Citation: *M. Z. v. Minister of Employment and Social Development*, 2014 SSTAD 218

Appeal No. AD-13-33

BETWEEN:

M. Z.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF HEARING: June 26, 2014

DATE OF DECISION: August 29, 2014

TYPE OF HEARING: Video-Conferencing

IN ATTENDANCE

Appellant	M. Z.
Representative for the Appellant	Lesley C. Tough (Counsel)
Representatives for the Respondent	Amichai Wise (Counsel)

DECISION

[1] The Social Security Tribunal allows the appeal of the decision of the Review Tribunal and refers the matter to the General Division.

BACKGROUND

[2] The Appellant appeals the decision of the Review Tribunal issued on May 3, 2013, dismissing his application for disability benefits, on the basis that he did not prove that his disability is severe for the purposes of the *Canada Pension Plan*. Leave to appeal was granted on March 3, 2014.

PRELIMINARY MATTER

[3] The Appellant sought a hearing *de novo* before the Appeal Division. He submits that he is entitled to a hearing *de novo* for two primary reasons. Firstly, he says that he would have been entitled to a hearing *de novo* before the Pension Appeals Board and secondly, he says that the hearing before the Review Tribunal took place prior to April 1, 2013, when the *Department of Human Resources and Skills Development Act* now the *Department of Employment and Social Development Act* came into force.

[4] The Appellant also submits that as there was no record of hearing before the Review Tribunal and as the procedure was unfair and the evidence was incomplete, he should be provided with the opportunity to proceed by a hearing *de novo*.

[5] I decided that the Appellant is not entitled to a hearing *de novo* in this appeal before me, on the basis that subsection 58(1) of the *Department of Employment and Social Development Act* provides for limited grounds of appeal. That subsection does not allow for any reconsideration or re-hearing of the evidence.

ISSUES

[6] The issues before me are as follows:

a) What is the applicable standard of review?

Grounds of Appeal

b) Did the Review Tribunal fail to observe a principle of natural justice?

c) Did the Review Tribunal commit errors in law by failing to apply the principles set out in *Villani v. Canada (Attorney General),* 2001 FCA 248, and in *Bulger v. Minister of Human Resources Development* (March 30, 2006), CP0916 (PAB)?

d) Did the Review Tribunal make an erroneous finding of fact without regard for the material before it?

STANDARD OF REVIEW

[7] The Supreme Court of Canada determined in *Dunsmuir v. New Brunswick*, 2008 SCC 9 that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of fact and mixed questions of fact and law are decided on the reasonableness standard. Questions of law are determined on the correctness standard. The parties agree that there are only two standards of review, but take opposing positions as to which standard of review applies in these proceedings.

[8] The Appellant did not provide any written submissions regarding the standard of review. He submits that the appropriate standard of review is correctness, as the appeal is from a specialist tribunal and as the Social Security Tribunal is also a specialist tribunal. The Appellant relies on *Dunsmuir*. He submits that in *Dunsmuir,* the Court was concerned with the judicial review of a decision of the Federal Court of Appeal, whereas this application concerns the appeal of a specialist tribunal. The Appellant did not refer to any particular passages in *Dunsmuir,* nor direct me to any other legal authorities on this point.

[9] The Appellant further submits that where there are questions of law, the standard of review is correctness.

[10] The Appellant relies on *San Miguel Brewing International Limited v. Molson Canada* 2005, 2013 FC 156 and *Bahceli v. Yorkton Securities Inc, and Orion Securities Inc.,* 2012 ABCA 166 which state that where new evidence is filed that is substantial and significant, the standard of review is correctness. In my view, those two authorities are not relevant to these proceedings. In *San Miguel*, the Court was concerned with the standard of review in the context of the *Trade-marks Act*, and in *Yorkton Securities*, the Court was concerned with appeals from Masters to a judge in Alberta.

[11] The Respondent submits that the reasonableness standard should apply in respect of Review Tribunal decisions that are reviewed by the Appeal Division of the Social Security Tribunal, as it is a "deferential standard that recognizes the legislative intention to grant discretion to the tribunal". The Supreme Court of Canada stated in *Dunsmuir* that,

> **49** Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
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> **50** As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.
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> . . .

> **53** Where the question is one of fact, discretion or policy, deference will usually apply automatically *(Canada (Attorney General) v. Mossop,* (1993]1 S.C.R. 554, at pp. 599-600; *Dr.* Q, at para. 29; *Suresh,* at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
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> **54** Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board),* [1995]1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S. T.F., District 15,* [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v.* C.*U.P.E.,* at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan,* [1975]1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[12] The Respondent submits that there is support for using the reasonableness standard, in that the Appeal Division is reviewing the Review Tribunal decision on essentially the same grounds as when the Federal Court of Appeal judicially reviewed a decision of the Pension Appeals Board.

[13] The Respondent further submits that in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, the Supreme Court of Canada indicated that a reviewing court should not undertake separate analyses of a tribunal's reasons and the result required under the reasonableness standard of review. Rather, the Court described the review of an administrative decision as an organic exercise in which the reasons of the tribunal must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible acceptable outcomes. This approach is followed when the reasonableness standard of review applies.

[14] The difficulty with which I am confronted is that the Appellant raises numerous issues in his appeal of the decision of the Review Tribunal, including questions of law and natural justice, questions of fact and questions of mixed fact and law.

[15] On questions involving natural justice, the Supreme Court of Canada in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 stated that,

> **82** It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see e.g. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557), but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its "home statute" or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear, no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner.

[16] In *Richmond Cabs Ltd. v. British Columbia (Motor Carrier Commission)* (1992), 11 Admin. L.R. (2d) 183, the Supreme Court of British Columbia stated that,

> The concepts of fairness and natural justice are not related to the particular specialities of administrative tribunals; rather, they transcend specialties and apply in general to dealings between people and all tribunals.

[17] The Supreme Court of B.C. referred to the decision of the Supreme Court of Canada in *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, which established that the standard to apply is that the breach of procedural fairness or natural justice must be substantial, rather than being trivial or merely technical.

> The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[18] In both the *Cardinal* and *Richmond Cabs* decisions, the Court found the breaches of the duty of fairness to be of sufficient substance as to warrant judicial intervention.

[19] I am of the view that if I determine that there was a fundamental breach of the duty of fairness, this generally would render the decision of the Review Tribunal void: *Cardinal,* ibid (unless the decision can be cured, which I do not take to be the case here, or if there are any bases, such as delay, waiver or misconduct of the applicant, upon which I might choose to deny relief). Assessing the merits of the case otherwise would involve inappropriate speculation about what the outcome of a fair hearing might have been. If I do not find that there was a fundamental breach of the duty of fairness, I find the standard of review to be "reasonableness", as set out in *Dunsmuir.* That is, if the standard to apply is "reasonableness", is the outcome which the Review Tribunal reached acceptable and defensible on the facts and the law?

GROUNDS OF APPEAL

(a) Alleged Failure to Observe a Principle of Natural Justice

[20] The Appellant submits that the Review Tribunal failed to observe a principle of natural justice, in that it failed to provide him with a reasonable opportunity to present his case. In particular, he submits that the Review Tribunal did not provide sufficient time for witnesses to give evidence and secondly, within that shortened time allowance, constantly interrupted and asked questions of the Appellant. While the Appellant readily concedes that questioning is to be expected, he submits that the questioning in this particular case was excessive and disruptive to the Appellant's case, and ultimately threw the "examination into chaos". He submits that as the hearing was delayed, owing to a preliminary matter brought on by the Review Tribunal, he was reduced to only 45 minutes to make his case, when he had expected to have approximately twice that amount of time to give evidence. The hearings before the Review Tribunal were not recorded and there was no affidavit evidence before me that this is what had occurred at the hearing. I accept the submissions from counsel in this regard, as she represented the Appellant at the hearing.

[21] The Appellant submits that not only was the reduced time insufficient for him to give evidence, ultimately it led to errors in findings of fact by the Review Tribunal. For instance, had the Appellant been provided with sufficient time, he would have clarified the nature of his earnings for 2011. That year, his total income was over $14,000. The Appellant submitted that the Review Tribunal concluded that earnings in 2011 represented employment earnings, when in fact the income was largely derived from non- employment sources. The Review Tribunal wrote,

> [58] As far as whether earnings of perhaps $14,000 would be considered substantially gainful employment, the Tribunal consulted *Landry v. MSD* (October 17, 2007), CP 24673 (PAB). It was found that income levels of that amount, particularly through part-time efforts, were in fact found to be substantially gainful employment.

[22] While it is not for me to make any findings of fact, I note that the 2011 Tax Return Summary suggests that of the total income of approximately $14,700, close to $13,500 consisted of "other pensions or superannuation" and another roughly $3,800 consisted of RRSP income. The total income also includes both business and farming income. The Tax Return Summary indicates that the gross income derived from the business and farming was $1,750 and $18,920, respectively, while the net income was $1,750 and net loss was $4,664.45, respectively.

[23] I note also that in denying the Appellant's application for disability benefits, the Respondent wrote in its letter dated May 5, 2011 that, "in combination these values [of over $18,000 and $3,350 for gross farming and trapping, respectively] represent a viable and productive business that would support capacity for work". The Appellant addressed the issue of his capacity for work, in his hand-written letter dated May 12, 2011. In his letter, he explained how he was able to engage in any farming or trapping. He also provided a breakdown of his gross farming income and expenses. The Appellant also queried how anyone could survive on the combined incomes generated by his farming and trapping, i.e. he doubted that employment earnings at the $14,000 level or so, irrespective the source, could represent the capacity to regularly pursue any substantially gainful occupation.

[24] I point out these documents to show that firstly, the issue of the Appellant's capacity was neither novel nor unanticipated at the hearing before the Review Tribunal and secondly, to show that the Appellant had already availed himself of the opportunity to make some submissions regarding his capacity, albeit it was in the context of farming and trapping. The Appellant did not address the question about the breakdown of his 2011 income in his letter of May 12, 2011, though it is unknown whether he might have had this information available to him by then.

[25] The Appellant submits that as the Review Tribunal concluded that he had employment income of perhaps $14,000, he must have had the requisite capacity to regularly pursue a substantially gainful occupation and therefore could not be disabled. The Appellant submits that had he been provided with the time allotted to give evidence about his 2011 income, the Review Tribunal ultimately would not have made any connection between his 2011 income and his capacity.

[26] The Appellant did not provide any further examples of what evidence he might have given or what submissions he might have made at the Review Tribunal hearing, had he been provided with additional time.

[27] The Respondent submits that the Appellant is barred from proceeding with an appeal on the grounds of a breach of procedural fairness, as the issue was not raised at the earliest practicable opportunity, which in this case would have been at the Review Tribunal hearing. The Respondent further submits that if the Appellant failed to voice any objections as to an alleged breach of procedural fairness at the hearing, then the Appellant is taken to have provided an implied waiver of any perceived breach or unfairness. The Respondent notes that the Appellant's first notice of any alleged breach was in the Application for Leave to Appeal filed with the Social Security Tribunal on May 15, 2013.

[28] The Respondent relies upon *Jorge Luis Restrepo Benitez et al. v. Canada* [2006] FC 461 at paras. 204 to 220 and *Gill v. Attorney General of Canada* 2011 FCA 195 at para. 6.

> The common law principle of waiver requires that an Appellant must raise an allegation of bias or a violation of natural justice before the tribunal at the earliest practical opportunity ... A failure to object at the hearing must be taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself.

[29] Setting aside the issue of the timeliness of any objections, the Respondent did not make any submissions as to whether the Review Tribunal committed any breaches of natural justice or procedural fairness.

[30] I do not see that an Appellant is always required to raise early objections before he can succeed in an appeal on the grounds of a breach of procedural fairness or natural justice. In *Beaudoin v. Canada (Minister of National Health and Welfare)*, [1993] 3 FC 518, the appellant had requested that the hearing proceed in French, but the Pension Appeals Board decided that the hearing would take place in English, a conclusion which the applicant was "persuaded" to accept. There, the applicant was found admittedly at fault in not requesting an adjournment as she had apparently intended so that she could have counsel present, but although she did not request an adjournment, she had requested a hearing in French. The Court held that an "unrepresented party's *bona fide* request, on notice, for a hearing in the other official language must always be respected in full, and its denial amounts to a denial of natural justice, since it fetters the requesting party's ability to present a case in his or her own way".

[31] In any event, I find that here, the Review Tribunal implicitly recognized that a condensed hearing could potentially result in procedural unfairness or a breach of the principles of natural justice. The Appellant does not deny that he did not make any objections at the hearing that he was left with less time, but there would have been no need for him to have done so, as the Review Tribunal freely offered an adjournment of the proceedings.

[32] While there is no right to an in-person hearing to ensure a fair hearing, were there alternative means by which the Appellant could have given evidence and made submissions? In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, the Court said,

> [32] . . . the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.
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> [33] However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. . . .
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> [34] . . . These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or [page844] notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

[33] Here, however, there is no mention by either of the parties that the Review Tribunal invited written submissions in lieu of an adjournment. Rather, the Review Tribunal offered the Appellant the opportunity to adjourn the hearing to another date and time. Ordinarily I would conclude that a party is not entitled to await the outcome of a hearing and then object that he was denied a fair hearing, in the face of an offer of an adjournment. Otherwise, this could well amount to securing an unfair advantage and essentially having two opportunities to try one's case.

[34] In this case, the Review Tribunal could not suggest when the new hearing might take place (which by itself would not be the basis for any objection), how long it might be, or that it would be conducted in person. (The uncertainty arose as the Review Tribunal was soon to be phased out and replaced with the Social Security Tribunal – General Division.) The process had already taken 2.5 years from the time that the Appellant had submitted his Application for *Canada Pension Plan* disability benefits to the hearing before the Review Tribunal (though this would have also included the consideration and reconsideration stages by the Respondent). There is no indication either that an adjournment would have satisfied the concerns of the Appellant. As the Appellant felt that an in-person hearing would be

advantageous and given his impecuniosity, he decided to proceed with the hearing on February 28, 2013, rather than delay the hearing indefinitely and risk another mode of hearing.

[35] A party is entitled to a fair hearing. Was the procedure before the Review Tribunal fair to the parties and, in particular, were the parties provided with a fair opportunity to present their respective cases? It would be a mischaracterization or oversimplification to say that a party should have been given more time to make its case. Rather, the focus ought to be on how the purported unfairness impacted upon that party. The factual circumstances here are somewhat more than ordinary and merit a more detailed examination and consideration:

a. The Review Tribunal did not limit itself to the evidence elicited in the hearing before it. There was of course documentary evidence and correspondence from the Respondent which it took into account.

b. The Respondent had previously raised the issue of the Appellant's earnings and in particular, his gross farming and trapping income. In its letter of May 5, 2011, the Respondent suggested that the Appellant's combined income from farming and trapping represented a viable and productive business that would support capacity for work. The Appellant responded in his handwritten letter dated May 12, 2011, explaining how he had managed to earn this income.

c. Significantly, the Respondent did not raise any issues prior to the Review Tribunal hearing as to whether total income of $14,000 in 2011 represented employment income. The Review Tribunal did not address what the $14,000 was made up of, and appeared to conclude that it represented earnings from employment and therefore showed that the Appellant had the capacity for substantially gainful employment.

d. It does not appear that the Review Tribunal posed any questions about the $14,000 figure to the Appellant. The Appellant claims that he would have explained the breakdown of the $14,000 figure, had he had more time to give

evidence. That said, I query whether the Appellant would have done so, and whether he had even been alive to any issues surrounding the $14,000, given that the 2011 Tax Return Summary appears to have provided some breakdown of the $14,000. In other words, it may not have been reasonable for the Appellant to have thought to address this in submissions prior to the hearing, and he only raises it now with the benefit of hindsight, in seeing the Review Tribunal decision.

e. The Appellant was aware that the Review Tribunal was not extending the time for hearing. Was he judicious or extravagant in his use of the remaining time? There were no submissions before me about how complex or time-consuming the Appellant's case may have been, how long the parties expected to be or how much time each required to complete their respective cases, and what additional evidence the Appellant felt he was required to give to bolster his case. There was no evidence before me as to what effort the Appellant undertook to complete his case within the remaining time. If he had been more judicious and efficient in his use of the remaining time, could he have completed his case, even if it was given in a more cursory fashion?

f. The Appellant did not provide any additional examples of what other evidence or submissions he might have made, had there been additional time for the hearing of his case, or why he could not have addressed this in the remaining time. He also did not explain how any additional evidence or submissions might have impacted upon the ultimate decision of the Review Tribunal.

g. On the other hand, while there is no right to an indefinite period of time to give evidence or make submissions, it was reasonable and legitimate for the Appellant to expect that he would have had considerably more time to give evidence and make submissions. The Notice of Hearing indicates that the hearing was scheduled from 2 to 3:30 p.m. Half of the allotted scheduled hearing time was consumed by the procedural matter.

h. The Appellant apparently did not make any objections at the hearing about the reduced time.

i. The Review Tribunal offered an adjournment to the Appellant, but also indicated that it did not know when the new hearing before the Social Security Tribunal would take place, how long it would take and what format it might follow. The Appellant had been provided with an in- person hearing initially, so it was reasonable and legitimate for him to expect that any new hearing would be of similar length and format, but such could not be assured. The Appellant felt that he would be prejudiced by an adjournment of the proceedings, for various reasons, so elected to proceed with the hearing before the Review Tribunal on February 28, 2013.

[36] In addition to the prejudice that an impecunious party typically faces caused by a further delay with an adjournment, there was the added disincentive of possibly being left without the opportunity to be heard, or being left with only as much or less time than remained at the hearing on February 28, 2013. The Appellant did not see an adjournment as a credible alternative and felt constrained by the options.

[37] While a party can expect procedural delays and interruptions and less than the scheduled time to give evidence and make submissions, if these delays substantially eat into the expected scheduled time, this could well be unfair to the party that relied on having the allotted time available to it, as this would have shaped his or her preparations necessarily. Here, the Appellant may have expended considerable thought, resources and time in preparing for a lengthier hearing, and then discovered, with little notice, that the hearing time would be reduced. Even with counsel, he may not have been able to re- organize his case and present it in the manner he might have in the reduced time, had he been aware that the hearing of evidence would be cut short.

[38] Although I did not receive any evidence or submissions about the complexities of the Appellant's case, I see from the Review Tribunal decision that the Appellant has a number of medical issues. He has seen different medical specialists and been provided with various treatment recommendations. The Appellant has some self-employment and is

involved in farming and trapping, to some extent. There are a number of factual and legal issues which necessarily would or should have arisen and been addressed, in determining whether the Appellant could be considered disabled for the purposes of the *Canada Pension Plan*.

[39] While the Appellant could have addressed many of these issues in the form of written submissions in advance of the hearing on February 28, 2013, he did not do so, likely with the expectation that he could address these at the time of the hearing. As well, the "best evidence" of his medical condition, employment and other issues generally is through oral testimony, rather than by affidavit or other. Evidence of how the Appellant's medical disability has impacted him surely would be considered more compelling when given orally. Doubtless, the Appellant could not have anticipated that a significant portion of the originally scheduled time would be consumed by procedural matters, over which the Appellant had no control. The remaining time may well have been sufficient for the Appellant to make his case – had he been given notice of the time allotment and been able to prepare for it accordingly. The late notice necessarily altered his presentation and may have left him without the ability to give evidence on some crucial aspects of his case, and to make submissions on that evidence. The Review Tribunal may have been left without crucial factual and evidentiary matters, and this could have had some impact on its decision. While this is all speculative, the perception that the hearing may have been unfair cannot be overlooked, as this otherwise could cast the administration of justice into some disrepute.

[40] Given the exceptional circumstances here, I am prepared to find that there was a breach of procedural fairness and that the Appellant was denied a fair hearing. This by no means should be interpreted as meaning that everyone who expects or wishes to have additional time beyond the scheduled hearing time will have been denied a fair hearing. Each case will need to be decided on its own set of facts.

[41] The Appellant submits that I ought to apply the standard of correctness, but this presupposes that the Review Tribunal would have decided differently and would have necessarily found the Appellant to be disabled as defined by the *Canada Pension Plan.* I cannot draw that conclusion, based on the evidence before me. Even had the Review

Tribunal found that there was no connection between the Appellant's 2011 income and his capacity to work, it does not stand to reason that from this, one could conclude that the Appellant could be found disabled. I find that in the circumstances of this case, it would be appropriate to order that this matter be referred to the General Division of the Social Security Tribunal for a re-hearing on the merits of the matter. I make no directions as to the mode of hearing before the General Division and leave the parties to make submissions in that regard.

[42] The Appellant made further submissions regarding various errors of law and findings of fact. Although I have determined that this matter should be remitted to the General Division, I will address some of the issues raised in the appeal by each of the parties.

(b) Errors in Law

i. Failure to Apply *Villani*

[43] The Appellant is involved in farming and trapping, which he submits is a past- time tied to his cultural heritage, rather than a "truly remunerative activity". The Review Tribunal found that his "earnings of perhaps $14,000, particularly through part-time efforts, were in fact found to be substantially gainful employment". Aside from the question as to what $14,000 represents, the Appellant submits that the Review Tribunal erred in law in failing to apply the principles set out by the Federal Court in *Villani*, in that it did not assess his disability in a "real world context". The Appellant submits that the Review Tribunal erred in determining that his limited self-employment could be considered "truly remunerative occupation as provided in *Villani*".

[44] The Appellant referred to paragraphs 38 and 44 to 45 of *Villani.*

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. 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 occupations 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.
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> [44] In my respectful view, the Board has invoked the wrong legal test for disability in so far as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.
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> [45] Unfortunately for decision-makers under the Plan, employability is not a concept that easily lends itself to abstraction. Employability occurs in the context of commercial realities and the particular circumstances of an applicant. ...

[45] The Appellant submits that because of his various medical issues, he does not have the functionality or capacity to pursue any "truly remunerative employment" in the context of commercial realities. The Appellant notes that he makes little money from either venture and that he requires assistance from his wife or son, due to functional limitations in his hands and joints and his inability to walk in the snow. He submits that he is slow, inefficient and unproductive, and that as a consequence, he would not be employable.

[46] It should be noted that the Federal Court of Appeal also said at paragraph 45,

> [45] . . . Furthermore, I wish to express that I should not be taken as stating that employability is to be determined purely by reference to an applicant's chosen occupation. ... the federal Plan makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the Plan is in relation to any substantially gainful occupation.

[47] The Respondent submits that this ground of leave to appeal as to whether the *Villani* factors were at all applied is irrelevant. This is so, as the Appellant did not challenge the Review Tribunal's finding that "taken in the whole, these [medical] conditions are not of a severe type, nor are they disabling". The Appellant did not seek and leave to appeal was

not granted on the basis of whether the Appellant has a serious medical condition. The Respondent submits that the Review Tribunal's finding that the Appellant does not have a serious medical condition is therefore final and binding. In following *Giannaros v. Canada (Minister of Social Development)*, 2005 FCA 187, the Respondent submits that where there is no issue that the appellant suffered from a severe and prolonged disability, there is no need to apply the "real world approach".

[48] The Federal Court of Appeal referred to *Villani*, at paragraph 50, and stated, "Our Court stated unequivocally that a claimant must always be in a position to demonstrate that he or she suffers from a severe and prolonged disability which prevents him or her from working".

[49] The Respondent submits that it is insufficient that the Appellant be engaged in employment that may not be considered remunerative, or that his personal circumstances limit his capacity to regularly pursue substantially gainful occupation, as he is still required to provide sufficient medical evidence and show efforts at employment and possibilities, amongst other things.

[50] The Respondent further submits that the capacity to perform part-time work, modified activities, sedentary occupations or attend school may preclude a finding of disability, as it is an indication of capacity to work. The Respondent relies upon *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158, at paras. 14-15, and *McDonald v. Canada (Human Resources and Skills Development)*, 2009 FC 1074, at para. 14.

[51] The Respondent further submits, at paragraph 62 of its submissions, that it is irrelevant as to whether a business, such as the Appellant's farming enterprise, enjoys a net profit, as the test is whether the Appellant has the requisite capacity for substantially gainful employment. In *T.C. v. Minister of Human Resources and Skills Development* (CP26949) (June 1, 2011) unreported (PAB) at para. 33, the Board dismissed the Appellant's appeal, as it found that he had the capacity to regularly pursue a substantially gainful occupation for the material time. While the business was not profitable and much of the work was performed by others, the Appellant in that case had assumed full control and responsibility

for the running of the business and was involved in its day-to-day operations. The Board wrote,

> [32] Did the hunting and fishing lodge business of the Appellant and his role in its operations from 2003 to 2006 inclusive, support, sustain and show cause for termination of disability benefits to him? The matter of contention here is whether the Appellant had the physical and mental capacity to pursue any substantially gainful employment.
>
> [33] Mr. T.C. operated the business over a period of some four years. It is argued that it was not profitable because of economic conditions and the continuing health problems of the Appellant that prevented him from doing heavy work resulting in work that had to be done by others to run the operation because of his limitations. The failure to generate a profitable venture does not substantiate a severe and prolonged incapacity to regularly pursue substantially gainful work.
>
> [34] Mr. T.C.'s active involvement in the business and its operations over a period of four years in spite of and aside from his initial disability determination shows that he at least had residual capacity to work. The medical evidence as I assess it does not substantiate that Mr. T.C. suffered from a severe and prolonged disability under the terms of the *CPP* after September 2003. This along with the undisputed evidence, that despite his condition, Mr. T.C. was actively involved in the running of the business and its operations cannot support a finding of disability to the extent that during the relevant period of time Mr. T.C. could not engage in gainful employment.

[52] The evidence before the Review Tribunal regarding the Appellant's trapping, farming and other employment is as follows:

> [43] … The Appellant states he can spend a few hours a week checking the traplines, riding a pickup or a quad in summer and a snowmobile in winter. The Appellant's wife always accompanies the Appellant in case of emergency or if the Appellant needs assistance. Due to the severe arthritis in his fingers, the Appellant easily drops things and cannot grasp anything with his hands.
>
> [44] The Appellant is also employed to control nuisance beaver populations. As the beavers are usually in and along ditches near the Appellant residence' he can drive along in his pickup truck and shoot the beavers from the cab.
>
> [45] The Appellant stated he has a hard time doing chores on the farm, even with help from his family. The Appellant felt he was disabled and could not pursue a substantially gainful employment.

[53] The Appellant is requesting that we extend the "real world" factors contemplated by *Villani* to include whether an applicant has the capacity to pursue any "truly remunerative employment" in the context of commercial realities. While this is certainly a novel submission, I am of the view that the "real world" factors were intended to refer to an appellant's personal characteristics or circumstances, as opposed to his overall functionality and capacities. After all, the characteristics or circumstances have some influence on an appellant's capacity to regularly pursue any substantially gainful occupation. For instance, age, educational attainments or past work experience could be examined to see how they might impede or advance efforts in pursuing or obtaining employment. I do not regard an applicant's capacity to pursue any "truly remunerative employment in the context of commercial realities" to be one of the factors contemplated by *Villani*. If capacity could be considered a personal characteristic or circumstance, certainly it is not similar or in the same class as those listed "such as age, education level, language proficiency and past work and life experience". In my view, having to determine whether an applicant has the capacity to pursue any "truly remunerative employment in the context of commercial realities" goes to the ultimate issue to be determined by the trier of fact, namely, whether an applicant's disability is severe for the purposes of the *Canada Pension Plan.* In reviewing *Villani*, at paragraph 38, I cannot see that the Court intended otherwise.

[54] Or, to simplify the Appellant's position, he is asking that we accept that he is incapable (of pursuing truly remunerative employment) so that we can find he is incapable of regularly pursuing substantially gainful employment and therefore severely disabled. This cannot stand to reason.

[55] While overall I agree with the thrust of the submissions made on behalf of the Respondent, I do not accept that an applicant is precluded from applying the "real world" approach, if he has not challenged the Review Tribunal's finding that he does not have a "serious medical condition". While claimants must be able to demonstrate that they suffer from a severe and prolonged disability, an "air of reality" or a "certain measure of practicality" must also figure into the severity determination: *Villani.*

ii. Failure to Apply *Bulger*

[56] The Appellant submits that the Review Tribunal determined that the Appellant was disentitled to a disability pension as he did not comply with his doctors' treatment recommendations. The Appellant submits that the Review Tribunal erred in law by failing to follow *Bulger*, by not determining whether his non-compliance was reasonable, given his personal circumstances (such as non-availability of resources including a supervised exercise program, being unable to engage in meaningful exercise due to widespread pain, his intolerance to pain relief medication, and seeing no appreciable weight loss, despite following a diabetic diet). The Appellant also submits that some of the recommendations were made after his minimum qualifying period had passed, and suggested that he therefore ought not to be required to comply with them. The Appellant referred to page 8 of the *Bulger* decision:

> While the Board agrees with the Minister's contention that the Appellant has not always been fully compliant with the various recommended treatment programs, the Board nonetheless finds that Appellant's failure to fully engage or pursue these programs was not always unreasonable. Compliance must be viewed in the context of Appellants' circumstances. Persons afflicted with fibromyalgia and experiencing the constant diffuse pain, lack of proper sleep, loss of energy, feelings of despair and associated depression cannot be expected to engage in treatment programs with the same enthusiasm, regularity and positive attitudes as persons recovering from fracture or a trauma injury. Another factor that cannot be overlooked is quite often the lack of publicly funded secondary health care facilities including pharmacotherapy.

[57] The Appellant further submits that as no one has suggested that he would be employable or able to engage in remunerative employment if he managed to lose weight – even if there were some relief of his symptomology -- his non-compliance ought to be an irrelevant consideration in determining whether he is disabled under the *Canada Pension Plan*, against the backdrop of his medical conditions.

[58] The Respondent submits that *Bulger* can be distinguished on the facts, in that unlike *Bulger*, the Appellant has not undertaken any efforts to comply with treatment recommendations that he exercise, lose weight, and change his diet. The Respondent submits that the lack of a dedicated effort to follow a treatment plan amounts to an

unreasonable refusal to accept treatment. The Respondent referred to the Appellant's testimony at the Review Tribunal, at paragraph 40 of the Review Tribunal decision, that his weight had been unchanged for the past two years and that he was starting a diabetic diet. (From the evidence before the Review Tribunal, it was difficult to determine what efforts, if any, the Appellant had undertaken in those two years to lose any weight.) At the same time, the Respondent submits that it would be premature to follow *Bulger* as the Appellant needs to firstly begin to follow the recommendations of his doctors.

[59] While the Review Tribunal cited *Minister of Human Resources Development v. Mulek* (September 13, 1996), CP 4719 (PAB), in holding that an appellant is obliged to make reasonable efforts to undertake and submit to programs and treatment recommended by treating and consulting physicians, the Review Tribunal also found that it was early yet to measure the efficacy of the treatment recommendations, as insufficient time had elapsed since the Appellant had received the recommendations.

[60] By that same logic, if it was premature for the Review Tribunal to have followed *Bulger*, as insufficient time had elapsed since the Appellant had received his physicians' recommendations, then so too, would it have been premature to apply *Mulek*. Sufficient time will have however elapsed by the time this matter of rehearing before the General Division, so it can determine then whether the Appellant has been compliant with treatment recommendations and if not, whether any non-compliance has been reasonable, taking into account the Appellant's personal circumstances.

[61] The General Division may wish to explore whether the Appellant's physicians considered the Appellant's personal circumstances when making their recommendations. However, I am of the view that the Appellant cannot escape from consistent and regular efforts at compliance over a reasonable period of time, by virtue of his medical issues. I am of the view also that he is required to pursue each of the recommendations, where they are practical, reasonable and any potential benefits outweigh any risks. And, while the Appellant may be intolerant of certain pain relief medication, it would seem reasonable to undergo trials of other pain relief medication or measures and see what his response to them might be. While the Appellant may reside in a remote community without cardiac

rehabilitation facilities, for instance, I would expect that he and his physicians would have explored what other treatment options might be available to him. I would also expect that, as the Appellant suggests, some of his physicians were unaware of his limitations and the availability of resources near him, that the Appellant would have brought these to their attention and explored other treatment options, with these limitations in mind.

[62] I am mindful that by the time of the rehearing of this matter, the Appellant might have vigorously pursued all of the treatment recommendations to date, and still have seen no appreciable results, and that his physicians might have provided additional recommendations close to the time of rehearing. If that should be the case, it would be appropriate to apply *Mulek* and *Bulger* in the case of the older recommendations. For new recommendations made close to the time of rehearing, it would be appropriate to consider the risks and benefits of these new recommendations (i.e. the reasonableness in following them), and the anticipated outcome and when they could expect to be attained, if at all. Would it be reasonable by that time for the Appellant to pursue them, if he has not already been responsive to other treatment recommendations?

[63] Finally, I reject the Appellant's submissions that he is excused from any non-compliance with treatment recommendations if no one suggests that he would be employable or able to able to engage in remunerative employment, and if they were made after his minimum qualifying period. As stated above, I am of the opinion that reasonable efforts have to be undertaken by the Appellant, particularly when those recommendations can be expected to lead to a more favourable prognosis in terms of his symptomology, functionality and overall capacity.

(c) Erroneous Findings of Fact

[64] The Appellant submits that the Review Tribunal based its decision on erroneous findings of fact that it made without regard for the material before it. The Appellant submits that the Review Tribunal erred in finding that:

a) His symptomology would improve and he would see improved function if he were to pursue all treatment options, including those made by the Review

Tribunal, when there was no evidence that he would necessarily respond to any treatment, and that he would be able to resume working again if he were to pursue all treatment options, when there was no evidence that he would be able to resume working again.

b) He was engaged in a grain farming occupation, when the evidence showed that his actual involvement in the operations was rather meagre. He submits that he was never actually involved in grain farming, as the land was rented or crop insurance was collected in the year that the land was unfit to be rented.

c) The farming enterprise was capable of providing substantial and gainful employment, when the evidence showed that the farm generated a loss for the years 2007 to 2011 and in the Applicant's submissions, therefore did not qualify as being substantially gainful employment.

[65] Given that this matter is being remitted for rehearing, it would be largely moot to address whether the Review Tribunal based its decision on erroneous findings of fact without consideration for the material before it. I will note however that it was implicit in the decision of the Review Tribunal that the Appellant could expect improvement in his symptoms. After all, it wrote, "…a significant improvement in symptoms **could** be expected" (my emphasis). On the other hand, the Review Tribunal also wrote that the Appellant "**may** succeed" (my emphasis) in losing weight. The General Division will need to clarify any findings it might make regarding the impact of any lifestyle changes which the Appellant might have pursued.

[66] I will leave the General Division to explore issues of treatment and compliance in greater detail with the Appellant. I anticipate that sufficient time will have elapsed by the time of rehearing, such that the General Division will be in a better place to determine whether the Appellant complied with or undertook reasonable efforts to comply with treatment recommendations, and what his response to those efforts might have been. The General Division presumably will also wish to determine whether, if efforts to comply have thus failed, if the Appellant and his physicians have explored other available options, what the likelihood of improvement might be, and when he might be able to expect to see positive

results, if any. Or, if there has been improvement, to what degree, and whether this has had any impact on his capacity.

[67] Presumably, the General Division will also wish to canvass the extent of the Appellant's involvement in his farm and trapping. On one hand, the Appellant submits that losses amount to roughly $4,600 from farming and that this therefore could not be substantially gainful, while the Respondent submits that total income of $14,000 could be considered substantially gainful. The Appellant also submits that the income derived from farming is from rent or crop insurance. The General Division may wish to clarify the nature of the farm operations, as the Appellant appears to differentiate it from a hay operation. The evidence as set out in the Review Tribunal decision may need to be clarified or reconciled.

[68] The 2011 Tax Return Summary suggests that the $14,000 in total income consists chiefly of pension, investment and RRSP income and in that regard, would not represent substantially gainful employment. It also includes the loss of roughly $4,600 from farming. Where self-employment is concerned, net earnings or losses can be taken into consideration, but they are by no means a measure of whether that self-employment – whether part-time or full-time -- qualifies as being substantially gainful employment, as the focus, in my view, ought to be on the Appellant's capacity in terms of his performance and productivity.

[69] So, while the Appellant may face limitations in being able to engage in perhaps the more physically demanding aspects of farming, are there other aspects in which he can participate? And if so, to what extent? Is it done regularly and for what duration? What has the Appellant done and what does he continue to do to earn the income from his farming and other enterprises? Why does the Appellant (alone?) declare the earnings or losses from his self-employment, if his spouse and son are also involved? I will leave the General Division to canvass these and other issues more fully with the Appellant, to determine if he can be found disabled as defined by the *Canada Pension Plan*.

CONCLUSION

[70] For the reasons stated above, the Appeal is allowed and the matter referred to the General Division. As one of the members of the Review Tribunal now sits with the General Division, it would be appropriate to have the matter heard by a different member of the General Division.

Janet Lew
Member, Appeal Division