Citation: *D. B. v. Minister of Employment and Social Development*, 2015 SSTAD 806

Appeal No. AD-15-112

BETWEEN:

**D. B.**

Applicant

and

**Minister of Employment and Social Development**
**(Formerly Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 25, 2015

## INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated November 7, 2014. The General Division determined that the Applicant was not eligible for an Old Age Security (OAS) pension, as it found that he did not establish sufficient Canadian residency, as defined under paragraph 21(1)(a) of the *Old Age Security Regulations*, during the relevant period.

[2] The Applicant filed an Application Requesting Leave to Appeal to the Appeal Division on March 5, 2015. Leave is sought on the grounds that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; made various errors of law whether or not the error appears on the face of the record; and based its decision on erroneous findings of fact that it made in a perverse and capricious manner. To succeed on this application, I must be satisfied that the appeal has a reasonable chance of success.

## BACKGROUND AND HISTORY OF PROCEEDINGS

[3] Some factual background is necessary, owing to the nature and length of the submissions of the Applicant.

[4] The Applicant filed an application for Old Age Security benefits on May 18, 2010 (Document GT1-, pages 12 to 15). The Respondent denied the application initially on October 4, 2010 (Document GT1, page 10) and upon reconsideration on October 21, 2011 (Document GT1, pages 3 to 4), on the basis that the Applicant had not established 20 years of Canadian residency after age 18. In or about November 2011, the Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). The appeal was placed on hold until February 27, 2012, when the Applicant decided he would no longer be pursuing an appeal pursuant to the *Canadian Charter of Rights and Freedoms.*

[5] On April 1, 2013, the appeal was transferred to the Social Security Tribunal of Canada. The Respondent filed a Notice of Readiness with the Social Security Tribunal in October 2013. The appeal was assigned to a General Division Member in July 2014.

[6] On July 9, 2014, the Social Security Tribunal wrote to the parties, advising that the General Division Member intended to proceed with a teleconference hearing, for the following reasons: "the complexity of the issue(s) under appeal; the fact that there might be inconsistencies in the evidence best addressed in a certain type of hearing; the cost-effectiveness and expediency of the hearing choice; and the require under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit". The Social Security Tribunal advised that the parties would have until August 24, 2014 to file any additional documents or submissions (the "Filing Period"), and the parties would have until September 23, 2014 to respond to any additional documents which might have been filed during the Filing Period. The letter also indicated that any documents not filed within the appropriate timelines might not be considered by the General Division Member in his decision. If documents were filed late, but before a decision was issued, they would be considered only at the General Division Member's discretion (Document GT0 of the hearing file).

[7] The letter of July 9, 2014 also provided details of the hearing. The letter highlighted certain instructions. The parties were to dial in to the teleconference at least ten minutes prior to the commencement of the hearing. After 15 minutes into the commencement of the hearing, the parties would be unable to connect and access the teleconference. The parties were provided with a toll-free telephone number. The Social Security Tribunal invited the parties to contact it within two business days of receiving the Notice of Hearing, if a party was unable to attend the teleconference hearing, or if a party had special needs that required accommodation. The Social Security Tribunal also asked to be advised if a party was to be accompanied by a witness, or if the services of an interpreter were required. Finally, the Social Security Tribunal advised that a party could request an adjournment of the hearing, provided that there were supporting reasons. The Social Security Tribunal also advised that any subsequent adjournment requests would not be granted unless there were exceptional circumstances.

[8] The letter of July 9, 2014 was delivered and service was effected on the Applicant on July 24, 2014.

[9] The Applicant made a telephone enquiry and requested a change in the form of hearing. The Social Security Tribunal responded and wrote to the Applicant on August 5, 2014, advising that it required a written request and supporting submissions for a change in the form of hearing, by no later than August 18, 2014 (Document GT03 of the hearing file).

[10] The Applicant responded by e-mail on August 17, 2014. He requested an in- person hearing in Toronto and appealed to the Chairperson of the Social Security Tribunal that any expenses related to travel to and accommodations in Toronto be reimbursed, so that he might be able to attend the in-person hearing in Toronto. He advised that he had special reasons: firstly, he was impecunious and lacked a sufficient credit rating and therefore was unable to meet the travel and living expenses on his own, and secondly, he had been unsuccessful thus far in obtaining records and securing witnesses, and felt that travelling from Las Vegas to Toronto would enable him to readily access the documents and to secure the cooperation of witnesses (Documents GT04, GT10 and GT13 of the hearing file).

[11] On August 27, 2014, the Respondent recommended that the appeal proceed in writing based on the current record (Document GT06 of the hearing file). On the same date, the Applicant wrote to the Social Security Tribunal by e-mail. Part of the e-mail was directed to the Respondent. The Applicant requested a list of all documents which he had filed to date, as well as those "adverse to [his] claims". He also requested the Respondent advise him as to which dates it accepted that he had resided in Canada and to advise what portion of this fulfilled any Old Age Security requirements (Documents GT07 and GT09 of the hearing file).

[12] On September 3, 2014, the Social Security Tribunal wrote to the parties, in response to the Applicant's request to change the format of the hearing. The Member decided to proceed by teleconference, for the reasons set out in the Notice of Hearing dated July 9, 2014, and because the Applicant then would not have to incur any expenses related to attending an in-person hearing in Canada. Delivery and service of this letter was effected on the Applicant on September 10, 2014 (Document GT08-A of the hearing file).

[13] On September 18, 2014, the Applicant wrote to the Respondent requesting its position regarding his claim for Old Age Security benefits, in order to narrow issues and arrive at some consensus. He also requested that the Respondent provide him with a copy of "the current record", as he advised that he did not have it. In fact, the Social Security Tribunal had already provided a copy of the "the current record", i.e. the hearing file that would be placed before the General Division, with the Notice of Hearing (Document GT09 of the hearing file).

[14] On September 20, 2014, the Applicant filed additional documents by e-mail. He again requested that the Respondent advise as to how many years of Canadian residency it considered he had attained, and what documents it had received (Document GT10 of the hearing file).

[15] On September 23, 2014, the Respondent filed a response to the Applicant's letter of August 27, 2014. The Respondent advised that the Applicant "ha[d] not provided any documents when he entered Canada or departed from Canada. As a result, the Respondent is unable to determine any periods of residence in Canada" (Document GT11 of the hearing file).

[16] On September 29, 2014, the Applicant provided further documents to the Social Security Tribunal by e-mail. The first document was a signed statement from G. B., confirming that the Applicant resided at his residence in Scarborough, Ontario until January 2002 and then in Revelstoke, British Columbia, until September 2002. The second document was a recent letter from a lawyer based in Tottenham, Ontario, in which he detailed his frequent dealings with the Applicant. The Applicant also advised in his letter that additional records were forthcoming which would show he was a Canadian resident to at least August 2006. He advised that he would be prepared to proceed to "trial" upon receiving this further evidence (Document GT13 of the hearing file).

[17] The Applicant sent two subsequent e-mails to the Social Security Tribunal on September 29, 2014, with additional records supporting his claim for Old Age Security benefits. They included various newspaper clippings; a letter dated November 2012 from Canada Revenue Agency, advising that it considered him a Canadian resident for income tax

purposes for the years 1978, 1979, 1980, 1981, 1984, 1985, 1986 and 2000; a letter from OD/Park Secondary School confirming that he was a student there from September 1961 to May 1964 and that he resided in Orillia, Ontario; various court documents including an affidavit of service for August 1995 and certificate of service on a P.O. Box address for June 1999; Canadian passports and birth certificate (Documents GT12 and GT14 of the hearing file).

[18] On October 2, 2014, the Applicant e-mailed the Social Security Tribunal, advising that he was unaware of the Respondent's position or "even the rules of the game we're playing" (Document GT17 of the hearing file).

[19] On October 3, 2014, the Applicant filed a letter from one of his former employees, in support of his claim (Document GT15 of the hearing file).

[20] On October 7, 2014, the Social Security Tribunal responded to the Applicant's correspondence of October 2, 2014, in which he had advised that he was unaware of the Respondent's position. A Manager with the Social Security Tribunal advised the Applicant that the Respondent was of the position that he had not established 20 years of residency in Canada in order to export his OAS pension abroad. The Manager also advised that the General Division Member would lead a preliminary discussion to ensure clarification of the issue under appeal, if necessary, "at the outset of the hearing on October 22, 2014". The Manager also advised that for further information regarding the appeal process, rules and regulations, the Applicant could access the website of the Social Security Tribunal, where its rules and regulations were posted (Document GT16 of the hearing file).

[21] The Applicant immediately responded to the Manager's letter by e-mail on October 7, 2014. The Applicant requested the General Division clarify the issues in advance of the hearing. He enquired as to what he was required to prove and what rules of evidence would govern. The Applicant also requested that the Social Security Tribunal have the Respondent disclose its argument and any documents it intended to produce at the hearing (Document GT17 of the hearing file).

[22] On October 9, 2014, the Social Security Tribunal wrote to the parties, advising that the General Division Member would be convening a pre-hearing conference "prior to commencing the hearing as scheduled in the Notice of Hearing dated July 9, 2014", and that it would address the matters raised in the Applicant's e-mails of October 2 and 7, 2014 during this pre- hearing conference. The General Division Member stressed that he would not convene a pre-hearing conference on another date and time. The General Division Member reminded the parties that the filing deadlines set out in the Notice of Hearing had passed. The General Division Member also invited the parties to give oral evidence and make oral submissions at the hearing (Document GT18 of the hearing file).

[23] On October 20, 2014, the Applicant submitted a request that rather than an oral hearing, the hearing of the appeal be held by instant messaging, as this would be more reliable than his wireless device; the "boiler room atmosphere" of an in-person hearing or teleconference would lead to "fogging of the brain"; he anticipated the Respondent to "game the system" and "try tricks"; and it would afford greater clarity and eliminate the need for any transcripts. He did not foresee any costs or prejudice to the parties (Document GT23 of the hearing file).

[24] The Applicant also wrote a separate letter to the Social Security Tribunal on this date, advising that he had exhausted his efforts at securing confirmation of his residency from the Morden, Manitoba Court Registry. He attached a copy of his e-mail setting out his request to the Registry (Document GT23 of the hearing file).

[25] On October 21, 2014, the Applicant sent three separate e-mails to the Social Security Tribunal. Some of the e-mails duplicated previous correspondence from the Applicant. In the first e-mail, the Applicant advised the Social Security Tribunal that he had been unable to have Ms. M. (his life-partner from 1969 to 1986) and Ms. T. agree to give evidence as to his residency. He attached a copy of the first page of the Notice of Hearing, which he had copied to Ms. M. (Document GT26 of the hearing file).

[26] In his second e-mail of October 21, 2014, the Applicant again wished to pursue having the hearing proceed by way of Instant Messenger. He implied that as hearings by

way of Instant Messenger or something similar was likely made available for the hearing impaired, it ought to be made available to him as well (Document GT25 of the hearing file).

[27] The Applicant's third e-mail attached a letter to the Social Security Tribunal, seeking a declaration in advance of the hearing whether any evidence submitted after August 24, 2014 would be declared admissible. He renewed his request to have the hearing heard by Instant Messenger (Document GT24 of hearing file).

[28] On October 21, 2014, the Respondent filed an Addendum to the Submissions of the Minister. The Respondent listed the additional documents which had been submitted by the Applicant. The Respondent presented its submissions as to why these additional documents ought to be rejected as necessarily representing residency. The Respondent also referred to provisions within the *Old Age Security Act* and the *Old Age Security Regulations*. The Respondent submitted that there was an insufficient and contradictory evidentiary foundation to establish sufficient residency for the Applicant (Document GT22 of the hearing file).

[29] The hearing of the appeal before the General Division proceeded by teleconference on October 22, 2014 as scheduled. (The General Division Member conducted the teleconference hearing from Western Canada.) The General Division Member wrote in his decision that, "no parties were in attendance after twenty minutes from the appointed start time of the hearing, as set out in the Notice of Hearing".

[30] On October 23, 2014, the Applicant notified the Social Security Tribunal that he was unwell and would be seeing a specialist. He advised that he would not be participating in "tomorrow's hearing" for various reasons, including that he had yet to prepare rebuttal submissions to the Respondent's Addendum of October 21, 2014; the General Division Member had yet to make a ruling on his request for a hearing to be heard by Instant Messenger; his wireless reception is spotty; and he felt that the Minister's position on his residency raised Charter considerations (Document GT27 of the hearing file).

[31] On October 24, 2014, the Applicant filed a draft reply to the Respondent's Addendum of October 21, 2014 (Documents GT29 and GT30 of the hearing file).

[32] On October 24, 2014, the Applicant wrote to the Social Security Tribunal advising that it was now "13.00hrs and [he had yet to receive] a call nor any E-advisory on this hearing" (Document GT31 of the hearing file).

[33] On October 25, 2014, the Applicant wrote to the Social Security Tribunal by e-mail, with a list of individuals who purportedly had knowledge of his residency in Canada (Document GT32 of the hearing file).

[34] On October 25, 2014, the Applicant wrote to the Social Security Tribunal by e-mail, with an Addendum to his reply to the Addendum to the Submissions of the Minister. He attached a copy of a list of Federal Court proceedings in which he or his companies were involved (Document GT33 of the hearing file).

[35] On October 31, 2014, the Applicant wrote to the Social Security Tribunal requesting an update as to the status of his appeal, as he had not been contacted by the General Division Member on October 24, 2014 (Document GT34 of the hearing file).

[36] On November 4, 2014, the Applicant re-visited his enquiry of October 21, 2014 as to whether the hearing could proceed by way of Instant Messenger or something similar to it, as he presumed that these forms of hearings were provided for the hearing impaired (Document GT35 of the hearing file).

[37] On November 7, 2014, the General Division Member issued his decision. The decision was sent to the parties on November 12, 2014. The Applicant continued to correspond with the Social Security Tribunal. On November 17, 2014, the Applicant again sought an update as to the status of the proceedings. He also included a letter dated September 29, 2014 from his former common-law spouse, which confirmed that she was unprepared to assist him.

[38] On November 27, 2014, the Applicant wrote further to the Social Security Tribunal. He wrote:

> … this matter was scheduled to be heard orally on October 24, 2014, with a pre-conference to immediately precede the hearing. For whatever reason, perhaps due

> to the shooting issue at Parliament Hill that day, the conference did not proceed. Notwithstanding several requests for updates, nothing from the Tribunal has been received.

[39] The Applicant requested the General Division Member obtain some resolution or to narrow the issues and failing that, schedule a settlement conference in advance of the hearing of his appeal. He also requested the General Division Member provide him with any written questions.

[40] On November 28, 2014, the Applicant wrote to the Social Security Tribunal again, advising that he did not have an address or any contact information. He requested the Social Security Tribunal deliver his letter addressed to the Respondent on his behalf. He advocated that the parties endeavor to resolve any outstanding issues by way of a settlement conference.

[41] On December 3, 2014, the Social Security Tribunal wrote to the Applicant advising that a decision had been issued by the General Division Member on November 7, 2014 and that as the decision was considered final, "the Tribunal Member [did] not have the authority to revisit [the] appeal". The Social Security Tribunal notified him that his recourse was to the Appeal Division of the Social Security Tribunal.

[42] The Applicant filed his leave to appeal application on March 5, 2015 (Document AD1 of the hearing file).

[43] On April 27 and 28, 2015, the Applicant advised the Social Security Tribunal that he was pursuing new evidence in support of his appeal (Document AD1A of the hearing file).

[44] On May 11, 2015, the Applicant wrote to the Social Security Tribunal confirming that he was continuing to pursue an in-person hearing. He provided additional records (Document AD1-B of the hearing file).

**SUBMISSIONS**

[45] The Applicant made extensive submissions, spanning 112 pages, some of which are duplicative. He submits that the General Division erred as follows:

a) Denied his request for a pre-hearing conference, well in advance of the hearing of the appeal before the General Division. He advises that the General Division offered to only be available half an hour prior to the hearing of the appeal;

b) Denied his request for an in-person hearing in Toronto, or for the hearing to be held by alternative means, such as "Instant Messenger". The Applicant explains that had there been an in-person hearing held in Toronto, this would have enabled him to "attend various locations in Toronto to obtain records that he had not been able to source …", he would avoid the considerable costs and poor reception involved in using his wireless device; he would not be subjected to either the "intense 'boiler room' pressure of hearings" or any potential "respondent sneak attack[s]". The Applicant also added that had there been an in-person hearing, he would have been able to produce more documentary evidence during the proceedings. The Applicant also submits that an in-person hearing was the best forum in which to address credibility, which apparently was an issue for the General Division Member. He submits that ultimately the General Division Member made perverse findings regarding his credibility;

c) Failed to notify him of the proper date for the hearing. He had understood that the hearing was scheduled for October 24, 2014. He did not learn of the hearing date of October 22, 2014, until December 4, 2014, after several weeks had passed;

d) Failed in its fiduciary duties to an unrepresented litigant to notify him "of any issues with his evidence" and to provide him with a reasonable opportunity to know and meet the case against him, until after he received the decision.

Additionally, the Applicant submits that the General Division neglected to notify him of any legal authorities it followed or considered;

e) Failed to provide him with an opportunity to participate in the proceedings. He submits that all federal facilities were under "lockdown" on October 22, 2014 and so he was led to believe that the hearing was cancelled as a result. Secondly, he submits that telephone communications were severed, thus rendering it impossible for him to participate in the teleconference. The Applicant wrote that the "phone line was disconnected 15 minutes BEFORE the hearing even began, this (*sic)* making it impossible for [him] to participate in the hearing";

f) Failed to contact either him or his witness, either during the course of the proceedings or subsequently. (Due to cost, he had requested the General Division "conference [him] into the hearing", i.e. that it contact him, rather than he contact the General Division). He alleges that the witness, a practicing lawyer, has known him personally and can "vouch" for his Canadian residency;

g) Failed in its duties to ask him any questions;

h) Was willfully blind and based its decision on erroneous findings of fact, without regard for the material before it. In particular, the Applicant submits that the General Division found that he must have acquired U.S. citizenship through five years of residency in the U.S., without giving any consideration to the fact that his parents, both U.S. citizens, had sponsored his U.S. citizenship. The Applicant submits that by finding him resident in the U.S. during these five years, the General Division concluded that the Applicant could not have been resident in Canada within that time;

i) Failed to fully consider all of the evidence before it;

j) Refused to exercise its jurisdiction and showed bias in favour of the Respondent, when it accepted the Respondent's evidence and submissions on

the day prior to the appeal, without providing the Applicant an opportunity to conduct any cross-examination on that evidence or to give any rebuttal to the submissions. The Applicant submits that the General Division should have either declared the submissions inadmissible or adjourned the proceedings to provide him with an opportunity to rebut the Respondent's submissions. The Applicant submits that the General Division was "obliged to deny the respondent evidence and severely rebuke the respondent for its sharp practice";

k) Used the wrong burden of proof. The Applicant submits that the General Division did not come to its decision on a balance of probabilities, as it rejected "irrefutable data" including income tax returns; letters signed under "penalty of perjury and from a practising lawyer"; news articles and other documentation which supported a finding that he had met the Canadian residency requirements; and,

l) Failed to adjourn the proceedings, despite being aware of the Applicant's "significant health issues". The Applicant submits that he had suffered a heart attack, was experiencing other health issues and was under a physician's care.

[46] The Applicant then addressed a number of issues concerning his Canadian residency and explained how and why he came to acquire U.S. citizenship.

[47] The Applicant also prepared an unsworn affidavit supporting his request for leave. He presented "new evidence" regarding his common-law marriage to Ms. A., his high school record, investments in Ontario and evidence of U.S. employment and social security statement.

[48] The Applicant further requested that the hearing of an appeal be held in person in Toronto and that witnesses be subpoenaed.

[49] The Applicant made further submissions on April 27, 2015. He attached a response from the Toronto Public Library regarding historical phone records. He advised that he was

pursuing new evidence including an Ontario driver's licence history, telephone book records and WRT driver's licence,

[50] The Applicant advised in his e-mail of April 27, 2015 that he is in the process of preparing a motion to Federal Court for a court Order setting aside the decision of the General Division, on the basis of "failure to appear due to inadvertence", pursuant to Federal Court Rule 399.

[51] On May 12, 2015, the Applicant reiterated his request for an in-person hearing. He provided a copy of his Ontario driver's licence history.

[52] The Respondent has not filed any written submissions.

**ANALYSIS**

[53] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an application has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[54] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[55] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

**(a) Request for pre-hearing conference**

[56] The Applicant submits that the General Division denied his request for a pre-hearing conference ahead of the actual hearing of his appeal, and instead, offered to be available only half an hour prior to the hearing of the appeal.

[57] Section 15 of the *Social Security Tribunal Regulations* governs pre-hearing conferences. The section reads:

> 15.(1) the Tribunal may, on its own initiative or if a request is filed by a party, request the parties to participate in a pre-hearing conference on any matter concerning an appeal or an application to rescind or amend a decision.
>
> (2) A pre-hearing conference may be held by teleconference, videoconference, and other means of telecommunication or the personal appearance of the parties.

[58] The Applicant alleges that he requested that the pre-hearing conference be held in advance of the hearing on October 22, 2014. He alleges that a refusal to conduct a pre-hearing conference before October 22, 2014 denied him the opportunity to learn of the case that he needed to address.

[59] The Applicant did not make any formal requests for a pre-hearing conference. In fact, the pre-hearing conference was initiated by the General Division Member. The Social Security Tribunal communicated to the parties on October 9, 2014 that the General Division Member would convene a pre-hearing conference to address the matters raised in the Applicant's e-mail of October 2 and 7, 2014. Those issues concerned the Applicant's understanding of the Respondent's position vis-à-vis his application for Old Age Security benefits and what rules would apply during the course of the hearing.

[60] In fact, the Social Security Tribunal had already directed the Applicant to its website which provides some information about the hearing process. Otherwise, there were no strict rules of procedure governing the conduct of hearings, nor even any strict adherence

to the general rules of evidence. Generally, it is for the General Division Member to determine how to conduct proceedings before him or her. Indeed, subsection 3(1) of the *Social Security Tribunal Regulations* requires the Tribunal to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[61] The Applicant also sought the Respondent's position. The Respondent was under no obligation to provide any written submissions (though it is of decided benefit to the parties and to the General Division Member), but it had previously provided an Explanation of the decision under appeal to the Review Tribunal in June 2012 (Document GT-1, pages GT1-87 to GT1-91 of the hearing file), and in response to the additional records filed by the Applicant, prepared an Addendum to the Submissions of the Minister on October 21, 2014 (Document GT22). While the Addendum to the Submissions may have arrived the day before the scheduled hearing, they were in response to the records which the Applicant had recently filed with the Social Security Tribunal.

[62] The need for any pre-hearing conference for the reasons set out likely was rendered moot, in light of the Respondent's Addendum to the Submissions, and the advice provided by the Social Security Tribunal to the Applicant as to where he could locate information about the hearing process. Apart from a request on October 20, 2014 for the hearing to proceed by way of Instant Messenger, the Applicant did not raise any other outstanding issues.

[63] Although there is no entitlement as of right to a pre-hearing conference under the DESDA or the *Social Security Tribunal Regulations*, it cannot be said that the General Division denied the Applicant a pre-hearing conference. The General Division offered a pre-hearing conference to address or resolve some of the issues between the parties. The fact that the Applicant failed to attend the pre-hearing teleconference scheduled for October 22, 2014 cannot thereby be interpreted as a denial to a pre-hearing conference. Had he attended the pre-hearing conference on October 22, 2014 and determined that, for whatever reason, he required additional time to prepare for the hearing of the appeal after all, he could have sought an adjournment of the hearing at that time.

[64] I am not satisfied that the appeal has a reasonable chance of success on this ground.

### (b) Form of hearing

[65] The Applicant advises that he had requested an in-person hearing in Toronto, and subsequently, for the hearing to be held by alternative means, such as by "Instant Messenger", as it would have enabled him to obtain records in Toronto and secure the cooperation of witnesses; there were technical and costs issues associated with using his wireless device; and he otherwise would not be afforded a fair hearing, as he could be subject to intense "boiler room" pressure and the Respondent could launch a "sneak attack" against him.

#### i. Request for in-person hearing in Toronto

[66] The General Division Member considered and decided on the form of hearing. His reasons were set out in the Notice of Hearing of July 9, 2014. Within weeks of receiving the Notice of Hearing, the Applicant requested a change in the form of hearing and also queried whether he could be reimbursed his travel expenses. The Respondent requested that the hearing proceed on the written record.

[67] On September 3, 2014, the General Division Member wrote to the parties, in response to the Applicant's request to change the format of the hearing. The Member decided to proceed by teleconference, for the reasons set out in the Notice of Hearing dated July 9, 2014. The General Division Member addressed the Applicant's request for reimbursement of travel expenses. As the hearing would be proceeding by teleconference, the Applicant would not be required to incur expenses related to attending an in-person hearing in Canada.

[68] The Applicant subsequently withdrew his request for an in-person hearing, preferring to proceed instead by way of instant messaging. I will nonetheless consider this ground of appeal, as I have determined below that instant messaging was unavailable for the hearing before the General Division.

[69] An order regarding the form of hearing is a discretionary one that falls within the jurisdiction of the General Division. There is no dispute that the General Division is entitled to make these types of decisions.

[70] The Federal Court of Appeal has recently confirmed that to set aside a discretionary order, an appellant must prove that the decision-maker committed a palpable and overriding error: *Imperial Manufacturing Group Inc. and Home Depot of Canada Inc. v. Décor Grates Incorporated*, 2015 FCA 100; *Horseman v. Twinn, Electoral Officer for Horse Lake First Nation,* 2015 FCA 122; and *Budlakoti v. Canada (Citizenship and Immigration),* 2015 FCA 139.

[71] In *Budlakoti*, the Federal Court of Appeal referred to *Canada v. South Yukon Forest Corporation,*2012 FCA 165 (CanLII), 431 N.R. 286, where Stratas J.A. defined palpable and overriding error as one exacting a high standard:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[72] The Applicant submits that the decision to deny him an in-person hearing is rife with errors. In applying the concept of palpable and overriding error, I will make some general observations regarding the Applicant's request for an in-person hearing in Toronto.

[73] The Applicant's submissions for an in-person hearing overlook three significant considerations: that he requested a hearing take place in a Canadian city that was not the closest to him; he would have had to travel from Las Vegas to Toronto to attend any in-person hearing; and he expected the Social Security Tribunal to reimburse him for his travel and accommodations.

[74] The Applicant submits that had there been an in-person hearing in Toronto, he would have been able to travel to Toronto to obtain records and secure the cooperation of witnesses. While the Applicant was prepared to overlook any inconvenience to him, he would have had to bear significant costs for travel and accommodations. Had he been

prepared to bear those costs, that might have been a consideration in determining the form of hearing, but as it was, the Applicant wanted the Social Security Tribunal to bear those costs. While there are provisions within the DESDA to allow the Chairperson "in any particular case for special reasons" to reimburse any party required to attend a hearing for travel or living expenses, there is no entitlement to reimbursement as of right, nor are any applications for reimbursement rubber-stamped. The primary point to bear in mind is that section 63 of the DESDA contemplates that the party is required to attend a hearing, whereas, here, that requirement had not arisen and it was only the Applicant's own request for an in-person hearing that would have led him to undertake any travel to Toronto.

[75] Even had the General Division concluded that an in-person hearing was appropriate, it would have scheduled the hearing for a place closest to where the Applicant currently resides. This would have necessarily excluded Toronto as a consideration and this would not have met the Applicant's underlying motivation to obtain documents and secure witnesses.

[76] There are a number of factors which the General Division considers in determining the form of hearing. One factor alone is not determinative of what form the hearing should take.

[77] The DESDA and *Regulations* provide some guidance. Section 2 the *Social Security Tribunal Regulations* requires that the *Regulations* be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications, while subsection 3(1) of the *Regulations* requires the Social Security Tribunal to conduct proceedings as "informally and quickly as the circumstances and the consideration of fairness and natural justice permit".

[78] It goes without saying that one of the factors the General Division naturally considers is an applicant's current residency. For instance, where an in-person hearing is granted, generally the applicant resides in or close to the region in which the in-person hearing is scheduled to take place, as this is convenient and less costly for an applicant. For instance, it would be nonsensical to schedule a hearing in Halifax, Nova Scotia, for an applicant who resides in Victoria, British Columbia, as he would have to unnecessarily incur

costs which he would not have to bear were the hearing held in Victoria, or some nearby location.

[79] In instances where videoconference hearings are granted, one of the factors the General Division considers is whether videoconferencing facilities are available in the area where the applicant resides. This again takes into account convenience and cost for the applicant.

[80] Other factors which the General Division might consider in determining the form of hearing include, but are not limited to: the information in the hearing file; the number of parties; whether any of the parties are represented; whether a party requires an interpreter; the complexity of the issues; whether travel and accommodations are required; the availability of hearing space or videoconferencing resources; whether inconsistencies in the evidence is best addressed in a certain type of hearing; and the cost- effectiveness and expediency of the hearing choice. Some of these factors may carry more weight in some cases, while in other cases, may not merit any consideration.

[81] I turn now to the Applicant's specific grounds for appeal on this issue:

a) The Applicant alleges that had there been an in-person hearing in Toronto, he would have been able to obtain records and secure witnesses. While the Applicant faced financial constraints, it cannot be said that a teleconference (or other form of hearing) would have precluded the Applicant from obtaining records and endeavouring to secure the cooperation of witnesses based in Toronto;

b) The Applicant alleges that an in-person hearing would allow him to avoid the considerable costs and poor reception of his wireless device. The Applicant was not restricted to using his wireless device. A toll-free number had been provided to the parties, so the Applicant could very well have used another telephone or other wireless device, without having to face significant costs or poor reception;

c) He could avoid the "intense 'boiler room' pressure of hearings" or any potential "respondent sneak attack[s]". Generally, all types of hearings bring with them a certain level of stress. That is an unavoidable byproduct of hearings, particularly for parties unfamiliar with the process, but I do not think that an in-person hearing would have alleviated this stress. Rather, a teleconference hearing in which the Applicant could have chosen his own setting from which he made the teleconference call could have alleviated some of that stress. As for Respondent "sneak attack[s]", I am somewhat unclear what is meant by this. Generally, the Respondent prepares and delivers its submissions to all other parties and to the Social Security Tribunal in advance of the hearing, though in this case, it delivered an addendum to its submissions somewhat late, through no fault of its own. If the Applicant refers to any new records, submissions or case law which the Respondent might raise during the hearing, it likely could be in response to anything that might arise during the hearing. The remedy in that case might be to seek a short recess or adjournment, to enable the party to respond to any new evidence, submissions or case law;

d) Had there been an in-person hearing, he would have been able to produce more documentary evidence during the proceedings. This presupposes that the Respondent would not have objected to the late production of any records, that the General Division Member necessarily would have admitted those records into evidence, and that even if the records were admitted into evidence, that they would have carried some weight. The Filing Period had long passed. In any event, the Applicant continued to attempt to file records with the Social Security Tribunal after the hearing had taken place. There is no indication that any records filed shortly after the hearing date had any probative value such that they could have had any effect on the outcome of the proceedings; and

e) An in-person hearing would have been the best forum in which the General Division could assess his demeanour and credibility. That may well be so, but

> it would be but one factor for the consideration of the General Division Member and indeed, the Notice of Hearing indicates that the General Division Member was mindful of this factor. This factor alone is not determinative.

[82] These submissions do not rise to the standard of being palpable and overriding. I am not satisfied that the appeal has a reasonable chance of success on this ground.

#### ii. Request for instant messaging

[83] Section 21 of the *Social Security Tribunal Regulations* provides the General Division with the opportunity to hold the hearings by way of written questions and answers, teleconference or other means of telecommunication, or by the personal appearance of the parties. There is no entitlement to an in-person hearing or for hearings to proceed in any alternative manner, other than that provided by the legislation. Instant messaging does not fall into any of the specific categories or modes of hearing by which the General Division can conduct a hearing, nor is it specifically contemplated nor provided for in the legislation. It seems that, apart from the option of hearing by way of written questions and answers, the legislation contemplated that there be some verbal contact between the General Division Member and the parties during the course of the proceedings.

### (c) Notification of hearing date

[84] The Applicant submits that the General Division (in fact, the Social Security Tribunal) failed to provide him with sufficient notice of the hearing date. He had been of the understanding that the hearing was scheduled to proceed on October 24, 2014, and only learned of the hearing date of October 22, 2014, on December 4, 2014.

[85] It is unclear how the Applicant came to the understanding that the hearing of the appeal was on October 24, 2014, as a review of the hearing file indicates that there was correspondence and communications with the Applicant notifying him of the date of the hearing as being October 22, 2014. The Social Security Tribunal delivered a Notice of Hearing by letter dated July 9, 2014 to the Applicant. There is proof of service of the Notice

of Hearing. Canada Post's Proof of Service indicates that the Notice of Hearing was delivered and service was thereby effected on the Applicant on July 24, 2014.

[86] The Notice of Hearing clearly set out the date and time of the teleconference hearing. The Notice stated:

> Please refer to the table below for the date and time of the teleconference hearing.
>
> **Date: October 22, 2014**
> **Time: 10:00 AM Pacific Time**
> **Teleconference Number: X**
> **Teleconference ID: X**
> **Teleconference Security Code: X**
> **Approximate duration: 90mins**

[87] The letter clearly states that the hearing was scheduled for October 22, 2014 at 10:00 a.m. Pacific time.

[88] The Social Security Tribunal wrote to the Applicant on October 7, 2014 and referred to the hearing on October 22, 2014 (Document GT16). The letter stated:

- *Further to your email inquiry of October 2, 2014, please note the following:*

  a) *You have appealed the Respondent's decision dated October 21, 2011. In that decision, the Respondent took the position that you did not establish 20 years of residence in Canada in order to export your OAS pension abroad. At the outset of the hearing on* ***October 22, 2014*** *the Tribunal Member will lead a preliminary discussion to ensure clarification of the issue under appeal, if required.* (My emphasis)

[89] The Applicant responded to the Social Security Tribunal on October 7, 2014. The text of the Applicant's letter included the Social Security Tribunal's reference to the scheduled hearing date of October 22, 2014 (Document GT17).

[90] Apart from the exchange of correspondence between the Social Security Tribunal and the Applicant on October 7, 2014, I have no doubt that the Applicant had a copy of and was fully aware of the hearing date. For one, he attached a copy of the Notice of Hearing in

his correspondence to a third party (Document GT23 of the hearing file) and more tellingly, he confirmed the hearing date of October 22, 2014 in his correspondence with the Social Security Tribunal on October 21, 2014 (Document GT27 of the hearing file). He wrote that he "cannot and will not participate in tomorrow's hearing". And, despite alleging that he had no knowledge of and therefore could not have participated in the hearing on October 22, 2014, advised in the course of his written leave submissions that the telephone line was disconnected 15 minutes prior to the commencement of the hearing. He could not have known about any severed communications or a disconnected telephone line on the day of the hearing, had he not attempted to participate in the hearing on October 22, 2014.

[91] I query how the Applicant can posit that he was unaware of the hearing scheduled for October 22, 2014, when even in his own communications, he referenced a scheduled hearing date for October 22, 2014. I do not see anywhere in any of the communications between the Applicant and the Social Security Tribunal (or the Respondent for that matter) that the hearing was scheduled for any date other than October 22, 2014, or that it had been rescheduled to October 24, 2014.

[92] If the Applicant somehow mistakenly confused October 24, 2014 with October 22, 2014 -- sometime between his e-mail of October 21, 2014 and October 22, 2014 -- that error cannot be visited upon the General Division (or the Social Security Tribunal for that matter). This does not speak to an error or failing committed by the General Division.

[93] I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(d) Opportunity to know case**

[94] The Applicant submits that the General Division failed in its fiduciary duties to an unrepresented appellant to provide him with a reasonable opportunity to know and meet the case against him, until after he received the decision. Additionally, the Applicant submits that the General Division neglected to notify him of any legal authorities it followed or considered.

[95] What the Applicant is seeking, in essence, is to know the Respondent's case against him. It cannot be said that the Applicant was unaware of the Respondent's case or its

position, as it was communicated to him on at least four, and possibly five, separate occasions:

(1) February 10, 2011 - following the initial denial in October 2010, letter from the Respondent to the Applicant (GT1-34);

(2) March 22, 2011 – letter from the Respondent to the Applicant, in response to the Applicant's request for a reconsideration (GT1-22 to GT1-24);

(3) letter dated October 21, 2011 with summary of decision (GT1-03 and GT1-16);

(4) in the HRSDC Explanation of the Old Age Security (OAS) Decision under appeal to the Review Tribunal, dated June 5, 2012 (GT1-87 to 91); and finally; and

(5) in the Addendum to the submissions, filed October 21, 2014 (Document GT22 of hearing file). It is unclear how and when the Social Security Tribunal delivered a copy of the Addendum to the Applicant, but the Applicant's correspondence of October 23, 2014 indicates that he received the Respondent's submissions on October 22, 2014 (Document GT27).

[96] While undoubtedly the Applicant disputed the Respondent's position, it was clearly communicated to him. Other than the Addendum, the Applicant had the Respondent's position very early on. As noted above, given that the Addendum responded to records which the Applicant had filed as recently as October 2014, it was not unreasonable for the Respondent to have filed the Addendum so close to the date of the scheduled hearing.

[97] There is no obligation on a decision-maker or the General Division Member to give notice to the parties of the legal authorities which he might reference and which might prove to be persuasive of the ultimate outcome.

### (e) Opportunity to participate in proceedings

[98] The Applicant submits that the General Division failed to provide him with an opportunity to participate in the proceedings, as he had been led to believe that the hearing was cancelled, due to shootings on Parliament Hill on October 22, 2014. He also alleges that telephone communications were severed, thus rendering it impossible for him to participate in the teleconference. He also alleges that the "phone line was disconnected 15 minutes BEFORE the hearing even began, this (*sic*) making it impossible for [him] to participate in the hearing".

[99] This appears to contradict and undermine the Applicant's submissions that he had understood the hearings to be on October 24, 2014, rather than on October 22, 2014. On the one hand, the Applicant says that he was unaware of the proceedings on October 22, 2014, yet in the next instance, says that telephone communications were severed. As noted above, the Applicant could not have known about any severed communications or a disconnected telephone line on the day of the hearing (had that actually been the case), had he been unaware of the hearing on October 22, 2014.

[100] Momentarily setting aside his previous submissions that he was unaware of the date of hearing, there is no evidence that the shootings on Parliament Hill on October 22, 2014 resulted in a full-scale, nation-wide lockdown of facilities or that it impacted telecommunications, such as to lend any credibility to the Applicant's alleged belief that the hearing was cancelled.

[101] The decision of the General Division indicates that the Member not only waited a reasonable length of time after the pre-hearing and hearing were scheduled to commence before proceeding with the hearing to determine whether any of the parties would be participating, but also deliberated over the issue as to whether it should proceed in the absence of the parties. Subsection 12(1) of the *Social Security Tribunal Regulations* permits the Social Security Tribunal to proceed in the party's absence if it is satisfied that the party received notice of the hearing, if that party fails to appear at the hearing.

[102] I note that, notwithstanding the provisions under subsection 12(1) of the *Regulations*, the General Division Member also considered whether, on its own motion, an adjournment was justifiable. Ultimately the General Division Member concluded that the explanation provided by the Applicant did not justify an adjournment of the proceedings. There was no obligation or duty on the General Division to unilaterally determine whether to order an adjournment of the hearing, but in considering whether to do so, on its own motion, demonstrated that the General Division went beyond what it was required to do.

[103] The Applicant was not limited to making oral submissions. Indeed, he availed himself of the opportunity to communicate with the Social Security Tribunal and to file additional records well after August 24, 2014, the Filing Period established in the Notice of Hearing.

[104] I find no credence to these submissions that the General Division did not provide the Applicant with an opportunity to participate in the proceedings. The Social Security Tribunal notified him of the hearing and the General Division Member waited a reasonable period of time after the pre-hearing and hearing were scheduled to commence, before proceeding. I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(f) Failure to contact Applicant and witnesses**

[105] The Applicant alleges that the General Division failed to either contact him or one of his witnesses, either during the course of the proceedings or subsequently.

[106] The Notice of Hearing stipulated that the Applicant was to "dial-in to the teleconference from [his] own personal telephone". Notwithstanding the Applicant's request that the General Division Member contact him, it is clear that the General Division Member contemplated that the Applicant would contact and join in the teleconference hearing.

[107] The Notice of Hearing also stipulated that, "If you will be accompanied by a witness, or if you require the services of an interpreter, please advise us without delay".

[108] There is no indication in the hearing file that the Applicant had notified the Social Security Tribunal of his intention to call any witnesses for the hearing. While the Applicant advised the Social Security Tribunal of his desire to secure witnesses, there is no specific notification that he in fact had any witnesses who would be attending the hearing. In his e-mail of August 17, 2014, he advised that he had been unsuccessful thus far in securing the attendance of any witnesses. Some of his correspondence to the Social Security Tribunal attached witness statements or letters, but there is no indication that they would be giving evidence at a hearing, nor was there any request by the Respondent that they be produced for the purposes of cross-examination. For instance, in the e-mail sent on September 29, 2014, which attached the statements of G. B. and a lawyer, there is no hint that they would be called upon to give evidence. Similarly, there was no indication in the Applicant's e-mail of October 3, 2014, that his former employee was expected to give evidence at the hearing. Finally, in one of his e-mails of October 21, 2014, the Applicant confirmed that neither Ms. T. nor Ms. M. was prepared to give any evidence.

[109] Hence, having been unaware of the possibility of any witnesses, it cannot be said that the General Division failed to make any accommodations for any witnesses. There was no suggestion that the General Division would be contacting the Applicant or any witnesses, as part of the hearing. As such, I am not satisfied that the appeal has a reasonable chance of success under this ground.

**(g) Duty to ask questions**

[110] The Applicant submits that the General Division failed in its duty to ask questions of him prior to or during the course of proceedings. The Applicant suggests that had the General Division posed questions of him, it would have elicited evidence that could have been overall favourable to his claim for Old Age Security benefits.

[111] Neither the DESDA nor the *Regulations* impose any duty on the General Division to put questions to a party or his witnesses, but as the Supreme Court of Canada has pointed out in *Brouillard also known as Chatel v. The Queen*, [1985] 1 SCR 39, that while it remains a discretionary matter for a decision-maker to examine a witness, generally there is a duty upon him to put questions to a witness in order to clarify or resolve possible

misunderstandings. Lamer J. (as he then was) cited *R. v. Darlyn* (1946), 88 C.C.C. 269 with approval. He wrote:

> Finally, I cite with approval the judgment to which the respondent Crown referred us in *R. v. Darlyn* (1946), 88 C.C.C. 269, where Bird J.A. wrote the following on behalf of the British Columbia Court of Appeal (at p. 277):
>
> > The nature and extent of a Judge's participation in the examination of a witness is no doubt a matter within his discretion, a discretion which must be exercised judicially. I conceive it to be the function of the Judge to keep the scales of justice in even balance between the Crown and the accused. There can be no doubt in my opinion that a Judge has not only the right, but also the duty to put questions to a witness in order to clarify an obscure answer or to resolve possible misunderstanding of any question by a witness, even to remedy an omission of counsel, by putting questions which the Judge thinks ought to have been asked in order to bring out or explain relevant matters.
>
> In short, everyone agrees that a judge has a right and, where necessary, a duty to ask questions, but also that there are certain definite limits on this right.

[112] These two decisions were in the criminal context, but two general principles remain applicable: the decision-maker has the discretion to intervene and a general duty to intervene in order to clarify an obscure answer or to resolve possible misunderstanding to explain relevant matters. The decision-maker has a duty to intervene not only to the extent of seeking clarification or resolving possible misunderstandings, but also to the extent that he can then make findings and draw conclusions on those findings.

[113] Had the General Division Member required clarification or had incomplete information on any issues, it could have posed questions of the parties. As it was, there was an extensive documentary record to enable him to make findings and ultimately come to a determination as to the Applicant’s eligibility for Old Age Security benefits.

[114] It would have been going well beyond the Member’s duty and would have been highly irregular and inappropriate had the General Division stepped into the role of counsel for any of the parties and conducted a comprehensive examination (or cross- examination) to make or defend against a party’s case.

[115] I am not satisfied the appeal has a reasonable chance of success under this ground.

### (h) Erroneous findings of fact

[116] The Applicant submits that the General Division based its decision on erroneous findings of fact, without regard for the material before it. In particular, the Applicant submits that the General Division found that he had failed to consider that he could have acquired U.S. citizenship through parental sponsorship. He submits that the General Division instead inferred that he must have acquired U.S. citizenship after five years of residency in the U.S.

[117] The Respondent had made written submissions that, according to a U.S. government website, one may qualify for U.S. citizenship if he or she has been a permanent resident of the U.S. for at least five (5) years. The Respondent submitted that, as the Applicant had attained U.S. citizenship in 1992, he must not have been ordinarily resident in Canada from 1987 at least. In rebuttal, the Applicant submitted that, contrary to the Respondent's submissions, he had been sponsored by his mother and was required to reside outside the U.S. The Applicant also submitted that he obtained U.S. citizenship because dual Canada-U.S. citizenship furthered his business interests.

[118] The General Division was aware of and noted the submissions of both parties regarding the Applicant's U.S. citizenship, but it did not make any particular findings about how the Applicant might have acquired U.S. citizenship, nor did it make any specific findings tying any U.S. residency to U.S. citizenship. I note also that while there were submissions indicating parental sponsorship, there was no documentary evidence of parental sponsorship before the General Division. As the General Division did not make any particular findings on this point, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[119] The Applicant further submits that the General Division based its decision on erroneous findings of fact, namely, that he and his witnesses were "lying to the extent that his evidence was not acceptable" and "lying when they claimed that he resided in Canada and the specific times they claimed". In fact, the General Division never went as far as the Applicant suggests. The General Division assigned little weight to the Applicant's

statements regarding his residence history as it found them to be "incomplete, inconsistent and inaccurate, which cast doubt on the reliability of his statements generally" (at paragraph 69 of its decision). At paragraph 70 of its decision, the General Division also noted that in December 2010, the Applicant acknowledged that the account of his residency is "unreliable".

[120] The General Division made certain findings of credibility based in part on objective considerations such as inconsistencies. It was well within the purview of the General Division to make such findings, based on the material before it. I can see no obvious or specific error. Although the Applicant refutes any inconsistencies in the evidence, it is not for me at the leave stage to determine the reasonableness of the credibility assessment undertaken by the General Division.

[121] I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(i) Consideration of evidence**

[122] The Applicant submits that the General Division failed to fully consider the evidence before it, including the following:

- 3 Canadian passports covering a period of 24 years;
- a letter from a school board proving his attendance at school;
- letter from a former lawyer stating his "personal knowledge of residency, Canadian common-law spouse, business undertakings", which he submits covers a far greater period to establish his residency than that required;
- sworn letter from a former landlord;
- sworn letter from a former employee;
- evidence that he operated several businesses in Canada;
- applications for broadcasting and CRTC broadcasting licences, all of which show a Canadian addresses;
- news articles showing entertainment tours and business interests throughout Canada, all of which covers a far greater period to establish his residency than that required;

- Canadian driver's and vehicle licenses;
- proof of boat and airplane purchases within Canada;
- evidence that he taught at a Canadian college;
- evidence that he started a conference center and institute (Hillsburgh lnternational Institute) and also taught school classes
- the fact that he produced a newspaper and then funded publishing of those newspapers;
- the fact that he had started and sponsored a youth organization in downtown Toronto; and
- the fact that he started a native drum and bugle band in NWT and conducted extensive entertainment tours across Canada.

The Applicant submits that this represented irrefutable evidence that established that he resided in Canada for the requisite number of years.

[123] There was extensive evidence before the General Division. The General Division Member referred to much of the evidence and in the analysis, pointed to those which he found particularly compelling and of persuasive value.

[124] The Federal Court of Appeal has also held that there is no obligation for a decision-maker to exhaustively list all of the evidence before it, as there is a general presumption that it considered all the evidence. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Federal Court of Appeal held that, "… a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence". The Applicant has not pointed me to anything within the decision of the General Division that would lead me to question whether the presumption ought to be rebutted or displaced.

[125] I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(j) Admissibility of Respondent's late submissions**

[126] The Applicant submits that the General Division Member should have declared the submissions of the Respondent inadmissible, as they were filed late, or the Member should

have adjourned the proceedings. I will deal with the issue of an adjournment of the hearing under the heading "(l) Adjournment of proceedings" below.

[127] The Applicant submits that by accepting the Respondent's submissions, this showed bias and caused him some prejudice, in that he did not have any opportunity to conduct any cross-examination or rebut the submissions.

[128] These submissions must fail for the following reasons:

(a) The Respondent's submissions filed on October 21, 2014 were in response to the records which had been filed by the Applicant after the Filing Period of August 24, 2014. The records filed after August 24, 2014, by the Applicant were, by themselves, late;

(b) The Respondent's submissions consisted of argument. There was no evidence contained within the submissions and therefore, there was no basis to conduct any cross-examination;

(c) The Applicant's remedy was to seek an adjournment of the proceedings, but this was not done; and,

(d) The alternative was for the Applicant to withdraw any records which had been filed late by him after the Filing Period, which would have enabled the Respondent to withdraw the Addendum submissions.

[129] I am not satisfied that the appeal has a reasonable chance of success on this ground.

**(k) Burden of proof**

[130] The Applicant submits that the General Division applied the wrong burden of proof. He alleges that, in coming to the conclusion which it did, that it could not have applied the burden of proof on a balance of probabilities. He alleges that there was "irrefutable data" to establish sufficient years of Canadian residency, and had the General Division applied the burden of proof on a balance of probabilities on the evidence before it, it would have led to a finding that he had sufficient years of Canadian residency.

[131] At paragraph 84 of its decision, the General Division Member found that the Applicant did not meet his evidentiary burden on a balance of probabilities. It appears on the face of the record that the General Division applied the burden of proof on a balance of probabilities. Apart from alleging that the General Division must have used a stricter burden of proof, he has not pointed me to anything within the decision which could raise an arguable ground that another burden of proof was used. These submissions in essence call for a reassessment of the evidence, which is not an appropriate ground of appeal as contemplated by subsection 58(1) of the DESDA. I am not satisfied that the appeal has a reasonable chance of success under this ground.

### (l) Adjournment of proceedings

[132] There is no automatic entitlement to an adjournment. It is well-established that the decision whether to grant an adjournment is a matter that lies within a decision- maker's discretion. The decision-maker must exercise that discretion fairly. Generally, as noted above, courts will not interfere with the exercise of that discretion to refuse an adjournment, unless it can be shown that the decision-maker committed a palpable and overriding error in the exercise of that discretion.

[133] Setting aside the fact that the Applicant did not make any formal application to adjourn the proceedings with either the Social Security Tribunal or the General Division Member at any time prior to the commencement of the proceedings on October 22, 2014, the Applicant submits that the General Division ought to have adjourned the proceedings once it became aware of his "significant health issues".

[134] As indicated above, the General Division Member considered, on its own motion, whether an adjournment of the hearing was appropriate under the circumstances. It found, based on the evidence before it, including a doctor's note of October 16, 2014, that:

> there [was] no medical evidence confirming that the [Applicant] was incapable of joining the hearing on the day it was scheduled, just advice from the [Applicant] himself that he received a diagnosis that day. Since the time of his doctor's visit on October 16, 2014, the [Applicant] proved to be quite capable of communicating with the Tribunal …

[135] If this was the basis for an adjournment, the decision to refuse it does not rise to the standard that the General Division committed a palpable and overriding error.

**NEW RECORDS**

[136] Finally, the Applicant submits that he has additional documents which the General Division did not have before it. He submits that these documents support his claim for Old Age Security benefits.

[137] Any additional reports should relate to the grounds of appeal. The Applicant has not indicated how any proposed additional facts or records might fall into or address any of the enumerated grounds of appeal. If he is requesting that I consider these additional facts and records, re-weigh the evidence and re-assess the claim in the Applicant's favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-assess or re-hear the claim to determine whether the Applicant was resident for the requisite period of time under the *Old Age Security Act*, short of a reviewable error having been established.

[138] If there are any new facts or records which the Applicant intends to file in an effort to rescind or amend the decision of the General Division, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions.

[139] Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Under subsection 66(4) of the DESDA, the Appeal Division in this case has no jurisdiction to rescind or amend a decision

based on new facts, as it is only the Division which made the decision which is empowered to do so.

## CONCLUSION

[140] Given the considerations above, the application for leave to appeal is refused.

*Janet Lew*
Member, Appeal Division