Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *DW v Minister of Employment and Social Development*, 2021 SST 132

Tribunal File Number: AD-20-868

BETWEEN:

D. W.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: April 1, 2021

DECISION AND REASONS

DECISION

[1] I am dismissing the appeal. These reasons explain why.

OVERVIEW

[2] D. W. (Claimant) started receiving a *Canada Pension Plan* (CPP) retirement pension in October 2017. He applied for a CPP disability pension in November 2018. The Minister approved the disability pension application.

[3] As set out in the law, a claimant can be found to be disabled no more than 15 months before the Minister receives the disability application (I'll call that the "15-month rule").[1] The earliest the Claimant could be approved for the disability pension (based on this 15-month rule) was August 2017.

[4] The Claimant's CPP disability pension would have become payable in December 2017 (four months after the earliest date he could be approved).[2] The disability pension would have ended in February 2018 when the Claimant turned 65. A claimant cannot receive both a retirement pension and a disability pension at the same time. On August 1, 2019, the Claimant wrote that he did not want to cancel his CPP retirement pension or withdraw his disability application. The Minister made the decision to continue paying out the Claimant's retirement pension.

[5] On November 28, 2018, the Minister received a Declaration of Incapacity form completed by the Claimant's family doctor. The form stated that the Claimant had been continuously incapacitated since July 2010 because of chronic fatigue syndrome.[3]

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[1] *Canada Pension Plan*, s 42(2)(b).
[2] *Canada Pension Plan*, s 69.
[3] GD2-229.

[6] A claimant's eligibility for the disability pension can go back (further than the 15-month rule would normally allow) to a period when a claimant can show that they were incapable of forming an intention to apply.[4]

[7] The Minister concluded that the Claimant was not able to show that his situation fit into this exception to the 15-month rule. The Minister refused to find that the Claimant had been incapable, concluding that the Claimant's limitations would not have continuously prevented him from forming or expressing an intention to make an application at an earlier date.

[8] The Claimant appealed to this Tribunal and the General Division dismissed his appeal. I gave the Claimant permission to appeal that General Division decision.

[9] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA).

[10] The General Division did not make an error. I am dismissing the appeal.

PRELIMINARY MATTERS

[11] My role at the Appeal Division is to decide whether the General Division made any errors as they are described in the DESDA. That usually means that I need to consider only the same evidence that the General Division had when it made its decision. There are some exceptions to that rule (like hearing new evidence about any lack of fairness that might have happened at the General Division).[5]

[12] The Claimant provided some new evidence in support of his appeal.[6] But none of the exceptions to the rule applies to that evidence. I will not consider any of the new evidence that the Claimant provided at the Appeal Division level.

ISSUES

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[4] *Canada Pension Plan*, s 60.
[5] The Federal Court explained these ideas in cases like *Parchment v Canada (Attorney General)*, 2017 FC 354 and *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[6] AD04: a letter to his counsel at the GD level, references to news reports.

[13] The issues are:

1. Did the General Division made an error by failing to provide the Claimant with a fair process?

2. Did the General Division make an error of law by failing to apply the Federal Court of Appeal's decision in *Canada (Attorney General) v Danielson*[7]?

3. The General Division relied on seven parts of the medical evidence that failed to support a finding of incapacity. Did the General Division make an error of fact about any of that evidence?

4. The Claimant points to four other factual errors he says the General Division made. Did the General Division base its decision on any of those alleged factual errors?

ANALYSIS

Reviewing General Division decisions

[14] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether it made an error calling for a review. That review is based on the wording of the DESDA, which sets out the grounds of appeal. The three reasons for an appeal arise when the General Division fails to provide a fair process, makes an error of law, or makes an error of fact.[8]

[15] As a result, this decision focuses on the Claimant's arguments that allege errors in the General Division decision, rather than addressing in detail either:

- re-statements of the position the Claimant took about how the evidence ought to be weighed generally; or

[7] *Canada (Attorney General) v. Danielson*, 2008 FCA 78.
[8] DESDA, s 58(1).

- what overarching conclusions the General Division should have drawn from findings of fact more generally.[9]

[9] The Federal Court of Appeal has explained these concepts in *Cameron v Canada (Attorney General)*, 2018 FCA 100; and in *Garvey v Canada (Attorney General)*, 2018 FCA 118.

The General Division provided a fair process

[16] The General Division provided the Claimant with a fair process, so there is no error. The General Division did end the hearing, perhaps before the Claimant would have liked. However, the Claimant had a full and fair opportunity to make arguments on every fact or factor relevant to the case.

[17] I have reviewed the recording of the General Division hearing.[10] The Claimant had a lawyer representing him at the General Division level. Near the beginning of the hearing, the Claimant's lawyer asked and the General Division member agreed to allow the Claimant to read a statement.

[18] However, later in the hearing, it seems that the Claimant agreed not to read the full statement he prepared. The Claimant agreed instead to review his notes, and to "edit" and "summarize" the aspects of the statement that had not already been covered. The Claimant's lawyer did not object. At several points later during the Claimant's statement, the General Division member asked the Claimant whether he had anything further to say. It appears that each time, the Claimant reviewed his notes, and said more.

[19] The Claimant offered to provide more argument about medical consults he had, including a CT scan of his brain. The General Division member explained that he was focused on incapacity rather than whether the Claimant met the test for a severe disability. Then the General Division member explained what would happen next when the hearing was over. He said that if there was nothing further, the hearing was coming to a close. He said that he hoped the Claimant felt he had an opportunity to present his case.

[20] The Claimant argues that when the General Division member finished questioning him, the Claimant asked to read a statement he prepared in its entirety. He argues the General Division member did not allow him to do that. As a result, he states he was unable to represent fully his position after he gave his testimony. The Claimant argues that if the General Division had allowed him to give his full statement, the General Division may have decided some matters

[10] The Claimant's statement starts at about the 1:32:00 mark and continues until the General Division member closed the hearing (the end of the recording).

differently. The Claimant had more to say that he prepared in his statement, which was about his medical condition. He notes that his medical condition was directly connected to the key issue in the case – his capacity to form the intention to apply for the CPP disability benefit.

[21] The Minister argues that the General Division did not deny the Claimant the chance to explain fully his position in his personal statement. During the statement, the General Division member gave the Claimant space and prompted him to keep speaking. When the General Division member asked whether there was anything else the Claimant wanted to add, the Claimant said, "I'm almost done here." The General Division member interrupted only to answer the Claimant's question. The Claimant asked about whether he should testify more about some of the medical consults he had. The General Division member explained that the issue of incapacity was important.

[22] The Minister characterizes the General Division member's actions as fair and efficient, and notes that when he said, "if there's nothing further, we are going to call this hearing to a close" and that neither the Claimant nor his lawyer objected. And that after the General Division member said "I do hope that you feel you've had the opportunity to present your case to me today" he left a pause to confirm, and the Claimant said "thank you very much."

[23] What fairness requires in each case will depend on a variety of factors.[11] Part of the duty to act fairly is to allow for the right to be heard. The right to be heard is also about giving people the chance to make arguments on every fact or factor likely to affect the decision.[12] The Appeal Division has noted in another case that Tribunal members are "masters of their proceedings" and have latitude to hold their hearings in a way that balances "informality, speed, and fairness", which are requirements under the Social Security Tribunal's Regulations.[13]

[24] In my view, the General Division provided a fair process to the Claimant. The Claimant agreed to a process by which he would not read the entire statement. I am satisfied that the

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[11] The Supreme Court of Canada explained this in a case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817.
[12] The Federal Court explains this idea in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).
[13] The Appeal Division decision is *CS v Minister of Employment and Social Development*, 2020 SST 981, para 14. The Social Security Tribunal Regulations I refer to are section 2 and 3.

General Division did not have to allow the Claimant to make the full statement in order to provide him with a fair hearing. The Claimant had a lawyer. The lawyer had led the Claimant through his testimony. The lawyer made a closing argument. In that context especially, the General Division member was simply managing the time allotted for the hearing in a manner consistent with his obligations.

[25] The General Division member did gave the Claimant a chance to edit and summarize the whole statement as they initially agreed. The General Division member checked in more than once before closing the hearing. And while I can understand how the Claimant may have felt rushed, I am satisfied that the Claimant had the opportunity to raise every issue. Walking the General Division through additional evidence about his medical situation was not necessary in order to provide a fair process: the Claimant had a lawyer who had summarized the legal arguments based on the evidence – both the Claimant's testimony and the written record.

[26] I appreciate the Claimant's argument that further discussion of his medical circumstances was relevant to the question of his capacity; the two issues are linked. But the Claimant had a lawyer. The nature of the evidence the Claimant says he was going to discuss next was relevant, but his lawyer covered the arguments about incapacity to the General Division member's satisfaction. In my view, the Claimant had sufficient opportunity to make all the arguments about his capacity that would be likely to effect the decision by the time the General Division member closed the two-hour hearing.

The General Division followed the legal test from the Federal Court of Appeal's decision

[27] The General Division did not make an error of law by failing to follow the Federal Court of Appeal's decision in *Danielson*. That decision requires the General Division to consider both the Claimant's activities and the medical reports about the period he says he was incapable of forming or expressing an intention to apply for CPP.[14] I am satisfied that the General Division took that approach.

[28] In *Danielson*, the Federal Court of Appeal overturned the Pension Appeals Board's (PAB's) finding that the claimant lacked capacity to form the intention to apply for a disability

[14] *Canada (Attorney General) v. Danielson*, 2008 FCA 78, para 6.

pension. The Minister argued that the PAB failed to consider Danielson's activities during the alleged incapacity period, including: going to rehab; liquidating and consolidating assets; hiring and instructing a lawyer pursue insurance claims; seeking medical reports.

[29] Two of the three judges on the panel in *Danielson* agreed that the PAB failed to consider those activities and therefore made a legal error. The other judge wrote a brief dissenting opinion. That judge was not willing to infer that the PAB ignored the evidence about the activities because the medical reports described the activities and the PAB discussed the medical reports.

[30] The Claimant argues that his own activities during the period he claims he was incapable were different from Danielson's activities and are even more compelling evidence that he could not form or express the intention to apply for the disability pension. The Claimant also relies on the dissent in *Danielson*. He argues that the General Division did not consider the dissent in its decision.

[31] The Minister argues that the decision in *Danielson* requires the General Division to consider numerous activities during the period he was incapable, not just medical reports. The Minister argues that this is exactly the approach the General Division took to the Claimant's case and so there is no legal error.

[32] In my view, the General Division followed the legal test confirmed in the *Danielson* decision. The General Division considered both the Claimant's activities and his medical reports.[15] The General Division considered whether the Claimant showed that he had the capacity to form the intention to apply, which was also the correct analysis.

[33] The dissent in the *Danielson* case does not advance any argument for the Claimant here. The dissent is not a statement of current court-made law. The dissent decided only that the PAB did not ignore some evidence in the *Danielson* case. To the extent that the Claimant argues that the General Division should have analyzed his activities differently and come to a different

[15] General Division decision, paras 8-21.

conclusion about them, that is an error in applying the facts to settled law, which is not an error I can consider at the Appeal Division.[16]

The General Division made no factual errors in relation to the key evidence

[34] The General Division relied on seven parts of the medical evidence to decide that the Claimant was not incapable forming or expressing the intention to apply for a disability pension. The General Division made no error of fact about any of this key evidence. The General Division cited examples in one part of the decision that were all between 2013 and 2018.[17]

[35] The DESDA says that it is an error when the General Division "bases 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."[18] A mistake involving the facts has to be important enough that it could affect the outcome of the decision (that is called a "material" fact). The error needs to result from ignoring evidence, willfully going against the evidence, or from reasoning that is not guided by steady judgement.[19]

1. **In October 2013, Dr. Ritchie reported that the Claimant was in between jobs and that he was going through an ugly divorce.**

[36] The Claimant argues that the General Division should not have relied on this evidence because when his physician wrote this statement it was just reflective of his hope that he would return to work some day. As time passed, the Claimant came to terms with the fact that he was not going to improve. The Claimant argues that the General Division took the evidence about his divorce out of context, wrongfully implying that he was involved in divorce proceedings when

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[16] The Federal Court of Appeal explained this in *Garvey v Canada (Attorney General)*, 2018 FCA 118; and in *Cameron v Canada (Attorney General)*, 2018 FCA 100.
[17] General Division decision, para 20 contains the seven pieces of medical evidence the General Division relied on. The Claimant raised concerns at the Appeal Division about when the relevant period of alleged incapacity started. Regardless of whether it started when he says he was first bit by a tick, or later when he stopped working, the balance of the medical evidence the General Division relied on to reach its conclusion occurred after the Claimant stopped working.
[18] DESDA, s 58(1)(c).
[19] The Federal Court describe errors of fact that way in a case called *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

he was not. The Claimant says his mental incapacity has made impossible any further discussions about his divorce.

[37] In my view, the General Division did not make an error of fact. The Claimant is providing additional context for Dr. Ritchie's note. Even if the General Division misunderstood what the Claimant meant about being in between jobs when he saw Dr. Ritchie, it is not contested that the Claimant never felt well enough to return to work. The error, if there is one, is not material. The General Division was entitled to rely on the reference to an "ugly divorce", and I do not find that the General Division misunderstood this evidence. In my view, the General Division did not imply that the Claimant was in active divorce proceedings - the General Division noted in another part of the decision that the Claimant testified that he could not deal with his divorce.[20]

2. In March 2015, Dr. Taylor noted that the Claimant requested to have a longstanding inguinal hernia repaired. He reviewed the diagnosis and options for management with the Claimant and the Claimant signed a consent to have surgery.

[38] The Claimant argues that the General Division made an error of fact by assuming that he had a heavily involved discussion with Dr. Taylor, and deciding to have the surgery required a great deal of contemplation before consenting to the surgery. Faced with a massive hernia with danger of life threatening complications (like bursting), the Claimant argues that the consent required no thought. There was no actual decision or choice to make because there was no alternative to surgery.

[39] In my view, the General Division did not make an error of fact. The General Division's statement that the Claimant signed a consent for surgery does not involve the assumptions the Claimant sets out above. The General Division's reliance on consent to a surgery as being evidence of some capacity to make a decision is reasonable. This finding of fact is consistent with steady judgement; it is not perverse or capricious.

[20] General Division decision, para 18.

3. **In May 2015, Dr. Afifi, discussed treatment options for the Claimant's right ear basal cell carcinoma. The Claimant opted for surgical management.**

4. **In June 2015, Dr. Afifi reported that he and the Claimant agreed to opt for micrographic surgery. The Claimant was able to provide verbal and written treatment consent.**

[40] The Claimant argues that the General Division implies that opting for surgery requires great decision-making ability. He states that delaying surgery would inevitably have lead to a large hole through his ear (or possibly loss of his ear), or in rare circumstances spread of cancer. He says he had no choice so he gave consent. It required no thought or mental capacity.

[41] In my view, the General Division did not make an error of fact. Again, the General Division did not state that opting for surgery requires great decision-making ability, and I do not see a reason to infer that from the plain wording of the decision. I understand the General Division to conclude that consenting to surgery requires some capacity to make a decision. It is an example (in a list of seven items) that, taken together, show that the Claimant did not prove his case.

5. **In January 2016, the Claimant completed a pre-operative questionnaire independently. He indicated that he lived alone and had no concerns regarding his living arrangements. He also indicated that he did not require any community services following surgery.**

[42] The Claimant argues the General Division made an error by placing emphasis on the post-operative questionnaire because these questionnaires are very simple and require only ticking boxes in response to yes or no questions. The Claimant argues that he only stated he did not need post-operative care because he had already been living alone bed-ridden for several years dealing with excruciating pain in a semi-conscious state. He did not imagine that post-operative needs could have been any worse.

[43] In my view, the General Division did not make an error of fact. Again, a pre-operative questionnaire is evidence, on its face, of the Claimant answering questions and making decisions about his medical needs after surgery. This factor alone was not determinative: the General Division considered it among seven key parts of the medical evidence. It is not perverse or capricious to interpret a pre-operative questionnaire this way, even if the Claimant had been feeling unwell when he completed it.

6. In December 2016, the Claimant underwent a cardiac assessment. The Claimant was concerned about the possibility of coronary artery disease.

[44] The Claimant argues that this statement is not accurate. He says his concern was an actual soreness of the heart muscle as if the heart muscle itself was infected and inflamed. He says that this should not to be confused with chest pains that might be a result of clogged arteries. The Claimant explains that he had shortness of breath and that by the time he saw the cardiologist, the problems had largely dissipated.

[45] In my view, the General Division did not make an error of fact. Noting that the Claimant had a cardiac assessment is not perverse or capricious: the precise concern that led the Claimant to seek that assessment it not material. The point is that the Claimant underwent a medical test because he was concerned about a medical issue he was experiencing.

7. In April 2018, Dr. Wong reported that the Claimant typically went to the gym where he warmed up on a bike and then proceeded to do resistance training with weights. The Claimant had also reviewed his recent blood work and was concerned about his blood sugar levels. He wanted reassurance that he did not have diabetes and that he was not acidotic.

[46] The Claimant argues that the General Division made an error of fact by implying that he went to the gym regularly and performed some sort of robust workout. The Claimant argues that he testified that his attendance at the gym was intermittent and on days when he felt less sick. When he did go to the gym, he says the workout was not robust. The Claimant highlights the role that nausea and dizziness had in limiting his workouts, and argues that he stopped going to the gym shortly after July 2010 and started returning sporadically around the second half of 2016.

[47] In my view, the General Division did not make an error of fact. I cannot infer from the General Division's statements that the workouts were robust or that he completed them without symptoms or without difficulty. The Claimant's review of his blood work also shows a certain level of intention and decision-making ability that was relevant to the case.

None of the other alleged errors of fact are material

[48] The Claimant alleges the General Division made four other errors of fact. I find that none of those concerns are errors of fact because they are not material. This means that even if I corrected them as the Claimant would like, they would not change the outcome of the General Division decision.

1. When the Claimant learned about the CPP disability pension

[49] The General Division did not make an error about when the Claimant first knew about the disability pension.

[50] The General Division decision states:

> The Claimant testified that he was only first made aware of a CPP disability pension in 2017. That is when a Service Canada employee suggested that he could apply. A phone conversation between the Claimant and the Tribunal on May 24, 2019 corroborates this. The fact that a particular choice may not have suggested itself to the Claimant does not indicate a lack of capacity.[21]

[51] The Claimant argues that in his testimony, he said that he could not remember when he first became aware of the disability pension. As a result, the General Division made an error of fact by finding that he became aware of it in 2017.

[52] Maybe the General Division did not accurately restate the Claimant's testimony about when he first knew about the CPP disability pension. However, in the circumstances, the inaccuracy does not result in an error of fact because it is not important enough that it could impact the outcome of the decision. The General Division relied on multiple aspects of the

[21] General Division decision, para 12.

medical evidence and the evidence about the Claimant's activities to decide that he did not make out his case. The General Division considered not only the Claimant's testimony, but also a phone conversation he had with the Tribunal in 2019 about when he first learned about the disability pension.

[53] In light of the General Division's full analysis of the issues, the General Division's restatement of the Claimant's testimony, even if inaccurate, is not material and is therefore not an error of fact. As the Minister argues, the Claimant's unawareness about applying for CPP disability pension does not show incapacity.[22]

2. Claimant's testimony about weightlifting

[54] The General Division did not make an error of fact relating to its discussion of the words weightlifting and bodybuilding.

[55] The General Division discussed the issue like this:

> In 2015, 2017, and 2018 multiple independent specialists reported that the Claimant was a weightlifter and attended a local gym. In March 2015, Dr. Taylor reported that the Claimant liked to be in the gym quite a bit and was a weightlifter. The only reason he was not attending the gym was because of a knee injury. In 2017 and 2018, Dr. Wong reported that the Claimant was a bodybuilder and typically went to the gym where he warmed up on a bike and did resistance training. The Claimant denied that he was ever a weightlifter. He did attend a local gym off and on during the time period in question, but never consistently. I find it interesting though, that multiple specialists identified the Claimant's same routine at different points in time. Regardless, the Claimant was able to decide to drive himself to and from the gym and exercise there when he was able to. [23]

[56] The Claimant argues that the General Division made an error by referring to him as a weightlifter because he is not a weightlifter or a professional body builder but he lifts weights on resistance, meaning just that he goes to the gym. He says that he tried to clarify this in the hearing.

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[22] The Minister relies on *Maloshicky v Canada (Attorney General)*, 2018 FC 51; and also *Sedrak v Canada (Minister of Social Development)*, 2008 FCA 86.
[23] General Division decision, para 16.

[57] In my view, the General Division did not make an error of fact by using the terms "weightlifter" and "bodybuilder." The General Division hears and assesses the evidence. These terms are in the medical evidence the General Division reviewed. There is nothing that rises to the level of being perverse or capricious about the General Division's observations of the Claimant's ability to exercise. I do not infer from the term "bodybuilder" that the General Division meant that the Claimant was a professional. Even if the General Division should not have used these terms, I do not find the use of the terms to be material. The General Division noted that regardless of the details of the Claimant's exercise routine, he exercised and was able to get to and from the gym independently.

3. Finding that the Claimant was fired for non-medical reasons

[58] The General Division did not make an error of fact about why the Claimant stopped working.

[59] The General Division member described the circumstances surrounding the Claimant's reason for leaving work like this:

> When the Claimant's symptoms started, he was working for a large inspection and insurance company in a marketing and management role. His job was stressful and it required him to be mentally agile. After the tick bite he kept working, mainly from home, until he was fired on October 31, 2011. He was fired for non-medical reasons.
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> The Claimant submitted that his supervisor was hired in 2008. She was difficult to work with and fired most of the staff in the Claimant's department before he was fired. A co-worker even advised him shortly before being fired that the supervisor had it in for him.[24]

[60] The Claimant argues that the employer did not fire him, but that the company downsized because they had lost a large national client. Losing the client effected the bottom line. The Claimant argues that losing that client gave his employer a reason to dismiss (cost saving) and avoided what would have been a "lengthy and inevitable" disability leave.

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[24] General Division decision, paras 9 and 10.

[61] In my view, the General Division did not make an error as the key concept was that the Claimant's employment ended for "non-medical" reasons. I understand this to mean that evidence that the Claimant had to stop working for medical reasons may have been quite relevant to the question the General Division had to answer about the Claimant's capacity. The fact that the Claimant believes that the employer downsized him for medical reasons in the sense that they were trying avoid paying out a long-term disability leave in the future is not quite the same concept.

[62] I do not see how this alleged error could have an impact on the outcome of the decision about the Claimant's capacity.

4. Claimant's ability to "multi-task"

[63] The General Division did not make an error of fact relating to the Claimant's ability to multi-task.

[64] The General Division stated: **"**The Claimant described that he was very detail oriented and that he could easily multi-task before July 2010."[25]

[65] The Claimant takes issue with the General Division member referencing an inability to multi-task. The Claimant does not recall using that term in his evidence. It seems that the Claimant does not like this description. It minimizes the extent of the decline he experienced.

[66] In my view, the use of the term "multi-task" was simply an attempt to summarize one aspect of the cognitive decline the Claimant testified about. Even if multi-task was not a phrase that was ever used by the Claimant, the use of that term is not material given the other findings the General Division made about the Claimant's case.

[25] General Division decision, para 18.

CONCLUSION

[67] I am dismissing the appeal.

Kate Sellar
Member, Appeal Division

HEARD ON:	March 9, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. W., Appellant Jordan Fine and Olivia Gile, Representatives for the Respondent