

FEDERAL COURT

BETWEEN:

HERBERT WATKINS

Applicant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

APPLICATION UNDER S. 18.1 OF THE *FEDERAL COURTS ACT*

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court of Canada, 180 Queen Street West, Toronto, Ontario, M5V 1Z4.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

August , 2023

Issued by: _____
Registry Officer

Address of local office: Federal Court of Canada
180 Queen Street West
Toronto, Ontario
M5V 1Z4

TO: Attorney General of Canada
Department of Justice Canada
ESDC Legal Services
140 Promenade du Portage
Phase IV, 11th Floor
Gatineau, QC K1A 0J9

Attention: Andrew Kirk
Tel: 819-360-5319
Fax: 819-994-2291
Email: Andrew.kirk@hrsdc-rhdcc.gc.ca

APPLICATION

1. **THIS IS AN APPLICATION FOR** judicial review of a decision made by Service Canada in an anonymous letter dated June 30, 2023, postmarked July 6, 2023 and received by the Applicant on July 13, 2023 (“the anonymous decision”). The anonymous decision is in respect of a request, supported by submissions (“the request” or “the Applicant’s request”), filed by the Applicant with the Minister of Families, Children and Social Development (“the Minister”) on October 23, 2020, re-filed with Service Canada and with the Minister on April 16, 2021 and then filed a third time with Service Canada together with further submissions on March 7, 2023 and March 9, 2023. The request is that the Minister take remedial action pursuant to subsection 66(4) of the *Canada Pension Plan* to address erroneous advice provided to the Applicant by the Minister’s medical adjudicator D. Van Vlymen (“Van Vlymen”) on or about January 18, 2006. The advice was in respect of the expected outcome of a request for reconsideration of Van Vlymen’s decision regarding an application for *Canada Pension Plan* disability benefits filed by the Applicant on August 25, 2005, the Applicant having earlier been constructively dismissed by reason of disability in January 2005.
2. The anonymous decision of June 30, 2023 concluded that the Applicant did not receive erroneous advice from Van Vlymen.
3. The anonymous decision was made without regard to the submissions filed by the Applicant.
4. The anonymous decision, further, appears to have been made in violation of the September 22, 2022 decision of Madame Justice Pallotta in *Herbert Watkins v. The Attorney General of Canada*, 2022 FC 1363 ordering that the Applicant’s request be remitted for determination and evaluation by individuals who were not previously involved with his case.
5. Service Canada’s refusal to consider or, alternatively, give adequate consideration to the Applicant’s request under subsection 66 (4) of the *Canada Pension Plan*, and the flawed process by which the anonymous Service Canada decision of June 30, 2023 was arrived at

amount to an error of law and jurisdiction, and have served to deprive a disabled employee of his most basic and fundamental human right to receive his full entitlement as a disabled employee pursuant to the *Canada Pension Plan*.

6. Moreover, having regard to the submissions filed by the Applicant, and irrespective of the flawed process by which it was reached, the anonymous decision is in and of itself unreasonable on its face.

THE APPLICANT MAKES APPLICATION FOR:

1. An Order setting aside the anonymous Service Canada decision of June 30, 2023 and directing that the Minister of Families, Children and Social Development provide to the Applicant CPP disability benefits, as well as interest thereon, for the period from January 2005, the date of his constructive dismissal from employment, to May 2008, his deemed disability date in respect of his successful second application for disability benefits.
2. In the alternative, an Order remitting the Applicant's request pursuant to subsection 66 (4) back to the Minister for consideration in accordance with the directions of this Court.
3. An Order awarding costs to the Applicant for this application on a substantial indemnity basis.
4. An Order granting such further and other relief as counsel may request and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

1. The Applicant became unable to perform any substantially gainful work because of disability and was, as a result, constructively dismissed from his employment in January 2005.

2. He filed an application for *Canada Pension Plan* disability benefits August 25, 2005. His application was denied, wrongly, by medical adjudicator Van Vlymen in January 2006.
3. Van Vlymen also provided erroneous advice provided to the Applicant on January 18, 2006 in respect of the expected outcome of a request for reconsideration of his decision to reject the Applicant's application for disability benefits
4. Van Vlymen advised the Applicant that his disabilities of Chronic Pain Disorder and Fibromyalgia did not meet the *Canada Pension Plan* criterion of severe and prolonged disability for eligibility for disability benefits and, further, that he would not be successful if he filed a request for reconsideration of the adjudicator's decision and therefore ought not to file a request for reconsideration.
5. Following advice from the Ontario Office of the Worker's Adviser, the Applicant filed a second application for CPP disability benefits on August 14, 2009. This second application was determined by a new medical adjudicator, T. Ryan, on January 5, 2010 to have met the criterion of having a severe and prolonged disability. Pursuant to the provisions of the *Canada Pension Plan*, however, the Applicant was only awarded benefits retroactive to May 2008. Had the Applicant not been erroneously advised on January 18, 2006 by Van Vlymen that he would not be successful if he requested a reconsideration of that adjudicator's decision, the Applicant would have received CPP disability benefits retroactive to January 2005, the date he was constructively dismissed.
6. The applicant initially filed his request under subsection 66(4) of the *Canada Pension Plan* on October 23, 2020.
7. The request asserted, *inter alia*, that the advice provided by Van Vlymen constituted a violation of subsection 15 (1) of the *Charter of Rights and Freedoms*, in that it was a manifestation and continuation of the widely held inaccurate and negative assumptions towards disabled persons suffering from Chronic Pain in Canadian society held by compensation officials, employers and even the medical profession itself. These assumptions

were expressly recognized and roundly criticized by the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, wherein the Court determined that the exclusion of Chronic Pain from the purview of Nova Scotia's regular workers' compensation system violated the equality rights of disabled workers under subsection 15 (1) of the *Charter of Rights and Freedoms*.

8. Service Canada Benefits Officer N. Hill rendered a decision by letter dated October 6, 2021, denying the Applicant's request.
9. The Applicant applied to the Federal Court for judicial review of Hill's decision on November 10, 2021. In a decision by Madame Justice Pallotta dated September 29, 2022 the Federal Court allowed the application [*Herbert Watkins v. The Attorney General of Canada*, 2022 FC 1363].
10. Madame Justice Pallotta found that that Benefits Officer Hill did not read and adequately consider the Applicant's submissions of October 23, 2021 and April 16, 2022, thereby denying the Applicant an opportunity to present his case fully and fairly. The Court ordered that the Hill decision be set aside, and that the Applicant's request be remitted for determination and evaluation by individuals who were not previously involved with his case. The Court also directed that the new decision maker ought to have the requisite authority in respect of the quantum of underpayment potentially owing to the Applicant, as it appeared that Officer Hill did not possess the required authority. The Court declined to make a finding that the Applicant's rights under subsection 15 (1) of the *Charter* had been violated.
11. The anonymous decision of June 30, 2023 is the end result of the Respondent's purported attempts to comply with Madame Justice Pallotta's decision.
12. In an effort to ensure that Madame Justice Pallotta's decision was respected, Applicant counsel wrote to Respondent counsel on three occasions prior to issuance of the anonymous decision – November 30, 2022, February 14, 2023 and March 9, 2023. The Applicant requested on each occasion that the Respondent provide the names and contact information

of the individuals who would be conducting the re-determination and re-evaluation ordered by Madame Justice Pallotta. The Applicant also requested that the Respondent provide the names of the individuals involved in the first determination and evaluation of the Applicant's request. Applicant counsel further requested disclosure of the specific documents and correspondence that the Respondent would be reviewing in the course of the re-determination and re-evaluation.

13. Applicant counsel repeated these requests for information via correspondence directly to Service Canada on March 7, 2023, and July 6, 2023.
14. The Applicant was not provided with any of the information requested. Service Canada proceeded to render the anonymous decision dated June 30, 2023.
15. The anonymous decision made no reference to the submissions filed by the Applicant. Nor did it acknowledge that *any* of the Applicant's submissions had been received by the Respondent.
16. The Applicant's submissions included allegations that Service Canada had disregarded and dismissed Madame Justice Pallotta's direction that the re-determination and re-evaluation be conducted by individuals not previously involved in the Applicant's case. The Applicant submitted that this disregard supported a conclusion that the Applicant had similarly been carelessly and erroneously advised by Van Vlymen that he would be wasting his time in requesting reconsideration of the denial of his application for CPP disability benefits.
17. The anonymous decision attempted, wrongly, to justify its conclusion by considering a purported issue that, in fact, was never raised by the Applicant – namely, that medical adjudicator Van Vlymen had misrepresented statements made by Mr. Watkins in January 2006 – and then used the false conclusion that there was no evidence to support this purported allegation as a justification for its conclusion.
18. The anonymous decision of June 30, 2023 is unreasonable and constitutes an error in fact

and law and a deprivation of procedural fairness and natural justice, in that it completely failed to adequately consider any significant and relevant facts, submissions and documentary evidence presented by the Applicant. Indeed, it appears that the decision did not adequately consider any of the submissions made by the Applicant on October 23, 2020, April 16, 2021, March 7, 2023 and March 9, 2023.

19. Service Canada erred in fact and in law in deciding, anonymously, that the Applicant did not receive erroneous advice in January 2006.
20. Moreover, the anonymous decision maker/makers did not give any consideration to the Applicant's request for the names of the individuals who conducted the re-determination and re-evaluation ordered by Madame Justice Pallotta in *Herbert Watkins v. The Attorney General of Canada, supra*. Nor did they give any consideration to the Applicant's request for the names of the individuals who had been involved in the first determination and evaluation of the Applicant's request. Further, they gave no consideration to the Applicant's request for disclosure of the specific documents and correspondence reviewed in the course of the re-determination and re-evaluation.
21. As such, the anonymous decision appears to have been made in violation of Madame Justice Pallotta's direction that the Applicant's request be remitted for determination and evaluation by individuals who were not previously involved with his case.
22. The anonymous decision maker/makers failed to give any consideration to the Applicant's submission that their apparent disregard and dismissiveness for that portion of Madame Justice Pallotta's decision requiring re-determination and re-evaluation by individuals not involved in the first determination and evaluation of the Applicant's request, supported a conclusion that the Applicant had similarly been dismissively advised by medical adjudicator Van Vlymen that he would be wasting his time in requesting reconsideration of the denial of his application for CPP disability benefits.
23. Moreover, the anonymous decision maker/makers erred in fact and law by refusing to give consideration to the Applicant's submissions with respect to the caution issued by the

Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 that Canadian public administration officials and Canadian administrative tribunal members and staff can no longer summarily dismiss the disability claims of individuals who suffer from Chronic Pain.

24. By all of the actions described above, the anonymous decision maker/makers breached their duty of procedural fairness and natural justice. They failed to consider, evaluate, analyze, assess, or apprehend essential facts, submissions and documents placed before the Minister and Service Canada by the Applicant on October 23, 2020, April 16, 2021, and March 7, 2023 and March 9, 2023. Further, irrespective of the flawed process by which the anonymous decision was reached, considering the submissions filed by the Applicant, the decision is unreasonable on its face.
25. The anonymous decision maker/makers further breached Service Canada's duty of procedural fairness and natural justice and exceeded their jurisdiction by attempting, wrongly, to justify their decision by considering a purported issue that, in fact, was *never* raised by the Applicant – namely, that medical adjudicator Van Vlymen had misrepresented statements made by Mr. Watkins in January 2006.
26. As a result of the aforementioned errors in law and fact, and breaches of the duty of procedural fairness and natural justice, Service Canada and the Minister have committed a fundamental error in jurisdiction which has completely tainted their review and adjudication of this matter. Further, these errors are a manifestation and continuation of the widely held negative assumptions towards disabled persons suffering from Chronic Pain in respect of which the Supreme Court of Canada admonished employers, the medical profession and compensation officials in *Nova Scotia (Workers' Compensation Board) v. Martin, supra*.
27. As such, it is respectfully submitted that this Honourable Court must intervene in order to restore jurisdiction and to rectify the aforementioned errors which have deprived the Applicant of substantive and procedural justice and the full and fair review and adjudication of his request for relief pursuant to subsection 66 (4) of the *Canada Pension Plan* in

accordance with administrative law principles and natural justice.

28. The Respondent has twice been asked to decide whether the Applicant was given erroneous advice and, each time, has failed to render a decision in a reasonable and procedurally fair manner. Consequently, it is respectfully submitted that this matter ought not to be remitted back to the Respondent. Rather, the Respondent ought to be directed to provide to the Applicant CPP disability benefits, as well as interest thereon, for the period from January 2005, the date of his constructive dismissal from employment, to May 2008, his deemed disability date in respect of his successful second application for disability benefits.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The Affidavit of the Applicant together with exhibits.
2. Such further and other material as counsel may advise and this Honourable Court may permit.

August 7, 2023



Herbert Watkins per Glen Chochla
Glen Chochla Professional Corporation
LSO No. 29209L

300-25 Sheppard Avenue West
Toronto, ON M2N 6S6
Tel: 1-800-834-9783
Fax: 343-338-4333

HERBERT WATKINS
Applicant

-and-

THE ATTORNEY GENERAL OF CANADA
Respondent

Court File No.:

FEDERAL COURT

PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION

(APPLICATION UNDER S. 18.1)

Glen Chochla Professional Corporation
300-25 Sheppard Avenue West
Toronto, ON M2N 6S6
LSO #29209L

Glen Chochla
Tel: 1-800-834-9783
Fax: 343-338-4333

Counsel for the Applicant