canada

PLACE OF HEARING: Fredericton, New Brunswick

DATE OF HEARING: March 15, 2004

REASONS FOR ORDER BY : The Honourable Madam Justice Layden-Stevenson

DATED: March 25, 2004

APPEARANCES:

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SOLICITORS OF RECORD:

no one FOR APPLICANT

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