

Citation: *R. D. G. v. Minister of Human Resources and Skills Development*, 2013  
SSTAD 14

Appeal No: CP29131

BETWEEN:

**R. D. G.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal Decision**

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APPEAL MEMBER: OUDIT NARINE RAI

HEARING DATE: October 29, 2013

TYPE OF HEARING: IN PERSON

DATE OF DECISION: December 17, 2013

## PERSONS IN ATTENDANCE

Appellant	R. D. G.
Counsel for the Appellant	Rajinder Singh
Counsel for the Respondent	Johal Amichai Wise
Expert Witness for the Respondent	Dr. Donald Jewer
Interpreter	D. G.

## INTRODUCTION

[1] The Appellant applied for a Canada Pension Plan disability pension because she suffers from depression and anxiety which results in low energy, dizziness, fatigue, fear to go outside and is unable to work. The Appellant submits that her medical condition has rendered her disabled and this disability is severe and prolonged.

[2] The Appellant's Application for a *Canada Pension Plan* (the "CPP") disability pension was date stamped by the Respondent on January 28, 2010. The Respondent denied the Application at the initial and reconsideration levels. The Appellant then appealed to the Office of the Commissioner of Review Tribunals. On October 24, 2012, a Review Tribunal determined that a CPP disability pension was not payable and dismissed the Application.

[3] The Appellant filed an Application for Leave to Appeal the Review Tribunal decision with the Pension Appeal Board (PAB). The PAB granted leave on February 8, 2013.

[4] Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Social Security Tribunal is deemed to have granted leave to appeal in this case on April 1, 2013.

[5] The hearing of this appeal was done in person for the reasons given in the Notice of Hearing sent to the parties on August 22, 2013.

[6] To ensure fairness, the Appeal was examined based on the Appellant's legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination was made on the basis of an appeal *de novo* in accordance with subsection 84(1) CPP as it read immediately before April 1, 2013.

## **ELIGIBILITY REQUIREMENTS**

[7] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

## **ISSUES**

[8] The CPP is a contributory regime. Applicants are only eligible for disability benefits if they have made a minimum number of years of contribution to the CPP. This is known as the MQP, and it is calculated according to the provisions of the CPP at the relevant time. The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[9] There was no issue regarding the MQP because the parties agreed at the commencement of the hearing that the MQP date is December 31, 2011. The Tribunal finds that the MQP date is December 31, 2011.

[10] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP. Accordingly, the onus is on the Appellant to prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2011.

[11] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. Paragraph 42(2)(a) is reproduced below:

**42.(2)(a)** *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.*

## **EVIDENCE**

[12] The evidence in this proceeding is comprised of the oral testimony of the witnesses and the contents of the Hearing Book. The Hearing Book contains a variety of documents and reports, including medical reports, independent reports, assessments, and diagnostic imaging reports, most of which were submitted by the Appellant. The Hearing Book also contains documents submitted by the Respondent. The following Exhibits were also filed at the hearing:

Exhibit 1: Report from Dr. R. Kakar dated October 25, 2013. Exhibit 2: Curriculum Vitae of Dr. Donald Lemont Jewer.

Exhibit 3: Summary of Proposed Testimony of Dr. D.L. Jewer.

[13] The significant facts, background, and evidence are summarized in the paragraphs below.

## **Discussion of the Appellant's case**

[14] The Appellant was born on February 9, 1958. She was 52 years old at the date of her application in January 2010, 53 years old at her MQP date, and 55 years old at the date of the hearing. She is married, has two adult children and lives with her husband. The Appellant migrated from India to Canada in 2000.

[15] The Appellant completed her education in India. She attained grade 14 which is approximately the equivalent of a Bachelor of Arts degree in Canada. Her specialization was in History and Political Science. The language of her studies was Hindi and Punjabi. One subject was in English.

[16] The Appellant is fluent in Hindi and Punjabi but struggles with the English language. Her son acted as interpreter from English to Hindi and vice versa.

[17] Prior to coming to Canada, the Appellant worked with the Electricity Board of India for 21 years. The Board conducted its business in Hindi and Punjabi language.

[18] Within a month after her arrival in Canada, the Appellant did sewing work without any remuneration.

[19] In October 2001, the Appellant obtained a job at Canadian Starter Drives Inc. where she worked until September 13, 2009. She worked as a line worker assembling starters.

[20] The Appellant stopped working at Canadian Starter Drives Inc. because she was experiencing dizzy spells at work. During these dizzy spells she would attend at her employer's first aid medication room, or she would go home, or she would be taken to see her family doctor, Dr. Ralh.

[21] Under cross examination, the Appellant testified that on occasions her supervisor would instruct co-workers to take her home and the supervisor also took her home. In May 2009, she was taken home from work on 4 or 5 times.

[22] The Appellant testified that Dr. Ralh treated her for her negative thoughts but the medication did not assist her. She was referred by Dr. Ralh to Dr. Kakar, a psychiatrist.

[23] The Appellant testified that she has since continued to see Dr. Kakar. The sessions with Dr. Kakar are between 20 to 25 minutes. She testified that she has taken the medications prescribed by Dr. Kakar. Under cross examination, the Appellant indicated that she trusts Dr. Kakar. She takes the medications prescribed by Dr. Kakar and as recommended by Dr. Kakar. However, despite taking the medications her depression has not improved.

[24] The Appellant testified that she has experienced panic attacks on many occasions. She described her panic attacks to include her heart beating very fast, with dizziness and feelings as though she will fall.

[25] The Appellant testified that she has negative bad thoughts and prefers not to go outside because somebody will get into an accident or somebody will die.

[26] The Appellant testified that she feels better after talking to Dr. Kakar. However, her negative thoughts reappear after she gets home.

[27] The Appellant stated that her medication makes her drowsy. She would sleep for about three hours after which time her negative thoughts would reappear.

[28] The Appellant indicates that she does not have energy, she finds it hard to concentrate, she prays and cries because she does not know what will become of her, she does not watch television, she reads Hindu religious books but has problems concentrating. She does not go outside for walks and is fearful to use public transit or attend at the grocery store.

[29] The Appellant testified that she assists minimally in the home and her daughter-in-law who does not work prepares her lunch.

[30] The Appellant testified that she easily loses focus when she tries to read and is unable to recollect how much she read. She easily forgets things including her medication.

[31] The Appellant testified that she does not have friends, does not go to the temple, feels sad all day and feels that it is better for her to die. She cries a lot and gets angry easily over little things but she does not know why she gets angry.

[32] The Appellant does not sleep much. Sometimes she sleeps for 3 or 4 hours. She was unable to explain why she cannot sleep for longer duration.

[33] While the Appellant testified that she is scared to use public transit and go to the supermarket, she was unable to identify any occasion where she actually felt scared either inside a bus or in a supermarket. She however reiterated consistently that she felt scared to be in public with other people and that the mere thoughts of going outside make her scared.

[34] While the Appellant testified at the hearing that she felt better on the day of the hearing, she indicated that her depression remains the same and the medication has not assisted her.

[35] The Appellant testified that she saw a doctor at Etobicoke General Hospital with regards to pain in her eyes. She was unable to recall either the name of the doctor or the medication prescribed or how many times she met with the eye doctor. She testified that the medication for her eye pain provides relief sometimes but the pain reoccurs. According to a report dated August 10, 2010 (Tab. B p. 76) from Dr. Singal, who specialize in Internal Medicine, the Appellant was seen by an ophthalmologist at Etobicoke General Hospital for pain in her eyes. According to Dr. Singal, the Appellant complained of eye pain that gets worse with stress and the pain in turn causes her more stress.

[36] The Appellant testified that her blood pressure and her cholesterol are under control with medication. Her high cholesterol is managed with Crestor.

[37] The Appellant confirmed in cross examination that Dr. Kakar's medical reports indicating that she worked at Sears is incorrect.

[38] The Appellant was cross examined as to why she did not fill some of Dr. Kakar's prescriptions. She testified that Dr. Kakar gave her samples but was inconsistent as to how many samples. On one occasion she said she received samples a few times but cannot remember. On another occasion she indicated that Dr. Kakar gave her 10 pills but she does not remember. On yet another occasion she indicated that Dr. Kakar may have provided her with samples on one occasion.

[39] The Appellant testified that she has problems with both of her knees, more with the right than left. Her leg veins get numb and both of her legs get numb. She cannot sit for long periods and after 10 minutes she has to press her legs and walk a bit. According to the Appellant, her legs get numb many times during the day and often when they are numb she has to lie down. The Appellant requested short 5 minutes breaks during the hearing for her to walk around.

[40] The Appellant testified that her family doctor, Dr. Ralh injects her knees every 6 months. The Appellant brought her medications with her at the hearing, which include a bottle containing Meloxicam. She indicated that she takes Meloxicam for her knee pains and that she already finished a bottle of Meloxicam. She previously used Tylenol and Advil for her knee pains.

[41] In his report dated June 18, 2009 (Tab A p. 51), Dr. Singal indicated that Appellant developed palpitation but "her symptoms are related to stress and anxiety" rather than coronary artery disease.

[42] In a report dated August 12, 2009 (Tab A p.55), Dr. Singal advised that the stress test results ruled out any significant coronary heart disease. According to a report dated August 10, 2010 (Tab. B p. 76) from Dr. Singal, the Appellant continued to complain of palpitation. Dr. Singal ordered a Holter Monitor Test and a Stress Test. The results of these tests were negative.



[43] A head CT scan on September 15, 2009 revealed no abnormality. Testing with ENT specialist, Dr. Morrow, also returned normal results.

### **Testimony of Dr. Jewer**

[44] Dr. Donald Lemont Jewer was qualified as an expert witness for the Respondent. Dr. Jewer testified that the Appellant is being treated with Elavil. According to Dr. Jewer, Elavil at 10 mg is used as a sleeping aid mostly and it is not used for treating depression. The normal dosage for depression is between 50 mg to 150 mg, with a recommended maximum dosage of 300 mg per day. While Dr. Kakar reported that the Appellant was on Elavil 250 mg, the pharmacy records indicated that she was only receiving 25 mg. According to Dr. Jewer, Elavil at 200 mg to 250 mg has drowsy side effects.

[45] Interestingly enough, the Tribunal observed that after the Appellant completed her testimony and while Dr. Jewer was reviewing her Elavil usage, the Appellant placed her head on the hearing table and was mostly asleep for the remainder of the hearing. While the Appellant was physically present, she definitely was not mentally aware of the remainder of the proceeding which included the testimony of Dr. Jewer and submissions on behalf of both parties.

[46] Dr. Jewer submits that while the Appellant is maintained on Elavil 250 mg and Remeron 60 mg, the Appellant could be treated with other available medications which may have better results.

[47] Dr. Jewer pointed out the numerous mistakes contained in the 6 reports prepared by Dr. Kakar.

### **Reports from Dr. Kakar**

[48] Dr. Kakar prepared 6 reports dated September 20, 2009; June 14, 2010; November 15, 2010; April 1, 2011; September 23, 2011; and October 25, 2013. These reports are fraught with errors and are very problematic to accept as an

evidentiary basis. While it is not necessary to review the many errors contained in the reports of Dr. Kakar, the Tribunal attaches more weight on the testimony of the Appellant instead of relying on the reports from Dr. Kakar.

[49] Dr. Kakar's first report is dated September 20, 2009, and it is addressed to the Canada Pension Plan. Not even before a month had elapsed after meeting with the Appellant and without allowing much time for the prescribed medications to take effect, Dr. Kakar was able to state that, "...Mrs. R. D. G. is incapable of returning to any type of gainful employment as a result of her mental state. She has a severe and prolonged condition".

[50] In his last report dated October 25, 2013, which is also addressed to the Canada Pension Plan, Dr. Kakar reiterated that, "*In order to qualify for benefits under the CPP Long Term Disability Plan, my patient Mrs. R. D. G. must fit within the definition of a person with a severe and prolonged mental or physical disability. Mrs. R. D. G. would qualify as a "person with a severe and prolonged" mental disability as defined under the pertinent policy provisions....she is incapable of regularly pursuing any substantially gainful occupation...*".

[51] Understandable as it may be on the part of Dr. Kakar to advocate for his patient, in doing so, he has displayed the appearance of a lack of objectivity and at the risk of impinging his credibility. By crossing the realm from his role as treating psychiatrist to becoming an advocate for the Appellant, little weight is attached to Dr. Kakar's reports, with the result that his advocacy does not really assist his patient. Rather, his advocacy resulted in his reports being given little weight and this in turn has the potential to hurt rather than assist his patient's claim.

### **Medical, Diagnostic, Imaging, and Assessment Reports**

[52] As mentioned above, the Hearing Book contains various medical related documents and reports. While I have carefully reviewed all of these documents and reports, it is not necessary to refer to all of them. In *Simpson v. Canada (Attorney General)* 2012 FCA 82, the court indicated that the reviewing tribunal is presumed

to have considered all of the evidence before it and does not have to refer to each and every piece of evidence in the decision. I have discussed some of these medical documents above. While some of them are not specifically mentioned, all of these documents were carefully considered.

## **RESPONDENT SUBMISSIONS**

[53] The Respondent submitted that the Appellant does not qualify for a disability pension because her disability is not severe or prolonged on or before the MQP date of December 31, 2011. The Respondent relied on the testimony of its expert witness Dr. Donald Lemont Jewer.

[54] The Respondent further submitted that Dr. Kakar's reports should be given little weight because he crossed the threshold from being the Appellant's psychiatrist to becoming an advocate for the Appellant. To substantiate its position, the Respondent relied on *Canada (MHRD) v. Angheloni* [2003], 2003 FCA 140.

## **CASE LAW REVIEW**

[55] To be eligible for a disability pension under the Canada Pension Plan (the "*Plan*"), the Appellant must satisfy two requirements. The Appellant must have made valid contributions to the *Plan* for a minimum qualifying period, and the Appellant must prove that the disability is severe and prolonged as defined in paragraph 42(2)(a) of the *Act*. To be classified as "severe" the disability must render the applicant incapable of regularly pursuing any substantially gainful occupation. It will be "prolonged" only if it is determined to be long continued and of indefinite duration, or likely to cause death.

[56] The CPP is a social benefits conferring legislation which ought to be interpreted in a broad and generous manner. In Canada, courts have been careful to apply a liberal construction to social legislation. In *Rizzo v. Rizzo Shoes* 1998 1 S.C.R. 27, at paragraph 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any

doubt arising from the language of such legislation ought to be resolved in favour of the claimant.

[57] In the Federal Court of Appeal case of *Canada (MHRD) v. Rice*, 2002 FCA 47, the court stated that the purpose of the *Canada Pension Plan* disability provisions is to provide individuals who have been disabled with a disability pension, in accordance with the legislation, because they are incapable of pursuing regularly any form of substantially gainful employment. At paragraph 13 the court also stated that the disability provisions are not a supplementary insurance scheme.

[58] The CPP was designed to provide social insurance for Canadians who experience a loss of earnings due to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution, *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28.

[59] The Federal Court of Appeal in *Canada (MHRD) v. Henderson*, 2005 FCA 309 determined that section 42 is aimed at assisting people with "long-term" disability and not to "tide over" those with short term problems.

[60] In *Villani v. Attorney General of Canada* 2001 FCA 248, Isaac J.A. delivered the judgment which favoured this "real world" test. At paragraph 38 he said:

Requiring that an applicant be incapable regularly of pursuing any substantially gainful occupation is quite different from requiring that an applicant be incapable at all times of pursuing any conceivable occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupation which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[61] At paragraph 39 of the same decision, Isaac J.A. said:

...on the plain meaning of the words in subparagraph 42(2)(a)(i), Parliament must have intended that the legal test for severity be applied with some degree of reference to the “real world.” It is difficult to understand what purpose the legislation would serve if it provided that disability benefits should be paid only to those applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful or insubstantial. Such an approach would defeat the obvious objectives of the Plan and result in an analysis that is not supportable on the plain language of the statute.

[62] At paragraph 42 he continued:

The test for severity is not that a disability be “total.” In order to express the more lenient test for severity under the Plan, therefore the drafters introduced the notion of severity as the inability regularly to pursue any gainful occupation... the clear intent of the drafters all indicate with equal force that the crucial phrase in subparagraph 42(2)(a)(i)’s severity definition cannot be ignored or pared down.

[63] At paragraph 50 he said:

This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants must still be able to demonstrate that they suffer from a “serious and prolonged disability” that renders them “incapable regularly of pursuing any substantially gainful occupation.” Medical evidence will still be needed as will evidence of employment efforts and possibilities.

[64] In *Minister of Human Resources Development v. Scott*, 2003, docket A-117-02, Strayer J.A., speaking for the Federal Court of Appeal, at paragraph 7 said:

“With respect I believe that the Board made an error of law in stating the test as being whether the appellant is “incapable of regular employment”... the test of whether a disability is “severe,” the issue here, is stated by the statute to be whether the person “is incapable regularly of pursuing any substantially gainful occupation...” It is the incapacity, not the employment, which must be “regular” and the employment can be “any substantially gainful occupation.”

[65] In *Inclima v. Attorney General of Canada* 2003 FCA 117, Pelletier J.A., speaking for the court, said at paragraph 2:

“S.42(2) of the Canada Pension Plan, supra, says that a person is severely disabled if that person “is incapable regularly of pursuing any substantially gainful occupation.” In *Villani v. Canada* 2002 1 FC

130 at paragraph 38, this court indicated that severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment.”

[66] In *Inclima* the court also stated that:

“Claimants still must be able to demonstrate that they suffer from a ‘serious and prolonged disability’ that renders them ‘incapable regularly of pursuing any substantially gainful occupation’. Medical evidence will still be needed as will evidence of employment efforts and possibilities. Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.”

[67] In *Klabouch v. Minister of Social Development* 2008 FCA 33 the Federal Court of Appeal reiterated that:

“...the measure of whether a disability is “severe” is not whether the applicant suffers from severe impairments, but whether the disability “prevents him from earning a living”... In other words it is an applicant’s capacity to work and not the diagnosis of his disease that determines the severity of the disability under the CPP.”

[68] Socio-economic factors such as labour market conditions are not relevant in a determination of whether a person is disabled within the meaning of the CPP. The focus should be on any substantially gainful occupation having regard to the Appellant’s personal circumstances and not on whether real jobs are available in the labour market. In *Canada (MHRD) v. Rice*, 2002 FCA 47, the court stated that:

“When the words of subparagraph 42(2)(a)(i) are considered, it is apparent that they refer to the capability of the individual to regularly pursue any substantial gainful occupation. They do not refer to labour market conditions.”

## **ANALYSIS**

[69] The onus is on the Appellant who must prove on a balance of probabilities that her disability is a severe and prolonged disability, as defined in the CPP, on or before the MQP date of December 31, 2011.

[70] The provisions of other public and private plans for disability pensions or other periodic payments vary from those involved here. The legislated rules discussed above that determine eligibility for a disability pension under the CPP are strict and inflexible. Although the threshold for a disability pension under the CPP is a high and stringent one, it is not an insurmountable threshold.

### **Severe Criterion**

[71] The severe criterion must be assessed in the real world context as discussed above in the *Villani v. Canada* case. This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of occupation, language proficiency, and past work and life experience. The Appellant was 52 years old at the date of her application in January 2010, 53 years old on her MQP date, and

55 years old on the date of the hearing. Despite achieving the equivalent of a Bachelor's degree, she was unable to find employment except in a factory environment. While her limited English skills did not prevent her from obtaining and maintaining regular employment in Canada, it is doubtful that she would be a candidate for either language, skills or employment related retraining. Mentally, the Appellant clearly suffers from psychiatric issues. Physically, the Appellant has problems with both of her knees which cause her legs to become numb and is unable to sit for long duration. It is very doubtful whether a real world employer would employ the Appellant knowing that she would be unreliable to perform employment duties given her mental and physical limitations.

[72] While little weight is attached to the reports of Dr. Kakar, the reality is that the Appellant had 29 sessions with Dr. Kakar, continues to see Dr. Kakar, trusts Dr. Kakar and mostly complies with Dr. Kakar's treatment recommendations. These facts cannot be easily discounted.

[73] The Appellant had difficulties recalling the amount of samples provided to her by Dr. Kakar, difficulties explaining instances of fear in public places such as in a bus or

a supermarket. I find that the Appellant's memory difficulties are more in accordance with Dr. Kakar's prognosis of pseudo-dementia than evasive tendencies by the Appellant.

[74] The Appellant's mental health has resulted in an inability to go outside as is obvious from her testimony that she is scared to go outside due to her fears of someone getting into an accident or someone dying. The issue is not whether her fear of going outside is unfounded or unreasonable. Rather, it is a reflection of her mental health condition which precludes her from having the capacity to pursue regularly any substantially gainful employment. I accept the Appellant's testimony that she suffers from panic attacks and she has not had relief from her depression.

[75] I accept the Appellant's testimony that she suffers from knee problems and that this condition creates numbness in her legs and sometimes forces her to lie down.

[76] I have carefully reviewed and considered the evidence, the submissions and the jurisprudence. I considered the Appellant's mental disability within the context of her physical disability. I find that the Appellant was incapable regularly of pursuing any substantially gainful employment on or before December 31, 2011. The Appellant has met the onus under the legislation on a balance of probabilities that her disability was severe as defined in the CPP legislation and case law.

### **Prolonged**

[77] I find that the Appellant's disability is also prolonged and long lasting both on and after her MQP date of December 31, 2011. There is no medical information to suggest that the Appellant's depression and her pain will improve in either the near short term or long term.

### **Conclusion**

[78] I find that the date of onset to be the date when the Appellant could no longer work, being September, 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of January 2010.



[79] **DECISION**

[80] The appeal is granted

*Oudit Narine Rai*  
Member, Appeal Division