Federal Court  Cour fédérale

Date: 20190604

Docket: T-858-18

Citation: 2019 FC 780

Ottawa, Ontario, June 4, 2019

PRESENT: Madam Justice Mactavish

BETWEEN:

JANET ZEPOTOCZNY BERGER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Janet Zepotoczny Berger seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal denying her leave to appeal the decision of the Tribunal's General Division. The General Division had denied Ms. Berger's application for disability benefits under the *Canada Pension Plan*.

[2] The General Division found that Ms. Berger was not entitled to disability benefits as she had been working in a "substantially gainful occupation" as an anaesthesia assistant. Ms. Berger asserted in her application for leave that the Tribunal had committed numerous errors in arriving

at this decision. However, the Tribunal's Appeal Division found that her appeal had no reasonable chance of success, and that the General Division had not based its decision on an erroneous finding of fact, nor did it fail to observe a principle of natural justice.

[3] While I understand the difficult situation in which Ms. Berger finds herself, I have not been persuaded that the Appeal Division committed a reviewable error in denying her leave to appeal the General Division's decision. I am also not persuaded that the Appeal Division's decision was unreasonable. Consequently, Ms. Berger's application for judicial review will be dismissed.

I. Background

[4] Ms. Berger is a Registered Nurse. When she experienced health problems in 1990, she applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). This application was successful, and Ms. Berger continued to receive benefits until 1991.

[5] In 1999, Ms. Berger was riding on a Toronto city bus when the bus came to a sudden stop. She was thrown from her seat, causing her to incur a number of injuries including a whiplash injury to her neck, back and leg injuries, contusions and abrasions. Ms. Berger continues to experience a number of physical problems that affect her ability to work, including, amongst other things, chronic neck and back pain, spinal stenosis, high blood pressure, cardiac issues and dizziness.

[6] In September of 2005, Ms. Berger applied for CPP disability benefits for a second time, based on the injuries that she had sustained in the bus accident. This application was denied on the basis that she was able to work, and that she had been involved in substantially gainful

employment. After she exhausted her internal appeals, the decision refusing Ms. Berger's application for disability benefits was upheld by this Court on judicial review: *Berger v. Canada (Attorney General)*, 2009 FC 37, [2009] F.C.J. No. 80.

[7] In August of 2013, Ms. Berger once again applied for CPP disability benefits, once again asserting that she had been disabled since the 1999 bus accident. Ms. Berger claimed that she was experiencing chronic diffuse pain, cardiac issues, spinal stenosis, C7 radiculopathy and SI nerve root compression.

[8] Ms. Berger's third application for disability benefits was denied on the basis that she had continued to be able to work. Ms. Berger's request for reconsideration of this decision was also dismissed.

[9] Ms. Berger then appealed to the General Division of the Social Security Tribunal (SST) for relief, asserting that she did suffer from a disability that was sufficiently serious as to qualify her for CPP disability benefits.

[10] Under paragraph 42(2)(a) of the CPP, a person will be considered to be disabled if he or she has "a severe and prolonged mental or physical disability". A disability is "severe" if the person is "incapable regularly of pursuing any substantially gainful occupation". A disability is "prolonged" if it is "likely to be long continued and of indefinite duration or is likely to result in death".

[11] After conducting a global assessment of her personal circumstances, the General Division determined that Ms. Berger did not qualify for disability benefits because the work that she did assisting with the administration of anesthesia in dental offices constituted "substantially gainful

employment". A consideration of her gross income indicated that her disability was not "severe", as it was a "good indicator of her level of work or activity." As the Tribunal found that Ms. Berger has not established that her disability was "severe", it found it unnecessary to consider whether her disability had been "prolonged".

II. Ms. Berger's Leave Application

[12] Unsatisfied with the General Division's decision, Ms. Berger then sought leave to appeal that decision to the Tribunal's Appeal Division. She argued in her leave application that the General Division had erred by:

a. Failing to consider some evidence pertaining to her injuries and payment for treatment;

b. Failing to consider that a Tribunal member had previously found that she had an "arguable case";

c. Failing to advise Ms. Berger before the hearing that it was bound by the prior Review Tribunal's decision;

d. Failing to fully answer her conflict of interest question;

e. Failing to consider that she felt bullied at the teleconference hearing;

f. Failing to consider or address the effect that the delay had on her;

g. Failing to effectively case manage the application or adjudicate the case in a timely and efficient way;

h. Failing to consider whether her disability was prolonged;

i. Failing to find that her disability was severe;

j. Failing to explain how gainful employment is to be determined, and failing to accept that her work was not gainful;

k. Failing to consider that she has received a disability tax credit from the Canada Revenue Agency;

l. Considering her gross income as a measure of substantially gainful employment, without considering what it costs her to earn income and to live;

m. Failing to consider the financial hardship that she has suffered as a result of the denial of benefits or prolonged adjudication, as well as the fact that her income has declined in recent years;

n. Considering irrelevant personal circumstances, including Ms. Berger's age, education and language skills in its "real world" analysis;

o. Distributing medical documentation that was subject to a "Privacy Order" issued by the Federal Court in 2008; and

p. Failing to consider a 2016 Auditor General's report about mismanagement at the SST and delays in processing applications for benefits.

[13] The Appeal Division of the SST dismissed Ms. Berger's application for leave on the basis that none of the grounds that she cited had a reasonable chance of success on appeal. In

coming to this conclusion, the Tribunal observed that subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, provides that the only grounds that may be cited in support of an appeal are that:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[14] Subsection 58(2) of the Act further provides that leave to appeal is to be refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success". A "reasonable chance of success" has been defined by this Court as being "some arguable ground upon which the proposal might succeed": *Osaj v. Canada (Attorney General)*, 2016 FC 115 at para. 12, [2016] F.C.J. No. 131.

[15] The Appeal Division accepted the General Division's finding that the relevant "window period" governing Ms. Berger's application was the period between March 21, 2007 and May 31, 2014. March 21, 2007 was the date on which the Review Tribunal had finally determined that Ms. Berger's 2005 application for disability benefits should be rejected. May 31, 2014 was the last day on which Ms. Berger could qualify for disability benefits, as she had started collecting a CPP retirement pension in June of 2014.

[16] The Appeal Division considered the submissions filed by Ms. Berger in support of her application for leave. It also listened to the recording of her hearing before the General Division. The Appeal Division then proceeded to consider the grounds cited by Ms. Berger in support of her application for leave, explaining why, in its view, none of these grounds had a reasonable chance of success. It was, moreover, satisfied that no important information had been overlooked or misconstrued by the General Division in coming to the conclusion that Ms. Berger was not eligible for CPP disability benefits.

[17] Ms. Berger now seeks judicial review of the Appeal Division's decision.

III. Standard of Review

[18] As noted earlier, the grounds on which leave may be granted are set out in subsection 58(1) of the *Department of Employment and Social Development Act*. Ms. Berger has not suggested that the Appeal Division erred in law by applying the wrong legal test in considering her application for leave. I further agree with the parties that the Appeal Division's application of the law to the facts of this case is reviewable on the standard of reasonableness: *Andrews v. Canada (Attorney General)*, 2018 FC 606 at para. 17, [2018] F.C.J. No. 628.

[19] As I explained to Ms. Berger at the hearing, the question for me to decide is not whether I personally think that she should be entitled to CPP disability benefits, but rather the whether the Appeal Division's decision was reasonable.

[20] That is, I must determine whether the Appeal Division's decision was justified, transparent and intelligible, and whether the conclusions that it drew with respect to the strength of Ms. Berger's arguments fell within a range of possible, acceptable outcomes that are

defensible in light of the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

IV. Analysis

[21] Ms. Berger has identified what she asserts are numerous errors that were committed by the Appeal Division, which are largely the same as those she identified earlier as having been committed by the Tribunal's General Division. While I have carefully considered each of Ms. Berger's arguments, I have determined that it is only necessary to address some of them.

A. *The Delay in Processing Ms. Berger's Application for Disability Benefits*

[22] Ms. Berger asserts that the SST failed to effectively case manage her application for disability benefits or to decide the case in a timely and efficient way. In support of this assertion, she points to a 2016 Report of the Auditor General of Canada that pointed to serious systemic problems with the way that the Tribunal manages its caseload.

[23] I agree with Ms. Berger that the length of time that it took to decide her application for disability benefits is very troubling. Ms. Berger's application for disability benefits was brought in August of 2013 and the decision of the Appeal Division dismissing her application for leave was not issued until March 28, 2018.

[24] Many applicants for disability benefits (including Ms. Berger) face significant financial challenges and it is most unfortunate that it should take upwards of five years to process such a claim.

[25] That said, Ms. Berger bears the burden of demonstrating the delay in this case was unacceptable to the point of being so oppressive as to taint the proceedings: *Blencoe v. British*

Columbia (Human Rights Commission), 2000 SCC 44 at para. 121, [2000] 2 S.C.R. 307. While Ms. Berger undoubtedly faced financial hardship during the five years in question, she has not asserted that her ability to pursue this matter was negatively affected by the delays that she encountered, or that any evidence on which she might seek to rely was no longer available.

[26] Moreover, the systemic problems identified by the Auditor General and the delays that Ms. Berger herself experienced before the Tribunal have no impact on the question of whether she suffered from a severe and prolonged disability. Consequently, the Appeal Division did not err in finding that these arguments had no reasonable chance of success.

B. *Ms. Berger's Allegations of Bias*

[27] Ms. Berger asserts that consideration should have been given to the conduct of the Registered Nurses who were involved in the processing of her application, and to whether the member of the General Division deciding her case was biased or had a conflict of interest.

[28] Insofar as the conduct of the nurses is concerned, Ms. Berger asserts that various notes in the record reveal a "dismissive" attitude on the part of the individuals in question. Ms. Berger further suggests that the fact that she herself is a Registered Nurse may have led these individuals to expect more of her than she was capable of performing.

[29] The test for a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically – and having thought the matter through – would think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, 26, [2015] 2 S.C.R. 282.

[30] It is not clear whether Ms. Berger raised her concern with respect to the conduct of the nurses before the Appeal Division. I would in any event observe that she has not adduced any evidence that would demonstrate any actual or apprehended bias on the part of the nurses involved in her file. I have, moreover, carefully reviewed the notes that are of concern to Ms. Berger. I do not see anything in those notes that would objectively give rise to a concern of bias on their part. I would, moreover, observe that the individuals making the notes were not the ones making the decision with respect to Ms. Berger's application for disability benefits – either at the General Division or at the Appeal Division.

[31] Ms. Berger also failed to adduce any evidence to demonstrate that the member of the General Division who decided her case had a conflict of interest. Ms. Berger noted that the member was a retired lawyer, and as such, he may have had past dealings with the CIBC, a bank with whom she had been engaged in litigation. She further speculated that the member may have been friends with the lawyers who had represented the Bank in the case against her.

[32] The member of the General Division squarely addressed this issue in an interlocutory decision. He noted that Ms. Berger's allegations were entirely based upon speculation, and had no evidentiary foundation. He further observed that Tribunal members are expected to recuse themselves from files if they are aware of any actual or perceived conflict of interest, affirming that he would have done so in this case, had he been aware of any such conflict.

[33] The Appeal Division also addressed this issue, noting that Ms. Berger's allegation that the member of the General Division may have had a conflict of interest was entirely unsupported by any evidence, with the result that this ground of appeal could not possibly have succeeded. In

the absence of any evidence supporting Ms. Berger's allegations, the Appeal Division's finding on this point was entirely reasonable.

C. *"Bullying" by the Member of the General Division*

[34] Ms. Berger also asserted that she felt "bullied" by the member of the General Division and by the process that was followed in her case.

[35] While recognizing that it was "unfortunate" that Ms. Berger was uncomfortable with the process that was followed in her case, the Appeal Division observed that it was not open to the General Division to change the process or the statutory requirements set out in the *Department of Employment and Social Development Act*.

[36] The member of the Appeal Division also stated that in addition to reviewing the paper record in this case, she had also listened to the recording of Ms. Berger's hearing before the General Division. The member noted that while Ms. Berger had indeed stated at the hearing before the General Division that she was feeling "bullied", she was nevertheless given a full opportunity to present her case, and that there had been no breach of natural justice.

[37] I accept that Ms. Berger may have subjectively felt bullied by the process. She has not, however, identified an objective basis for these feelings, or that she had in any way been prevented from advancing her claim. Consequently, the finding of the Appeal Division that this ground of appeal could not possibly have succeeded was one that was reasonably open to it on the basis of the evidence before it.

D. *The "Arguable Case" Argument*

[38] Ms. Berger's appeal to the General Division was brought outside of the 90-day period provided for in paragraph 52(1)(b) of the *Department of Employment and Social Development Act*. Consequently, she required an extension of time to be able to proceed with her appeal. In an October 2015 decision granting her an extension of time, a member of the General Division found, amongst other things, that she had "an arguable case".

[39] As I understand Ms. Berger's position, she asserts that because the General Division had previously determined that she had "an arguable case", it was unreasonable for the Appeal Division to find that none of her grounds of appeal were arguments that had any reasonable chance of success.

[40] The Appeal Division rejected this claim, noting that the legal test for an arguable case for the purposes of granting an extension of time is different from the test on an application for leave to appeal from a decision of the General Division.

[41] In considering Ms. Berger's request for an extension of time, the Tribunal had to consider whether there was any potential merit to her application for disability benefits. In contrast, the Appeal Division had to consider whether there was an arguable ground upon which the proposed appeal might succeed: *Osaj*, above at para. 12. In light of this difference, Ms. Berger has not persuaded me that the Tribunal erred in concluding that this argument had no reasonable chance of success.

E. *The Financial Hardship Argument*

[42] Ms. Berger further asserts that the Appeal Division erred in finding that economic factors were not relevant to the determination of whether an applicant is disabled for the purposes of the *Department of Employment and Social Development Act*. According to Ms. Berger, the Appeal Division should have considered the significant financial hardship that she has faced over the years, including the fact that she has been forced to sell two homes because of her financial situation, as well as the thousands of dollars that she was required to expend on medical treatments for her various conditions.

[43] While I am sympathetic to the situation in which Ms. Berger finds herself, the law is clear that financial hardships faced by claimants are not relevant to the question of whether an individual has a severe and prolonged disability: *Carter v. Canada (Attorney General)*, 2008 FC 1046 at para. 5, [2008] F.C.J. No. 1297; *Canada (Minister of Human Resources Development) v. Angheloni*, 2003 FCA 140 at para. 27, [2003] F.C.J. No. 473. As a consequence, the Appeal Division did not err in concluding that this ground of appeal had no reasonable chance of success.

[44] Ms. Berger also points out that her income has dropped substantially since 2014. However, as was previously noted, the period that was relevant to her application for disability benefits was between March 21, 2007 and May 31, 2014. Consequently, the fact that Ms. Berger's income may have declined in the years following the relevant "window period" had no bearing on the issues that the General Division and the Appeal Division had to decide.

F. *The CRA Tax Credit Argument*

[45] Ms. Berger submits that the General Division erred by failing to have regard to the fact that she has received a disability tax credit from the Canada Revenue Agency retroactive to 1999. Ms. Berger has not, however, demonstrated that the same criteria are used to demonstrate entitlement to a disability tax credit for income tax purposes as are used to evaluate entitlement to CPP disability benefits.

[46] Ms. Berger also notes that the General Division erroneously referred to her disability tax credit as having been granted retroactive to 2009, rather than 1999. However, as the Appeal Division correctly observed, the General Division did not base its decision on this finding. As a consequence, the error was not material to the result and the Appeal Division thus did not err in finding that Ms. Berger's argument on this point had no reasonable chance of success.

G. *The "Substantially Gainful Employment" Argument*

[47] Ms. Berger asserts that the Appeal Division erred in finding that her argument with respect to the General Division's determination that she had been engaged in "substantially gainful employment" had no reasonable chance of success.

[48] Ms. Berger takes issue with the fact that the Department does not have a written policy governing what will constitute "substantially gainful employment". The Tribunal further erred, Ms. Berger says, in failing to accept that her work is not gainful.

[49] Insofar as the policy question is concerned, the Appeal Division found that there was no requirement that the Tribunal follow a specific policy in determining whether someone was engaged in "substantially gainful employment". As a consequence, the Appeal Division was

satisfied that Ms. Berger's argument on this point had no reasonable chance of success. This conclusion was entirely reasonable.

[50] There is no requirement that an administrative body have a written policy outlining how the discretion vested in its members is to be exercised. That does not, however, mean that Tribunal members can act arbitrarily in this regard. There are a number of decisions of this Court and of the Federal Court of Appeal that are binding on Tribunal members that discuss how "substantially gainful employment" is to be assessed: see, for example, *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158 at para. 15, [2014] 4 F.C.R. 709; *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para. 14, 372 N.R. 385. The Appeal Division thus did not err in finding that Ms. Berger's argument with respect to the Tribunal's lack of a written policy addressing how substantially gainful employment is to be assessed therefore had no reasonable chance of success.

[51] Insofar as the substantive question of whether Ms. Berger had been engaged in "substantially gainful employment" is concerned, as was previously noted, Ms. Berger submits that her income had dropped substantially after 2014. However, as I have previously observed, the years after 2014 were outside the relevant "window period", and the fact that Ms. Berger's income may have declined in the years after 2014 thus had no bearing on the issues that the General Division and the Appeal Division had to decide.

[52] Ms. Berger also takes issue with the fact that the Appeal Division had regard to her gross income rather than her net income. Ms. Berger is self-employed with no guaranteed hours, working on an as-needed basis for various dentists. As a self-employed individual, she is entitled to write off various expenses such as those relating to her home office and her car for income tax

purposes. As such, Ms. Berger contended that it was an error to have regard to her gross income rather than her income net of expenses.

[53] I am not persuaded that the Appeal Division erred in concluding that this argument had no reasonable chance of success. As the respondent pointed out, the question for the General Division to decide was not what Ms. Berger's income was (whether gross or net), but rather what her work activity had been, and what her earning capacity was. That is, whether, in practical terms, Ms. Berger was capable of regularly pursuing any substantially gainful employment: *Villani v. Canada (Attorney General)*, 2001 FCA 248 at paras. 49-50, [2002] 1 F.C. 130.

[54] The Appeal Division considered how the General Division had dealt with this issue, concluding that it had not erred in this regard, and that Ms. Berger's arguments thus had no reasonable chance of success. This is a conclusion that was reasonably open to the Appeal Division on the basis of the record before it.

[55] Ultimately, what Ms. Berger seeks is to have me reweigh the evidence that was before the Appeal Division to come to a different result. That is not the role of this Court sitting in review of a decision such as the one in issue in this case.

H. *The Consideration of Ms. Berger's Personal Attributes*

[56] Ms. Berger also takes issue with the fact that the General Division had regard to her personal attributes in its analysis, including her age, level of education and language skills. According to Ms. Berger, considerations such as this have nothing to do with the question of whether or not she is disabled.

[57] However, the case law teaches that the question of whether a particular individual suffers from a severe disability has to be assessed in light of the individual's personal circumstances, including their age, education level and language proficiency, as well as their past work and life experience: *Villani*, above at para. 38. Consequently, the Appeal Division did not err in failing to find that this argument had a reasonable chance of success.

I. *The Failure to Consider Whether Ms. Berger's Disability had been "Prolonged"*

[58] Ms. Berger also argued that the Tribunal erred in failing to consider whether her disability had been "prolonged". This is not a reviewable error.

[59] As the Federal Court of Appeal observed in *Klabouch*, above at paragraph 10, "[t]he fact that the Board primarily concentrated on the 'severe' part of the test and that it did not make any finding regarding the 'prolonged' part of the test does not constitute an error". This is because there are two requirements in paragraph 42(2)(a) of the CPP, which are cumulative. As a result, if an applicant does not meet one or the other condition, her application for a disability pension under the CPP will fail.

J. *The "Privacy" Issue*

[60] Ms. Berger also asserts that the General Division erred by distributing medical documentation that was subject to a "Privacy Order" issued by the Federal Court in 2008.

[61] As I understand Ms. Berger's concern, it is that documents relating to her earlier applications for disability benefits are in the certified tribunal record relating to her 2018 application for judicial review. Ms. Berger is of the view that it was inappropriate for the

Tribunal to have maintained these documents in its files, and to have produced them in the respondent's record in what is a public forum, in light of the Court's earlier order.

[62] It appears that a confidentiality order was issued by this Court in connection with Ms. Berger's 2008 application for judicial review of the refusal of her 2005 application for disability benefits (Court file T-1871-07). A review of Prothonotary Aalto's November 16, 2007 confidentiality order in T-1871-07 confirms that the order related to the way in which documents in that Court file were to be handled. It did not relate to how those charged with administering the CPP disability benefits scheme were to manage their own internal files, nor does it apply to this application for judicial review.

[63] This issue was not addressed by the Appeal Division. That does not, however, give rise to a reviewable error, as it has nothing to do with Ms. Berger's entitlement to CPP disability benefits. Ms. Berger's argument on this point could thus have had no reasonable chance of success before the Appeal Division.

K. *Ms. Berger's Claim for Damages*

[64] Finally, Ms. Berger states in her memorandum of fact and law that she is seeking an award of punitive damages against the respondent for "forcing her to endure undue pain and suffering".

[65] However, as I explained to Ms. Berger during the course of the hearing, damages are not available as a remedy in judicial review applications: *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251 at para. 10, [2017] F.C.J. No. 1268; *Maximova v. Canada (Attorney General)*, 2017 FCA 230 at para. 14, [2017] F.C.J. No. 1212.

V. Conclusion

[66] The Federal Court of Appeal has been clear that an appeal cannot succeed where an applicant simply disagrees with the application of settled law to the facts of a particular case: *Quadir v. Canada (Attorney General)*, 2018 FCA 21 at para. 9, [2018] F.C.J. No. 46; *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at para. 7, [2018] F.C.J. No. 626. That is the situation here. Such a disagreement does not constitute an error of law, nor does it involve a factual finding that was made in a perverse or capricious manner or without regard to the evidence: *Garvey*, above at para. 7.

[67] The Federal Court of Appeal has also been clear that the definition of disability under the CPP is "highly restrictive", with the focus being on those physical and mental limitations that affect a claimant's capacity to work: *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 at para. 3, [2015] 3 F.C.R. 461. See also *Villani*, above at para. 38.

[68] The Court went on in *Atkinson* to observe that "individuals who experience significant and prolonged health challenges may nonetheless not qualify for a disability pension if they are found to be capable regularly of pursuing a substantially gainful occupation" above, at para. 3.

[69] Like the applicant in *Atkinson*, the record in this case demonstrates that Ms. Berger is a remarkable individual who has managed to pursue gainful professional employment since her bus accident in 1999, despite her physical limitations. There is no suggestion that she is malingering, and she clearly sincerely believes that she is entitled to CPP disability benefits.

[70] However, while I am sympathetic to Ms. Berger's situation, I am unable to conclude that the decision of the Appeal Division to deny her leave to appeal the General Division's decision

was unreasonable. Consequently, Ms. Berger's application for judicial review of the Appeal Division's decision is dismissed.

VI. Costs

[71] As the successful party, the respondent would ordinarily be entitled to its costs of this application. However, the respondent is not seeking costs of this application, and none are awarded.

JUDGMENT IN T-858-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Janet Zepotoczny Berger	FOR THE APPLICANT (ON HER OWN BEHALF)
Jean-François Cham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT