Court File No.: T-1221-15

FEDERAL COURT

BETWEEN:

XHEMAJL OSAJ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER s. 18.1 of the *Federal Court Act*

APPLICANT'S MEMORANDUM OF FACT AND LAW

DATE: October 29, 2015

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PART I: STATEMENT OF FACT

A. Overview

1. This is an application for judicial review of the decision of the Appeal Division of the Social Security Tribunal ("Appeal Division") refusing the Applicant leave to appeal the decision of the General Division of the Tribunal ("General Division") with respect to when the Applicant became disabled under the *Canada Pension Plan* ("CPP").

2. The Applicant Mr. Osaj is a 50 year old man who was involved in two traumatic accidents in January 2008 and November 2009. As a result of his injuries, Mr. Osaj developed chronic pain in his back, hip, legs, knees, severe anxiety and depression, and has been unable to work in any capacity since November 2009.

3. Mr. Osaj applied for a CPP disability pension but was denied. His appeal was granted by the General Division which determined that he was eligible for CPP disability benefits - he was disabled under the CPP as he had a "severe and prolonged" disability. However, the General Division found that Mr. Osaj was disabled as of April 2011 when a doctor reported that he had reached "maximum medical recovery" and was "permanently disabled". This was 17 months after the accident that disabled him.

4. Mr. Osaj applied for leave to appeal the General Division's decision with respect to the date of onset of his disability on the grounds that the General Division had applied the wrong legal test and made a perverse and capricious finding. The Appeal Division found neither ground of appeal would have a reasonable chance of success and refused leave.

5. It was unreasonable for the Appeal Division to conclude that the General Division had applied the correct legal test to determine onset of disability. A correct application of the legal test required the General Division to ask when Mr. Osaj was rendered incapable of regularly pursuing any substantially gainful occupation, which the General Division failed to do. Instead it relied on the factors of maximum medical recovery and permanent disability which are not part of or required by the legal test for disability.

6. The Appeal Division also erred in deciding that the General Division was reasonable to decide that Mr. Osaj did not qualify for CPP until he was declared to have reached maximum medical recovery in April 2011. The concept of "maximum medical recovery" refers to the point at which a person's condition is not expected to improve further. By definition, prior to that point, the person's condition must have been worse. Reliance on this point in time to determine onset of disability is perverse and capricious.

B. Background

7. Mr. Osaj is a married 50-year-old father of six children aged five to 14. He was born in Kosovo and came to Canada as a refugee in 1992 to escape the war. He has a Grade 8 education and has worked in physical labour since leaving school. Prior to his accident in November 2009, he worked as a tile setter for 10 years.

   Transcript of SST General Division hearing: Applicant's Record, Volume 1, Tab 3, p.30-32, 38-39, 46-47

8. Mr. Osaj was injured in two accidents. The first accident occurred in January 2008. Mr. Osaj was "severely injured" when his car ran into a large pothole. His injuries caused pain in his lower back, right leg, neck, shoulders, and frequent headaches and dizziness. He was

diagnosed with adjustment disorder with mixed anxiety and depressed mood, and psychotherapy was recommended.

Transcript of SST General Division hearing: Applicant's Record, Volume 1, Tab 3, p.40-41
Report of Dr. Mihic (April 16, 2008): Applicant's Record, Volume 1, Tab 4, p. 107
Report of Dr. J. Pilowsky, Psychologist (May 5, 2008): Applicant's Record, Volume 1, Tab 4, pp. 110-112
Report of Dr. A. Birnbaum (July 29, 2008): Applicant's Record, Volume 1, Tab 4, pp. 114-115

9. Although not recovered, Mr. Osaj returned to work in September 2008 out of necessity to support his large family. He was still in pain, on medication, and receiving physiotherapy. He had to take painkillers to work and was only able to work at half capacity.

Transcript of SST General Division hearing: Applicant's Record, Volume 1, Tab 3, pp. 3-44
Report of Dr. Marko Mihic (January 28, 2010): Applicant's Record, Volume 1, Tab 4, p. 134
Report of Dr. D.J. Ogilvie-Harris, Orthopaedic Surgeon (February 12, 2010): Applicant's Record, Volume 1, Tab 4, pp. 139, 145
Report of Dr. Daniel Bringleson, Physiomed (May 26, 2010): Applicant's Record, Volume 1, Tab 4, p. 163

10. The second accident occurred at his workplace on November 27, 2009. Mr. Osaj was carrying tiles when he started to sweat and feel dizzy. He fell down backwards about eight stairs, hitting his head. He was unconscious for several minutes. He was taken by ambulance to the hospital. He had back pain radiating to the right, testicular and knee pain.

Transcript of SST General Division hearing: Applicant's Record, Volume 1, Tab 3, pp. 43-44
Emergency Department Triage Assessment (November 27, 2009): Applicant's Record, Volume 1, Tab 4, p. 116
Ambulance Report (November 27, 2009): Applicant's Record, Volume 1, Tab 4, p. 118
Credit Valley Hospital Emergency Treatment Record (November 27, 2009): Applicant's Record, Volume 1, Tab 4, p. 119

11. Mr. Osaj has been unable to return to work since the second accident.

Transcript of SST General Division hearing: Applicant's Record, Volume 1, Tab 3, p. 44
Questionnaire for Disability Benefits CPP (May 11, 2010): Applicant's Record, Volume 1, Tab 4, p. 93

12. In June 2010, Mr. Osaj applied for CPP disability benefits. His application was denied by Service Canada in December 2010 on the ground that he did not have a disability that was severe and prolonged. His application for reconsideration was also denied. He appealed that decision.

> Application for Disability Benefits CPP (May 11, 2010): Applicant's Record, Volume 1, Tab 4, p. 87
> Letter from R. Shadd, Service Canada (December 20, 2010): Applicant's Record, Volume 1, Tab 4, p. 99
> Letter from J. Dietrich, Service Canada (June 28, 2011): Applicant's Record, Volume 1, Tab 4, p. 102
> Letter requesting appeal from Xhemajl Osaj (July 27, 2011): Applicant's Record, Volume 1, Tab 4, p. 105

C. Social Security Tribunal General Division Hearing

13. Mr. Osaj's appeal of the denial of his application for CPP disability benefits was heard by the Social Security Tribunal General Division on November 26, 2014. Mr. Osaj provided oral testimony and numerous medical reports to support his claim that he had a severe and prolonged disability from the time of his second accident in November 2009.

> Decision of the SST General Division, February 5, 2015, at para. 57: Applicant's Record, Volume 1, Tab 4, p. 219
> Transcript of the SST General Division hearing: Applicant's Record, Volume 1, Tab 3, p. 82

14. The medical evidence established that Mr. Osaj suffers from chronic lower back pain, neck pain, sciatica pain down to his legs, knee pain, post-traumatic stress disorder, depression, anxiety, insomnia and headaches.

15. In particular, the medical assessments included a February 2010 report from Dr. Ogilvie-Harris, an orthopaedic surgeon, who assessed Mr. Osaj two months after the 2009 accident. Dr. Ogilvie-Harris concluded that Mr. Osaj's back and neck pain from soft tissue injuries to

his lumbar and cervical spine from his first accident in 2008 were aggravated by his second accident in 2009. Mr. Osaj had gone on to develop the features of "chronic pain syndrome with central sensitization." In chronic pain syndrome, initial acute pain causes secondary changes in the spinal cord and brain and affects neurotransmitters which results in the pain becoming diffuse and non-anatomic in the musculoskeletal system. The pain is intrusive and affects all the patient's activities. In Dr. Ogilvie-Harris' view, Mr. Osaj's chronic pain affected his whole bodily function and represented "a permanent and serious impairment of important bodily functions."

Report of Dr. D.J. Ogilvie-Harris, Orthopaedic Surgeon (February 12, 2010): Applicant's Record, Volume 1, Tab 4, pp. 144-145, 146

16. Dr. Ogilvie-Harris' conclusions were supported and supplemented by multiple medical assessments by health professionals associated with the Workers Safety and Insurance Board as well as Mr. Osaj's other treating health professionals. These assessments confirmed that Mr. Osaj was not responding well to the rehabilitation process due to frequent pain flare ups during treatment and any improvements achieved were moderate in nature and not sufficient to permit a return to work. He continued to suffer from chronic pain and have limitations to his functional activities.

WSIB Regional Evaluation Centre Multidisciplinary Health Care Assessment Summary Report (March 9, 2010): Applicant's Record, Volume 1, Tab 4, pp. 150, 154
WSIB Health Professional's Report (March 16, 2010): Applicant's Record, Volume 1, Tab 4, p. 156-157
St. Joseph's Health Centre, Ambulatory Care Report Fracture Clinic, Dr. Martin Roscoe (March 23, 2010): Applicant's Record, Volume 1, Tab 4, p. 158
We-Do-Care 2010 Rehab Services Inc., Physiotherapy Report & Recommendations, Emil Dan Colcer (May 6, 2010): Applicant's Record, Volume 1, Tab 4, p. 159
WSIB Physiotherapist's Treatment Extension Request (May 6, 2010): Applicant's Record, Volume 1, Tab 4, p.160
WSIB Health Professional's Progress Report (May 7, 2010): Applicant's Record, Volume 1, Tab 4, p.161
Report of Dr. Daniel Bringleson, Physiomed (May 26, 2010): Applicant's Record, Volume 1, Tab 4, p. 164

Report of Dr. Marko Mihic (May 18, 2010): Applicant's Record, Volume 1, Tab 4, p.162
Report of Dr. Marko Mihic (June 8, 2010): Applicant's Record, Volume 1, Tab 4, p. 165
Report of Dr. Marko Mihic (July 15, 2010): Applicant's Record, Volume 1, Tab 4, p. 167
Questionnaire for Disability Benefits CPP (May 11, 2010): Applicant's Record, Volume 1, Tab 4, p. 97

17. A February 2011 assessment from Dr. Matthews (who had been seeing Mr. Osaj since 2009) reported that Mr. Osaj had "permanent and serious impairment of all physical capabilities (severe lower back and C-spine pain)" due to injuries sustained in January 2008 and November 2009 and had reached "maximum medical recovery." Dr. Matthews was of the opinion that Mr. Osaj's chronic back and neck pain interfered with all social, domestic, sleep and work activities. Mr. Osaj had reactive clinical depression and post traumatic stress syndrome resulting from his injuries. He was permanently disabled from work and would remain disabled permanently.

Report of Dr. Paul Matthews (February 1, 2011): Applicant's Record, Volume 1, Tab 4, p. 174

18. Dr. Matthews repeated his conclusion that Mr. Osaj had reached maximum medical recovery in a report dated April 13, 2011.

Report of Dr. Matthews (April 13, 2011): Applicant's Record, Volume 1, Tab 4, p. 177

D. Social Security Tribunal General Division Decision

19. The General Division allowed the appeal, finding that a CPP disability pension was payable to Mr. Osaj.

Decision of the SST General Division, February 5, 2015, at para. 1: Applicant's Record, Volume 1, Tab 4, p. 204

20. However, the General Division found that Mr. Osaj had a severe and prolonged disability as of April 2011, instead of November 2009 as Mr. Osaj had claimed, based on the April 13,

2011 report by Dr. Matthews that Mr. Osaj had reached maximum medical recovery and was "permanently disabled."

Decision of the SST General Division, February 5, 2015, at para. 57: Applicant's Record, Volume 1, Tab 4, p. 219

E. Application for Leave to Appeal to the Appeal Division

21. Mr. Osaj applied for leave to appeal from the General Division's decision concerning his date of eligibility for disability benefits. His grounds of appeal included:

a. The General Division erred in law in relying on "maximum medical recovery" and "permanent disability" to determine the date of onset of Mr. Osaj's disability.

Application to Appeal to the Appeal Division (May 14, 2015): Applicant's Record, Volume 1, Tab 4, pp. 222-223, 234, 236

b. The General Division's finding of April 2011 as the onset of disability was a finding of fact made in a perverse and capricious manner without regard to the material before it.

Application to Appeal to the Appeal Division (May 14, 2015): Applicant's Record, Volume 1, Tab 4, pp. 234-235

22. The Appeal Division refused to grant leave to appeal. The Appeal Division found that the General Division did not err in selecting the April 2011 opinion of Dr. Matthews as establishing the date of onset of disability and did not apply the wrong test.

Decision of the SST Appeal Division, June 16, 2015: Applicant's Record, Volume 1, Tab 2, pp. 8, 10-12

PART II: POINTS IN ISSUE

23. The issue to be determined is whether the Appeal Division's decision, that Mr. Osaj had not raised a ground of appeal with a reasonable chance of success, was reasonable.

PART III: LEGAL SUBMISSIONS

A. The test for leave to appeal to the Appeal Division

24. An appeal to the Appeal Division may only be brought if leave to appeal is granted.

Department of Employment and Social Development Act, 2005 (DESDA), s. 56(1)

25. Section 58(1) of the *Department of Employment and Social Development Act* (DESDA), permits only three grounds of appeal from a decision of the General Division: (1) a breach of natural justice; (2) an error of law, whether or not the error appeared on the fact of the record; and (3) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material.

DESDA, s. 59(1)

26. Leave to appeal is to be refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success. A reasonable chance of success is akin to "an arguable case at law".

DESDA, s. 58(2)
Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41 (CanLII), at para. 37: Applicant's Record, Volume 2, Tab 1
Bellefeuille v. Canada (Attorney General), 2014 FC 963 (CanLII), at para. 29: Applicant's Record, Volume 2, Tab 2

27. Because an application for leave to appeal is a preliminary step, the hurdle to be met by an applicant is lower than on the hearing of the appeal on the merits.

> *Falbo v. Canada (Attorney General)*, 2007 FC 578 (CanLII), at para. 6: Applicant's Record, Volume 2, Tab 3

B. Standard of Review

28. The judicial review of Appeal Division decisions on applications for leave to appeal involves a two-step inquiry. The first question is whether the tribunal applied the correct test for assessing the application for leave to appeal. The second question is whether a reviewable error was made in determining whether the requirements of the test were made out. The first question is reviewable on a correctness standard, while the second on a standard of reasonableness.

> *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100 (CanLII), at paras. 53-58: Applicant's Record, Volume 2, Tab 4
> *Consiglio v. Canada (Human Resources and Skills Development)*, 2014 FC 485, at para. 20: Applicant's Record, Volume 2, Tab 5

29. The issues raised by the Applicant fall under the second question, that is whether a legal or factual error was committed by the Appeal Division in determining whether Mr. Osaj had raised a ground of appeal with a reasonable chance of success. These are issues to be reviewed on a standard of reasonableness.

> *Falbo v. Canada (Attorney General)*, *supra*, at paras. 7, 11: Applicant's Record, Volume 2, Tab 3
> *Canada (Attorney General) v. Zakaria*, 2011 FC 136 (CanLII), at para. 14-16: Applicant's Record, Volume 2, Tab 6

30. An Appeal Division decision to refuse leave is unreasonable where it is not "justifiable, intelligible, and defensible in respect of the facts and the law" and its conclusion does not fall "within the range of acceptable outcomes".

Dunsmuir v. New Brunswick, 2008 SCC 9, at para 47: Applicant's Record, Volume 2, Tab 7
Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, at para 16: Applicant's Record, Volume 2, Tab 8

C. The Appeal Division was unreasonable to conclude that the General Division applied the correct legal test

31. The General Division applied the wrong legal test when it found the onset of Mr. Osaj's severe and prolonged disability to be April 2011. The General Division's basis for choosing that date was that Dr. Matthews reported on April 13, 2011 that Mr. Osaj had reached "maximal medical recovery" and was "permanently disabled".

Decision of the SST General Division, February 5, 2015, at paras. 41, 57: Applicant's Record, Volume 1, Tab 4, pp. 215, 219

32. To be considered "disabled" and eligible for a disability pension under the CPP, an applicant must be "suffering from a severe and prolonged mental or physical disability."

Canada Pension Plan, 1985, s. 42(2)(a); s. 44(b)

33. A disability is "severe" if by reason of the disability, the applicant is "incapable regularly of pursuing any substantially gainful occupation."

Canada Pension Plan, s. 42(2)(a)(i)

34. In *Villani*, the Federal Court of Appeal emphasized the purpose of CPP as a social insurance program (not a social welfare scheme) to provide help as of right rather than on a need or a means test, for those who find themselves disabled and unable to carry on work.

Villani v. Canada (Attorney General), [2002] 1 F.C. 130, at para. 28: Applicant's Record, Volume 2, Tab 9

35. The Court of Appeal stated that the test for severity must be applied with reference to the "real world" which requires a consideration of an applicant's particular circumstances and medical condition to determine if he or she is capable of regularly pursuing any substantial gainful occupation.

    Villani v. Canada (Attorney General), [2002] 1 F.C. 130 (CanLII), at paras. 32, 38, 39: Applicant's Record, Volume 2, Tab 9
    Bungay v. Canada (Attorney General), 2011 FCA 47, at para. 8: Applicant's Record, Volume 2, Tab 10

36. The Court of Appeal found that the application of the correct legal test for severity requires a tribunal to apply the ordinary meaning of every word in the statutory definition of severity in s. 42(2)(a)(i). The words of the provision suggest the severity test involves an aspect of employability.

    Villani v. Canada, supra, at para. 49: Applicant's Record, Volume 2, Tab 9

37. When the words of s. 42(2)(a)(i) are read in the context of the real world, a severe disability is one which "renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation".

    Villani v. Canada, supra, at paras. 38, 39, 44, 49: Applicant's Record, Volume 2, Tab 9

38. While the General Division referred to the "real world" aspect of the *Villani* test and stated that the severe criterion refers to the capacity to work, it is not enough to simply quote the appropriate test. The General Division was required to "apply the ordinary meaning of every word" in the definition of severe disability. In determining the date of onset of disability, it was required to ask when Mr. Osaj was rendered incapable of pursuing with consistent frequency any truly remunerative occupation. Instead it relied on the factors of "maximum

medical recovery" and "permanent disability", which are not part of or required by the legal test for severity. It equated a doctor's opinion about "maximum medical recovery" as definitive of the point at which Mr. Osaj's disability reached the "severe" threshold. Thus, the General Division erred in law in applying the wrong test.

> Decision of the SST Appeal Division, June 16, 2015, at para. 14: Applicant's Record, Volume 1, Tab 4, p. 11
> Decision of the SST General Division, February 5, 2015, at paras. 41-42: Applicant's Record, Volume 1, Tab 2, p. 215
> *Villani v. Canada*, *supra*, at para. 49: Applicant's Record, Volume 2, Tab 9

39. The Appeal Division found that the General Division when referring to maximum medical recovery and permanent disability to determine the onset of disability was not applying the wrong test but simply directly quoting the statements of the medical reports. This is a mischaracterization of the General Division's decision. The only reason the General Division gave for finding the onset of disability to be April 2011 was the report of Dr. Matthews. The General Division explicitly stated that it made this finding "particularly" on the basis of the report.

> Decision of the SST Appeal Division, June 16, 2015, at para. 14: Applicant's Record, Volume 1, Tab 2, p. 11
> Decision of the SST General Division, February 5, 2015, at para. 57: Applicant's Record, Volume 1, Tab 4, p. 219

40. The time when a person reaches maximum medical recovery is in itself an irrelevant factor to the severity and onset of the person's disability and capacity to work. It refers only to the point when an injured person's medical recovery has plateaued or medical condition stabilised and no further improvement is expected. It says nothing about the onset, nature, extent or degree of severity of the underlying medical condition or disability.

> See B Garner, Ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn: West Group, 1999), at p. 993: "… the point at which an injured person's condition stabilizes, and no further recovery or

improvement is expected, even with additional intervention.": Applicant's Record, Volume 2, Tab 11
WSIB Operational Policy, Document Number 11-01-05 (November 3, 2014): "… a plateau in recovery has been reached and it is not likely that there will be any further significant improvement in the work-related injury/disease.": Applicant's Record, Volume 2, Tab 12

41. Further, maximum medical recovery is a concept used primarily in workers' compensation schemes, where a person receives temporary benefits until reaching maximum medical recovery when they may be considered permanently disabled and eligible to receive permanent benefits. It is a specific technical term designed to fit within particular workers' compensation statutory regimes. It is absent from the CPP legislative scheme.

B Garner, Ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn: West Group, 1999), at p. 993: Applicant's Record, Volume 2, Tab 11
See *Workplace Safety and Insurance Act, 1997*, S.O. 1997, Ch. 16, Sch. A, ss. 2(1), 46(1): In Ontario's WSIB scheme, an injured worker may apply for a non-economic loss award once their impairment is considered permanent, and an impairment is only considered "permanent" when it "continues to exist after the worker reaches maximum medical recovery."

42. Likewise, the General Division erred in applying the wrong test in relying on "maximum medical recovery" and "permanent disability" to find that Mr. Osaj had a prolonged disability from April 2011.

Decision of the SST General Division, February 5, 2015, at para. 57: Applicant's Record, Volume 1, Tab 4, p. 219

43. A disability is considered to be "prolonged" if it is "likely to be long continued and of indefinite duration or is likely to result in death". As found by the Federal Court of Appeal in *Litke*, it is not necessary for a disability to be permanent, in order to meet the test for severe and prolonged disability.

CPP, s. 42(1)(a)(ii)
Litke v. Canada (Minister of Human Resources and Social Development), 2008 FCA 366 (CanLII), at para. 5: Applicant's Record, Volume 2, Tab 13

44. Therefore, the Appeal Division's decision was unreasonable. The General Division applied the wrong test to determine the onset of Mr. Osaj's disability and this ground of appeal had a reasonable chance of success.

D. The Appeal Division erred in adopting the General Division's erroneous finding of fact made in a perverse and capricious manner without regard to the material

45. With respect to the General Division's finding of April 2011 as the onset of disability, Mr. Osaj raised a further ground of appeal in his application for leave: the General Division made an erroneous finding of fact in a perverse or capricious manner.

46. The Appeal Division found that the decision of the General Division in choosing April 2011 as the date of onset was reasonable as it fell within the range of possible acceptable outcomes defensible in the facts and law.

> Decision of the SST Appeal Division, June 16, 2015, at para. 12: Applicant's Record, Volume 1, Tab 2, pp. 10-11

47. The General Division's decision about the date of eligibility, which the Appeal Division accepted as "reasonable" was based entirely upon the latter of two reports (the first being on February 1, 2011) in which Dr. Matthews stated that Mr. Osaj had reached maximum medical recovery. If "maximum medical recovery" is indeed determinative of eligibility for CPP benefits (which is disputed), then this factor was established in February 2011 rather than April 2011.

> Decision of the SST General Division, February 5, 2015, at para. 57: Applicant's Record, Volume 1, Tab 4, p. 219
> Report of Dr. Paul Matthews (February 1, 2011): Applicant's Record, Volume 1, Tab 4, p. 174

48. If evidence of "permanent" disability is required (which is disputed), Dr. Ogilvie-Harris concluded Mr. Osaj's disabilities were permanent as of February 2010. Indeed, Dr. Matthews explicitly relies on Dr. Ogilvie-Harris' conclusion of permanent disability in both of his reports.

> Report of Dr. Paul Matthews (February 1, 2011): Applicant's Record, Volume 1, Tab 4, p. 174
> Report of Dr. Matthews (April 13, 2011): Applicant's Record, Volume 1, Tab 4, p. 177

49. As noted above, maximum medical recovery refers to the point where a person's medical condition has reached a plateau of recovery where no further improvement is expected, that is, the person's condition has improved as much as it can. This would mean that prior to reaching maximum medical recovery, the person's condition would have been either the same or worse.

50. If, as found by the General Division, Mr. Osaj had a severe disability at the time of maximum medical recovery, he must have also met the definition of disability prior to that time. Indeed, the medical evidence (which the General Division accepted) established the onset of his severe disability from the time of his second accident in November 2009, and there was no evidence that Mr. Osaj's condition in April 2011 reflected a deterioration since that time.

> Decision of the SST General Division, February 5, 2015, at para. 56: Applicant's Record, Volume 1, Tab 4, p. 219

51. Therefore the General Division's finding that the onset of disability is at the time a person reaches maximum medical recovery was perverse and capricious, as was the Appeal Division's conclusion that the finding was a reasonable one.

PART IV: ORDER SOUGHT

52. It is therefore respectfully requested that this Honourable Court set aside the decision of the Appeal Division Member Ross and return the applicant's application for leave to appeal to the Appeal Division for redetermination with a direction that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th DAY OF OCTOBER 2015.

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Marie Chen
Co-Counsel for the Applicant

PART V: LIST OF AUTHORITIES

1. *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 (CanLII).
2. *Bellefeuille v. Canada (Attorney General)*, 2014 FC 963 (CanLII).
3. *Falbo v. Canada (Attorney General)*, 2007 FC 578 (CanLII).
4. *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100 (CanLII).
5. *Consiglio v. Canada (Human Resources and Skills Development)*, 2014 FC 485 (CanLII).
6. *Canada (Attorney General) v. Zakaria*, 2011 FC 136 (Can LII).
7. *Dunsmuir v New Brunswick*, 2008 SCC 9.
8. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.
9. *Villani v. Canada (Attorney General)*, [2002] 1 F.C. 130 (CanLII).
10. *Bungay v. Canada (Attorney General)*, 2011 FCA 47 (CanLII).
11. B Garner, Ed., *Black's Law Dictionary*, 7th ed. (St. Paul, Minn: West Group, 1999).
12. *WSIB Operational Policy*, Document Number 11-01-05 (November 3, 2014).
13. *Litke v. Canada (Minister of Human Resources and Social Development)*, 2008 FCA 366 (CanLII).

APPENDIX A: LEGISLATION

***Department of Employment and Social Development Act*, S.C. 2005, c. 34**

Appeal

55. Any decision of the General Division may be appealed to the Appeal Division by any person who is the subject of the decision and any other prescribed person.

Leave

56. (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.

...

Grounds of appeal

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.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

Decision

(3) The Appeal Division must either grant or refuse leave to appeal.

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

When person deemed disabled

42. (2) For the purposes of this Act,

(*a*) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

…

Benefits payable

44. (1) Subject to this Part,

…

(*b*) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who

(i) has made contributions for not less than the minimum qualifying period,

(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or

(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;

(iv) [Repealed, 1997, c. 40, s. 69]

***Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A**

Definitions

2. (1) In this Act,

…

"permanent impairment" means impairment that continues to exist after the worker reaches maximum medical recovery; ("déficience permanente")

…

Compensation for non-economic loss

46. (1) If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss.