Citation: *L. L. v. Minister of Human Resources and Skills Development and A. C.*, 2013 SSTAD 12

Appeal No: CP28966

BETWEEN:

L. L.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

and

A. C.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION - AMENDED

~~General~~ Appeal Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Shu-Tai Cheng
HEARING DATE:	19 December 2013
TYPE OF HEARING:	In person
PLACE OF HEARING:	Cornwall, Ontario

DATE OF DECISION: 31 December 2013

PERSONS IN ATTENDANCE

Appellant	L. L.
Appellant's spouse	B. L.
For the Respondent	Natasha Rende of CPP Policy and Legislation
Respondent's Counsel	Bahaa I. Sunallah
Added Party	A. C.
Added Party's Representative	Patricia Lydiard

DECISION

[1] The Tribunal dismisses the Appeal for the reasons stated below.

INTRODUCTION

[2] The Appellant's application for a retirement pension was date stamped by the Respondent on July 18, 2001. With this application, the Appellant submitted a request for the Child Rearing Provision (CRP) for the period April 1, 1980 and October 31, 1982, inclusively, (the "Relevant Time").

[3] By Notice of Entitlement, the Respondent informed the Appellant that his retirement pension was approved, effective March 2002, at a monthly amount of $456.01.

[4] The Added Party, by application dated September 4, 2006, applied for retirement benefits and made a request for the CRP. This application was approved and the CRP was applied to exclude months of low earnings in the Added Party's contributory period between November 1974 and December 1981.

[5] By letter dated July 26, 2007, the Appellant was informed that the CRP had been applied to his contributory period in error. The amount of the Appellant's retirement pension was recalculated as of March 2002, creating an overpayment of $2178.54 for the period between March 2002 and May 2007.

[6] The Appellant requested a reconsideration of the Minister's decision, by letter dated August 24, 2007.

[7] The Respondent informed the Appellant, by letter of February 21, 2008, that the decision had been reconsidered and maintained.

[8] The Appellant informed the Office of the Commissioner of Canada Pension Plan Review Tribunals (OCRT or Review Tribunal), by letter of May 20, 2008, that he wished to appeal the decision to the Review Tribunal.

[9] The Added Party wrote to the OCRT, on October 5, 2008, in response to the Appellant's appeal and requested that the decision of the Minister be affirmed.

[10] A Review Tribunal Hearing was scheduled twice in 2009 but was postponed: the first time because the Added Party was not available and the second time at the request of the Respondent.

[11] On March 5, 2010, the Respondent informed the Appellant that the overpayment assessed in connection with the application of the CRP was the result of an administrative error and that he would not be asked to repay the overpayment.

[12] The Review Tribunal hearing was convened on April 19, 2012, at Ottawa,Ontario. In the decision of July 11, 2012, the Review Tribunal dismissed the appeal. The Review Tribunal concluded that:

> The Tribunal is therefore not satisfied that the Appellant has established on the balance of probabilities that he was the 'family allowance recipient' under the expanded definition of that term pursuant to paragraph 77(1) (a) of the CPP Regulations with respect to either of the two children of his marriage to the Added Party for the period from April 1, 1980 to October 31, 1982.

[13] The Appellant's Application for Leave to Appeal to the Pension Appeals Board (PAB)

was received on October 9, 2012.

THE LAW

[14] The PAB granted leave to appeal on December 10, 2012. Pursuant to section 259 of the *Jobs, Growth and Long-term Prosperity Act* of 2012, the Appeal Division of the Tribunal is deemed to have granted leave to appeal on April 1, 2013.

[15] To ensure fairness, the Appeal will be examined based on the Appellant's legitimate expectations at the time of the original filing of the Application for Leave to Appeal with the PAB. For this reason, the Appeal determination will be made on the basis of an appeal *de novo* in accordance with subsection 84(1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP or Plan) as it read immediately before April 1, 2013.

[16] An in person hearing was held for the reasons given in the Notice of Hearing dated October 25, 2013.

[17] The Added Party was added according to Rule 10 of the *Social Security Tribunal Regulations*, 2013, as she "has direct interest in the decision". This appeal has an impact on the Added Party's benefit payments.

[18] The relevant statutory provisions are sections 42(1) and 48(2)(a) of the CPP and section 77 of the *CPP Regulations* as they read at the relevant time.

[19] Section 48(2) of the CPP states:

> **48(2) Deductions in calculating average monthly pensionable earnings of certain months during child raising years -** In calculating the average monthly pensionable earnings of a contributor in accordance with subsection (1) for the purpose of calculating or recalculating benefits payable for a month commencing on or after January 1, 1978, there may be deducted
>
> (a) from the total number of months in a contributor's contributory period, those

months during which he was a family allowance recipient and during which his pensionable earnings were less than his average monthly pensionable earnings calculated without regard to subsections (3) and (4), but no such deduction shall reduce the number of months in his contributory period to less than the basic number of contributory months, except

(i) for the purpose of calculating a disability benefit in respect of a contributor who is deemed to have become disabled for the purposes of this Act after December 31, 1997, in which case the words "the basic number of contributory months" shall be read as "48 months",

(i.1) for the purpose of calculating a disability benefit in respect of a contributor who is deemed to have become disabled for the purposes of this Act in 1997, in which case the words "the basic number of contributory months" shall be read as "24 months", and

(ii) for the purpose of calculating a death benefit and a survivor's pension, in which case the words "the basic number of contributory months" shall be read as "thirty-six months"; and

(b) from his total pensionable earnings, the aggregate of his pensionable earnings attributable to the months deducted pursuant to paragraph (a). [Emphasis added]

[20] A "family allowance recipient" is defined in 42(1) of the Plan as follows:

a person who received or is in receipt of an allowance or a family allowance pursuant to the *Family Allowances Act*, chapter F-1 of the Revised Statutes of Canada, 1970, as it read immediately before being repealed or the *Family Allowances Act* for that period prior to a child reaching seven years of age, and such other persons as may be prescribed by regulation; [Emphasis added]

[21] Section 77(1)(a) of the *CPP Regulations* prescribes these "other persons" and

expands the definition of "family allowance recipient" set out under subsection 42(1) by adding additional categories of contributors who may be eligible for CRP.

[22] At the time of the Minister's decision on July 26, 2007, section 77(1)(a) of the *CPP Regulations* read as follows:

> For the purposes of the definition "family allowance recipient" in subsection 42(1) of the Act, family allowance recipient includes
>
> (a) the spouse of a person, where the person is described in that definition as having received or being in receipt of an allowance or a family allowance, if the spouse remains at home and is the primary caregiver for a child under seven years of age, and where the other spouse cannot be considered a family allowance recipient for the same period.

ISSUES

[23] Who was the actual family allowance recipient during the Relevant Time?

[24] In light of Federal Court of Appeal jurisprudence, is it necessary to determine whether the Appellant remained at home and was the primary caregiver?

[25] If it is, was the Appellant a "family allowance recipient" under the additional categories defined in s. 77(1)(a) of the *Regulations*?

EVIDENCE

[26] The Appellant testified during the hearing through personal narrative. The Added Party gave evidence by answer to her counsel's questions. The Respondent, through Ms. Rende, answered questions during the hearing and confirmed statements made by its counsel. Each party was given the opportunity to ask questions of the others.

[27] Documentary evidence was submitted prior to and during the hearing, as follows:

Ex. 1 Appeal Record, prepared by the Tribunal

Ex. 2 Letter from the Appellant, dated December 6, 2013, attaching five (5) documents

Ex. 3 Letter from the Respondent, dated December 16, 2013

Ex. 4 "Guide on the Program Evaluation Function", Program Evaluation Branch, May 1981, pages 2 and 7, submitted by the Appellant at the hearing

Ex. 5 "Annual Income Profile", prepared by the Appellant, undated, submitted by the Appellant at the hearing

Ex. 6 "Information Sheet: How to Apply for the CPP Retirement Pension", pages 1 and 4, ISP-1000-A-04-01E, submitted by the Appellant at the hearing

Ex. 7 Three (3) printouts from Human Resources Development Canada website and one letter from the Appellant to his Minister of Parliament dated March 6, 2002, submitted by the Appellant at the hearing

Ex. 8 A letter from Scotiabank to Mr. L., dated August 4, 1993

[28] Where there was conflicting evidence on a specific fact, it is stated below. Otherwise, the oral evidence given is summarized without attribution to a particular witness.

[29] The Appellant was born in 1942. He applied for a retirement pension on July 12, 2001 and stated that he would be stopping work when he turned 60. With his retirement application, he filed a CRP asking for dropout entitlements with respect to his two children, G and S. Both children were adopted by the Appellant and the Added Party as infants.

[30] The Added Party and the Appellant were married in 1966 and separated in September 1990.

[31] Both spouses worked in the early years of the marriage. The Appellant was the primary income earner, once he had completed his university studies, and the Added Party was the secondary income earner and the homemaker. They lived in Ottawa, Waterloo and the Toronto area up to 1973.

[32] The Appellant was employed with the Ontario government starting in 1971 and then the federal government starting in 1973.

[33] The Added Party was in a car accident in 1972 and stopped work. In 1973, the couple moved back to Ottawa and was hoping to adopt a child. The Added Party did not return to work, as there was a requirement on adoptive parents that one parent stay at home.

[34] The Added Party remained at home and looked after the children during their early years. She was not employed outside the home until 1981 and was employed on a full-time basis by 1983.

[35] The Appellant took a leave of absence from federal government employment from April 1, 1980 to October 31, 1982, inclusively. The Appellant stated that this was in order to be more active as a caregiver to the children and because of a health scare.

The Added Party stated the reasons differently and said that the Appellant was not sure he wanted to continue as a federal public servant and he wanted to set up a consulting business.

[36] The family moved to North Bay, Ontario in 1980. The Appellant's evidence was that he was a "house husband" and "stay-at-home-dad", while the Added Party's evidence was that the Appellant tried to establish a consulting business and managed an income property and a "tree farm".

[37] In 1981, after living in North Bay for about one year, the Added Party offered to seek employment to supplement the family income and secured a job which paid minimum wage.

Both children were in school. The Added Party testified that she continued to look after childcare for the children using a combination of her time in the home, a neighborhood babysitter, her mother coming for an extended stay, and the Appellant. Her evidence was that her role in the family as homemaker and primary parent continued, though she had a job, and that the Appellant's role at home was to "babysit" the children when he was available. The Appellant testified that he spent his time learning to cook, shop and look after the children while the Added Party worked outside the home.

[38] In 1982, the Appellant decided to return to work with the Federal government. The family moved back to Ottawa in November 1982, and the Appellant resumed employment in the public service.

[39] Evidence was given in relation to the Family Allowance (FA) paid for the children. The Added Party testified that the FA cheques were made in her name and that the cheques were deposited into two (2) bank accounts, one for each child; the money was not needed for immediate spending and it was agreed, with the Appellant, that these amounts would go into trust accounts for "school or something substantial". The Added Party stated that she was the trustee of both accounts and she received the statements; also when each child wanted to access the funds, he or she obtained her agreement even though her consent was not strictly needed once the children were adults. The Appellant testified that he was the "deemed recipient" of the FA, because he took the cheques to the bank for deposit, he administered the trust accounts and he had possession of the bank books. He stated that he was trustee and had primary responsibility for the accounts.

[40] There was no disagreement that the FA cheques were made payable to the Added Party.

[41] There was also no disagreement that the Appellant's pension benefits were incorrectly calculated when first assessed in 2002. Between the Appellant's application, in late 2001, and the Respondent's last adjustment to these benefits, in March 2010, there were many points of contention. However, the only time period still at issue is April 1, 1980 to October 31, 1982, the Relevant Time.

[42] The CRP was applied to the Added Party for all of this period except in1982. In 1982, the Added Party was better off not applying the CRP, and for 1982, the CRP was not applied to the calculation of her retirement benefits.

[43] The Appellant seeks to have the CRP applied to him during the Relevant Time.

CASELAW

[44] Two Federal Court of Canada cases were relied upon by the parties: *Harris v. Canada (Minister of Human Resources and Skills Development)*, 2009 FCA 22 ("*Harris*"), and *Runchey v. Attorney General of Canada et al*, 2013 FCA 16 ("*Runchey*").

[45] The Appellant relied on *Harris*.

[46] In *Harris*, the FCA stated that the CRP allows an eligible contributor to drop years of low or zero earnings from their contribution period during the time they were providing primary care for a child under the age of seven. The purpose of the CRP is to ensure that a contributor who meets the CPP contributory requirements and temporarily withdraws from the workforce to raise a pre-school age child will not be penalized for this period of child-rearing in the calculation of future benefits.

[47] The Respondent and the Added Party relied on *Runchey*.

[48] In *Runchey*, the FCA considered two sets of provisions in the Plan: the Child- Rearing Provisions (CRP) and the Division of Unadjusted Pensionable Earnings provisions (DUPE). The Appellant, in that case, maintained that these provisions interact in a manner that treats men differently from women and discriminates against men, contrary to s. 15(1) of the *Charter*. The FCA concluded that the provisions do not violate section 15 of the *Charter* and commented extensively on the CRP, including ss. 42, 48(2) and subsection 77(1) of the *Regulations*.

[49] The wording in these provisions at the time of the Minister's decision in 2007 is not identical to the wording considered in *Runchey*. The Respondent submits that the effect is

the same.

[50] *Runchey* states that:

a) Section 42 of the Plan defines "family allowance recipient" for the purposes of the CRP and under this definition, a "family allowance recipient" includes any contributor who received an allowance under the Family Allowances Act before their child turned seven years of age;
b) Subsection 77(1) of the *Regulations* expands the definition of "family allowance recipient" and, in so doing, it adds new categories of contributors who are eligible for CRP;
c) 77(1) (a) further extends the definition to the spouses and common law partners of those who received a family allowance; it does so on two conditions: the spouse must have remained at home as the primary caregiver of a child under the age of 7 and the "period has not already been or cannot be excluded or deducted from the [recipient of the allowance]'s contributory period".

[51] The FCA concluded that there are three circumstances when a contributor is a "family allowance recipient":

1 before 1992, he or she received a family allowance under the old Family Allowances Act; or
2 he or she remained at home as the primary caregiver of the child, he or she is the present or former spouse or common law partner of a person who received a family allowance, and the person who received a family allowance does not qualify or waives his or her right to the CRP; and
3 after 1992, he or she did or could qualify for the Canada Child Tax Benefit.

[52] The FCA applied this analysis and further concluded that:

a) a spouse can only qualify for the CRP when the parent who received the family allowance does not;

b) 77(1)(a) allows the primary caregiver to access the CRP, but only if the other parent does not get access to the CRP; this can occur if the CRP would lower the amount of the parent's pension, or if the parent waives his or her right to it.

[53] The FCA noted women were the primary recipients of the family allowance, with males being eligible only in limited situations.

[54] The FCA, after analysis of the *Charter* issues, found that gender-based distinctions created by the CRP and DUPE provisions are not discriminatory.

SUBMISSIONS

[55] The Appellant submitted that:

a) He was the deemed family allowance recipient, because he was the primary caregiver during the Relevant Time;
b) He was the legitimate family allowance recipient, because he was the primary caregiver during the Relevant Time;
c) The CRP should be applied to him for all of the Relevant Time; and
d) The Respondent made errors in relation to his retirement benefits and this Tribunal should "do what makes sense and is reasonable" rather than be constrained by the wording of the CPP provisions.

[56] The Respondent submitted that:

a) *Runchey* is binding on this Tribunal, and the FCA's conclusions on the relevant sections of the CPP render the issue of "family allowance recipient" and "primary caregiver" irrelevant;
b) In 1980 and 1981, the Added Party benefited from the CRP; therefore, it is not open to the Appellant, who was not the FA recipient, to receive the CRP; and
c) In 1982, neither the Added Party nor the Appellant would benefit from applying the CRP; therefore, the CRP should not be applied to anyone.

[57] The Added Party submitted that:

a) The issue of who was the primary caregiver is not relevant for the reasons advanced by the Respondent;
b) In the alternative, the Added Party was primary caregiver before the Relevant Time and continued to be during the Relevant Time; and
c) The Appellant did not leave his employment to stay at home to be the primary caregiver but rather was self-employed during the Relevant Time.

ANALYSIS

[58] The *Harris* and *Runchey* decisions will be considered first.

[59] *Harris* was cited by the Appellant to describe the purpose of the CRP and, in particular, to show that these provisions were enacted to benefit parents who temporarily leave the workforce due to child-rearing responsibilities.

[60] Paragraph 77(1)(a) of the Regulations considered in *Harris* is the same as that which was in effect at the time of the Minister's decision in this matter.

[61] The issues in the *Harris* case related to whether the CRP cut-off violates section 15(1) of the *Charter* in the situation where a parent is at home looking after a child with disabilities beyond the age of seven. The majority of the FCA held that section 44(2)(b)(iv) of the CPP and section paragraph 77(1)(a) of the *Regulations* do not contravene section 15(1) of the *Charter*.

[62] This Tribunal accepts the *Harris* case for the general principle that the CRP ensures that parents who leave or reduce their workforce participation to raise pre-school age children are not penalized in determining future pension benefits. It is noted, however, that the fact situation in *Harris* is very different from the one on appeal. There was only one parent seeking the benefits of CRP and the Appellant sought to extend those benefits beyond the age of seven in the case of a disabled child.

[63] The *Runchey* decision is more applicable to the specific issues here. The parents in *Runchey* were divorced and did not agree on a period of time that would be or had been excluded or dropped out of the mother's contributory period due to the CRP. The Appellant asked that both he and the mother be allowed CRP eligibility for the relevant period or that the mother be disallowed from being able to claim CRP eligibility for that period.

[64] In its examination of the CRP provisions, the FCA made findings which are applicable to this appeal.

[65] Subsection 48(2) of the Plan as considered in *Runchey* is the same as 48(2) as set out in paragraph [19] above.

[66] The FCA stated that:

> The CRP provision does not automatically exclude "child rearing" years from the qualifying parent's benefit calculations. Periods are only dropped if doing so will result in higher pension benefits.

[67] The definition of "family allowance recipient" in section 42 of the Plan as considered in *Runchey* is the same as set out in paragraph [20] above.

[68] Subsection 77(1)(a) of the *Regulations* that was considered in *Runchey* stated:

> **77.** (1) For the purposes of the definition "family allowance recipient" in subsection 42(1) of the Act, family allowance recipient includes
>
> (a) the spouse, former spouse, common-law partner or former common-law partner of a person who is described in that definition as having received or being in receipt of an allowance or a family allowance in respect of a child for any period before the child reached the age of seven, if that spouse, former spouse, common-law partner or former common-law partner remained at home during
> that period as the child's primary caregiver and that period has not already been or

cannot be excluded or deducted from the person's contributory period under Part II of the Act;

[69] The differences in 77(1)(a) as considered in *Runchey* and the wording set out in paragraph [22] above are as follows:

Runchey	Applicable to this Appeal
spouse , former spouse, common-law partner or former common-law partner of a person	"spouse of a person"
if that spouse, former spouse, common-law partner or former common-law partner	"if the spouse"
remained at home during that period as the child's primary caregiver	remains at home and is the primary caregiver for a child under seven years of age
and that period has not already been or cannot be excluded or deducted from the person's contributory period under Part II of the Act	and where the other spouse cannot be considered a family allowance recipient for the same period

[70] The first two differences relate to a broader definition of spouse which is not at issue in this Appeal. The Appellant and the Added Party were married at the Relevant Time.

[71] The third noted difference is a difference of words chosen to describe the period when the child is under the age of seven.

[72] The last noted difference requires further discussion.

[73] In this appeal, the wording is "where the other spouse cannot be considered a family allowance recipient for the same period". The plain meaning is that the other spouse (the non-family allowance recipient) cannot qualify for the same period as the family allowance recipient. As such, the other parent can only qualify for the CRP when the person who received the family allowance does not.

[74] In *Runchey*, the Court stated at para. 67:

> Paragraph 77(1)(a) further extends the definition to the spouses of those who received a family allowance. It does so on two conditions: the spouse must have remained at home as the primary caregiver of a child under the age of 7 and the "period has not already been or cannot be excluded or deducted from the recipient of the allowance's contributory period under Part II of the Act".

The parties contested the meaning of this requirement. The FCA ruled that a spouse or partner can only qualify for the CRP when the parent who received the family allowance does not.

[75] Both versions of 77(1)(a) describe the same principle: the CRP is available when not already used by the spouse who received the family allowance.

[76] The FCA concluded as follows in *Runchey* at para. 73:

> In sum, section 42 of the Plan and subsection 77(1) of the *Plan Regulations* establish three circumstances when a contributor is a "family allowance recipient":
>
> 1. before 1992, he or she received a family allowance under the old *Family Allowances Act*; or
> 2. he or she remained at home as the primary caregiver of the child, he or she is the present or former spouse or common law partner of a person who received a family

allowance, and the person who received a family allowance does not qualify or waives his or her right to the CRP; and

3. after 1992, he or she did or could qualify for the Canada Child Tax Benefit.

[77] In this appeal, the Relevant Time is before 1992. The evidence is that the Added Party received the family allowance in relation to the children: the FA cheques were made payable to the Added Party. Further, the Added Party qualified for the CRP during the period April 1, 1980 to December 31, 1981.

[78] Therefore, the Appellant can only qualify for the CRP from January 1, 1982 to October 31, 1982, if the Appellant can establish that he remained at home and was the primary caregiver of the children.

[79] As noted above, both the Appellant and the Added Party gave evidence on who the primary caregiver of the children was in that period. The Respondent took no position on this issue. In fact, the Respondent submitted that it is unnecessary to determine this issue because the Appellant does not benefit from applying the CRP in 1982; he is in a better position in terms of his own retirement benefits by keeping his own earnings.

[80] The Appellant did not disagree that applying the CRP in 1982 would be of no benefit to his retirement benefits. The only evidence on this point was the Respondent's based on calculations done in accordance with the Plan.

[81] Periods are only dropped if doing so will result in higher pension benefits: *Runchey* para. 56.

[82] This Tribunal finds that the Appellant would not benefit from the CRP during the period January 1, 1982 to October 31, 1982. Therefore, it is not necessary to determine who the primary caregiver of the children was during this time.

[83] The evidence in relation to the primary caregiver issue was fully considered at the hearing of this matter, even though this Tribunal's conclusion, now, is that it is unnecessary to determine this issue.

[84] In summary, this Tribunal holds:

a) That the actual family allowance recipient during the period April 1, 1980 to October 31, 1982 was the Added Party; and

b) That, in light of the *Runchey* decision, it is not necessary to determine whether the Appellant remained at home and was the primary caregiver.

CONCLUSION

[85] The Appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division