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

Citation: *S. B. v. Minister of Employment and Social Development and M. A.*, 2018 SST 1043

Tribunal File Number: GP-18-923

BETWEEN:

S. B.

Appellant

and

Minister of Employment and Social Development

Minister

and

M. A.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Virginia Saunders

Videoconference hearing on: August 30, 2018

Date of decision: September 5, 2018

Canada

DECISION

[1] The appeal is dismissed. The Appellant and the Added Party did not cohabit in a conjugal relationship for a continuous period of at least one year, at any time before their marriage in October 1987. The Minister correctly divided their unadjusted pensionable earnings under the *Canada Pension Plan* (CPP) for the period January 1987 through December 1992.

OVERVIEW

[2] The CPP provides for the unadjusted pensionable earnings of spouses or common-law partners to be divided equally after the relationship ends[1]. This is commonly known as a DUPE or Credit Split. "Common-law partner" is defined in the CPP as "a person who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year"[2]. The requirement for a continuous one-year period of cohabitation is repeated with specific reference to the Credit Split[3]. The Credit Split is applied as of January of the year in which the parties were married or began to cohabit in a conjugal relationship, and ends in December of the last full year before they began to live separate and apart[4].

[3] In June 1996 the Appellant applied for a Credit Split[5]. In his application he claimed that:

- he and the Added Party were common-law partners from March 1983 until their marriage in October 1987;
- for part of this period - from August 1, 1985, to July 30, 1986 - he lived with his parents while he returned to school to complete his Bachelor of Arts degree "as discussed and agreed between the couple";
- he moved back in with the Added Party after he finished his university program;
- after their marriage they continued to cohabit until March 1993; and
- they divorced in October 1994.

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[1] CPP section 55.1
[2] CPP subsection 2(1)
[3] CPP subsection 55.1(3)
[4] CPP subsection 55.1(4); CPP Regulations subsection 78.1(1)
[5] GT1-50-51

[4] Based on this information, a Credit Split was applied for the period January 1983 to December 1992. The Minister disregarded the 1985-1986 separation because it was for less than 12 months and the parties resumed cohabitation for more than 12 months[6].

[5] Many years later, for reasons that were addressed by the Appeal Division and are not an issue in the present appeal, the Minister issued a reconsideration decision. The Minister decided there was not enough evidence of a common-law union before the Appellant and the Added Party married. The Credit Split was applied from January 1987 to December 1992; based on co-habitation beginning when the parties were married, and ending in March 1993[7].

[6] The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (now the Social Security Tribunal). In November 2015 the General Division of the Tribunal dismissed the appeal, and the Appellant appealed to the Appeal Division. The Appeal Division returned the matter to the General Division to determine if the Appellant and the Added Party were in a common-law relationship between 1982 and their marriage; and what impact that would have on the Credit Split.

[7] I heard the appeal by videoconference on August 30, 2018. The Appellant advised the Tribunal the day before that he was not planning to attend, and that the Tribunal should proceed in his absence[8]. I did not cancel the Appellant's hearing room, in case he changed his mind. However, he was not at the Service Canada centre when it was time for the hearing to begin. Because I was satisfied the Appellant received notice of the hearing, I decided to proceed without him[9], with the Added Party in attendance.

ISSUES

[8] Did the Appellant and the Added Party cohabit in a conjugal relationship for a continuous period of at least one year at any time between 1982 and October 1987?

[9] If they did, what impact does that have on the Credit Split?

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[6] GT1-75
[7] GT1-17-18, 29-30
[8] IS2-6
[9] *Social Security Tribunal Regulations* subsection 12(1)

ANALYSIS

[10] In his application, the Appellant claimed the common-law relationship began in March 1983[10]. However, he has also suggested it began in March 1982[11]. Whatever the start date, he claimed it continued up to when he and the Added Party married in October 1987[12]. The Added Party claimed that any common-law relationship was for less than one year, and ended in September or October 1984.

[11] I did not hear or decide the first appeal. The Appeal Division directed that the General Division's November 2015 decision and the recording of the original hearing be removed from the record; so I did not review either. In reaching my decision, I considered all the written evidence filed at the General Division and the Appeal Division – that is, everything beginning with GT, AD, or IS, including the Appellant's late submissions (IS2) - as well as the testimony at the hearing on August 30, 2018. Where the parties' submissions referred to events that occurred at the first hearing, I disregarded those.

[12] After considering the oral and written evidence, I find the Appellant and the Added Party were not common-law partners under the CPP at any time that would affect the Credit Split as it now stands. I find that any common-law relationship ended in October 1984, and that after that the parties did not resume cohabiting in a conjugal relationship until after they were married.

Features of a common-law partnership under the CPP

[13] Common-law partners are subject to a Credit Split in these circumstances:

- they must have cohabited;
- the cohabitation must have been in a conjugal relationship; and
- the cohabitation must have been for a period of at least one year.

[14] There are also time limits within which the application must be brought, which are discussed later in these reasons.

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[10] GT1-50-51
[11] Gt1-88-89; AD1-8
[12] GT1-50-51

[15] In *Hodge v. Canada*[13], the Supreme Court of Canada stated:

> ". . . cohabitation is a constituent element of a common law relationship. 'Cohabitation' in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof".

[16] The Court stated further that periods of physical separation do not end a common law relationship "if there was a mutual intention to continue", and that subject to whatever provision may be made in a statute, "a common law relationship ends 'when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one'".

[17] "Conjugal relationship" is not defined in the CPP. In *MSD v. Pratt*[14], the Pension Appeals Board stated: "the core of the [conjugal] relationship is that the parties have by their acts and conduct shown a mutual intention to live together in a marriage-like relationship of some permanence." In *Betts v. Shannon*[15], the Board listed elements that will generally be found in a conjugal relationship, but stressed that not all of them needed to be present. These included:

- financial interdependence
- a sexual relationship
- a common residence
- the purchase of gifts for each other on special occasions
- a sharing of household responsibilities
- shared use of assets
- shared responsibility in raising children
- shared vacations
- the expectation of mutual dependency each day
- the naming of each other as beneficiary in wills and insurance policies
- where each kept their clothing
- caring of each other during illness

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[13] 2004 SCC 65
[14] 2006 CP 22323
[15] 2001 CP 11654

- knowledge of each other's medical needs
- communication between the parties
- public recognition of the parties as a couple
- marital status declared by the parties on various applications or other forms completed by them, and
- responsibility for funeral arrangements.

The parties' statements about the relationship

i. March 1982 to October 1984

[18] The Appellant and the Added Party were both 22 years old when they met in March 1982. They agreed that they became a couple soon after meeting, but they have very different versions of what happened in the relationship after that.

[19] Throughout the file the Appellant described "a mutually supportive, intimate, continuous relationship" lasting 11 years from the time he met the Added Party in March 1982 until they separated in March 1993. He stated they rented apartments together on month-to-month tenancies; jointly owned personal property such as furniture and household goods; had joint bank accounts; and had life insurance policies that named the other as beneficiary. He stated that he purchased a car and registered it in the Added Party's name; that household bills were registered in his name; that they purchased Canada Savings Bonds together; that they shared expenses except for a one-year period when he was absent; and that he shopped, cooked, did household chores, and maintained vegetable gardens at two of the residences they shared[16].

[20] The Added Party stated that when she met the Appellant in March 1982, she was living on X in Toronto, and the Appellant was living with his parents at his childhood home on X, also in Toronto. In 1983 she moved to a rented basement flat on X. At first she recalled the Appellant moved in with her from approximately March to August of that year[17]; but several months later corrected herself and stated that in fact this period of cohabitation was in 1984[18]. She stated that she did not have access to any of her records because the Appellant had kept them after they

[16] GT1-7-8, 94; GT2-2-17; GT6-1
[17] GT1-69-71
[18] GT1-84

separated; but she recalled they lived together for about six months, and based on the information provided by others she now realized that it was 1984, not 1983[19].

[21] The Added Party then made a Statutory Declaration stating she and the Appellant cohabited in a conjugal relationship from February 1984 to August 1984. She denied having a joint document relating to a residence, jointly-owned property, joint accounts; or that she or the Appellant were named in each other's life insurance policies[20].

[22] The Added Party confirmed the above statements under oath at the hearing. She testified the Appellant moved into her flat on X in early 1984 because they decided to try living together. He brought some clothing but left some belongings at his parents' home, where his bedroom was kept for him. He sometimes returned to X to visit his parents or look after their cat while they were away. Occasionally the Added Party went with him, but she did not stay over unless his parents were out of town. The Added Party testified that during the months the Appellant lived with her on X, he contributed towards household expenses and paid half the rent, but he did not help with household chores.

[23] The Added Party testified that throughout the relationship, she and the Appellant spent their birthdays with each other. For several years they were apart for holidays like Christmas and Thanksgiving; spending them separately with their own families. This changed once their marriage drew closer, and they started spending these holidays together. She testified that she changed her last name to the Appellant's after they were married, but until then she used her maiden name.

ii. October 1984 to October 1987

[24] Both parties agree the Appellant moved out of X because he was returning to school at the X[21]. Whereas the Added Party at first recalled the Appellant moved out in the fall of 1983, and later corrected that to the fall of 1984; the Appellant originally stated he was absent from August 1985 to July 1986, but later appears to have accepted that in fact he left in the fall of 1984.

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[19] GT1-79, 82-83
[20] GT1-87
[21] GT1-51; Added Party's testimony

[25] The Appellant stated that his move back to his parents' home was a temporary arrangement that lasted about one year and did not change his relationship with the Added Party. He stated the Added Party's sister moved in with her to cover half the rent while he was away, and that he left furniture and other belongings at the flat and visited regularly, bringing groceries and household items. He stated that even after he left, he and the Added Party behaved as partners "caring for and looking after their general welfare"[22].

[26] The Added Party testified that she and the Appellant discussed his moving out beforehand. He told her there was no reason for them to live together as she was fine on her own and they weren't married. She believed the main reason the Appellant moved back with his parents was that he did not want the responsibilities or financial burden of living away from his childhood home. Although his parents lived closer to the university, her apartment was near a subway station so she did not think there was much advantage as far as travel was concerned.

[27] The Added Party agreed with the Appellant's statement[23] that her sister moved in with her after his departure because she wanted a room-mate to help pay the rent; but denied there was any plan for her sister to move out again if the Appellant returned. She testified that she and her sister moved out the following year because there was an oil leak in the basement where their flat was located. The Added Party moved to a flat on X, and her sister moved elsewhere.

[28] The Appellant stated he was absent for about one year, and then moved back in with the Added Party[24]. He explained that after he returned to live with the Added Party he was often at his parents' house because he rented space there, from which he ran a business called X[25].

[29] The Added Party testified that after he moved out of X in the fall of 1984, the Appellant did not return to live with her at any time until they were married in October 1987. They continued to see each other, and he stayed over about one night a week. They had no joint finances or property. She thought he probably left a toothbrush at her apartment; and he brought beer if he was staying over, but he did not pay rent, contribute anything to household expenses, or help with household chores until after they were married. The one exception to this was in the

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[22] GT1-88-89
[23] GT1-88
[24] GT1-89
[25] GT6-5

summer of 1987 as the wedding approached, when the Appellant paid part of the Added Party's rent because she was having trouble with the wedding expenses.

[30] The Added Party testified the Appellant gave up his key to X, and she gave it to her sister. He did not have a key for the X apartment. She thought he may have had a key for the X apartment she moved to around September 1986, but only for a few months before they married. She testified he did not actually move in with her until they had returned from their honeymoon.

Credibility and weight given to evidence

[31] Although the Appellant was not at the hearing, I considered his written statements. However, in weighing their probative value I had to take into account the fact that, except for his Statutory Declaration[26], the evidence was not given under oath. More importantly, the Appellant was not available to be cross-examined by the Added Party, or to answer my questions. As a result, things he might have clarified were not explained.

[32] At the hearing the Added Party answered my questions in a straightforward manner. She gave plausible explanations for inconsistencies; as discussed below. I found her credible.

[33] The Appellant attacked the Added Party's credibility for a number of reasons. He suggested she could not be believed because she initially said they lived together in 1983 but changed that to 1984 once evidence from that year became known[27]. I note the Appellant was similarly mistaken when he stated he moved back with his parents in 1985-1986; but changed his departure date to October 1984 when he found a letter indicating as much[28].

[34] I do not think these or any other errors regarding the particular month in which something happened are evidence of dishonesty by either party. They are the result of the passage of time. Obviously, it would have been preferable had both parties qualified their statements to allow for the possibility their memories were not exact. However, their failure to do so here does not mean they are generally unreliable. There was no benefit to the Added Party in claiming the period of

[26] GT1-94
[27] GT1-7; GT2-6
[28] GT1-7, 96

cohabitation was in 1983 rather than 1984: her point was that it was a short period that ended long before the marriage.

[35] The Appellant accused the Added Party of tampering with documents, because the address was removed from his February 1984 passport application and his university transcripts; and a letter he sent to the Minister was missing from the file[29]. The Added Party denied doing anything with these documents, and noted that she did not have access to them except for the copies the Tribunal sent to her. The Minister is required to send relevant documents to the Tribunal once an appeal is filed. Any redactions or losses would likely have occurred on or before that stage, and had nothing to do with the Added Party. I note as well that the Appellant could have re-sent the documents, and did so in some cases.

[36] Third, the Appellant suggested the Added Party was dishonest because she stated they did not have joint accounts or property. He produced a list of what he claimed was his property[30], and evidence of a joint bank account dating from 1988[31]. However, the Added Party was referring to property and accounts during the common-law period, not after the marriage. Moreover, the property list was simply a written statement the Appellant made in support of his appeal, which the Added Party disagreed with. That does not make her dishonest, nor does it make her memory unreliable.

[37] There is no merit to the Appellant's attacks on the Added Party's credibility. Because I found her credible, and because her evidence is supported by documentation, I accept her testimony as a truthful account of her relationship with the Appellant.

Supporting documents

i. Miscellaneous documents

[38] The Added Party filed statements from her sister; her niece, and a friend; all providing essentially the same information as the Added Party[32]. I acknowledge that these statements were

[29] GT2-5
[30] GT2-12
[31] GT2-20-21
[32] GT1-84-86

not made under oath and in two cases appear to be unsigned. For that reason, I placed no weight on them.

[39] The Appellant submitted few documents to support his position. I appreciate that much time has passed and obtaining documents might have been difficult. The Appellant might have helped his case if he had attended the hearing to explain why he was able to find some documents but not others. For example, he could have explained why he had a bank passbook showing that he paid rent for eight months in 1984, but no passbooks for any other periods; why he had a cheque showing a partial rent payment in August 1987 but not for any other month; or why he did not have documents to prove he rented office space from his parents.

[40] Many of the documents submitted by the Appellant are not evidence of the common-law relationship. Those showing his work-product and activities[33] are not particularly relevant to the issues. While they may suggest the Appellant was earning money, they do not show he was living at the Added Party's address or contributing to household expenses during the period in question. Other documents are dated after the marriage and there is nothing to connect them to the alleged common-law period[34].

[41] Most of the documents that are dated before October 1987 are consistent with the Added Party's evidence rather than the Appellant's:

- The Appellant's university transcript dated May 1982 is addressed to him at his parents' home on X[35], as the Added Party testified.
- The Added Party's Notices of Assessment dated August 25, 1983; and April 6, 1984[36] show she was living on X on those dates, as she claimed.
- The Appellant's passport application of February 9, 1984, does not show his address[37]. He claimed that before it was redacted it showed he was living on X. Assuming that was the case, it is consistent with the Added Party's testimony. I

[33] GT2-31-62; GT6-4
[34] GT1-100; GT2-20-29; GT6-5-13
[35] GT6-2
[36] GT2-19
[37] GT1-64-66

note as well that the Appellant named his mother, rather than the Added Party, as the person to contact in an emergency. This does not support his position that he was in the midst of or was about to begin a marriage-like relationship of some permanence.

- The Appellant's university transcript dated May 1983 is indeed addressed to him on X[38]. However, the document also indicates it was amended in May 1984, and so was mailed to the Appellant at a time when the Added Party agreed he was living with her there.

- Excerpts from what the Appellant stated was his bank passbook show a cheque for $395.00 cashed on February 7, 1984; and cheques for $418.70 cashed on March 7, April 4, June 5, July 5, August 3, and September 6 of that year[39]. The Appellant stated that these show his contribution to the rent for X. The document shows that no payments were made from October 1984 to February 1985; and the Appellant did not provide any other excerpts from his banking records to show payments before or after that date. Thus, the only evidence of his contribution towards rent is for February to September 1984, which is consistent with the Added Party's testimony that he lived with her only for those months.

- A cheque dated August 1, 1987, for $345.00[40] is consistent with the Added Party's evidence that the Appellant helped her with the rent that month because of her wedding expenses. The fact the Appellant wrote on the cheque that it was for the balance of the rent, rather than his portion; and the absence of any cheques for other months in that time, supports the Added Party's testimony.

ii. Letter of October 1, 1984

[42] The Appellant's letter of October 1984[41] is a curious document. The Added Party testified she had never seen this letter until it was sent to her by the Tribunal. She felt the letter

[38] GT6-3
[39] GT1-97-98
[40] GT2-21
[41] GT1-96

was self-serving and was written more recently by the Appellant to bolster his claim. I find it odd that one person in what both parties agree was at that point a close and loving relationship, would make and keep a copy of a personal letter he sent to the other person. If the Appellant did not make a copy but kept the original, that supports the Added Party's claim that the Appellant has since 1993 refused to return her personal records, which is one reason she has been unable to provide any documents to support her version of events.

[43] Given that the Added Party's memory is not infallible, and how much time has passed, I am not prepared to conclude the Appellant did not write this letter in October 1984, or that he did not give it to the Added Party. However, the letter does not assist the Appellant. It shows that by the beginning of October 1984 the Appellant had decided to move out of Pacific Avenue and had either left or was about to do so. Although he described the separation as temporary, no anticipated return date was included and he merely expressed hope and confidence in very general terms that the relationship would continue. Without other supporting documentation, this letter does little to prove that the common-law relationship continued or resumed later.

iii. Letter of November 24, 1983

[44] A letter dated November 24, 1983, addressed to the Appellant on X, suggests the Appellant lived there at the time. Possibly, he had moved in by then. Possibly, he was using the address in expectation of moving in soon. Possibly, he was using the Added Party's address to receive mail from some sources. Because the Appellant was not at the hearing, he did not answer any of the questions raised by this letter since it conflicted with the Added Party's recollection. On its own, the letter is not sufficient to refute the Added Party's testimony; nor does it change the fact that other evidence points persuasively to the common-law relationship ending in October 1984. That being the case, the fact that the Appellant may have moved in with the Added Party several months before February 1984 is irrelevant. As discussed above, errors regarding what months the parties began living together do not affect the credibility of either.

The burden of proof

[45] The Appellant must prove the existence of a common-law relationship, on a balance of probabilities[42]. He submitted the standard of proof should not be so high, because of the length of time that has passed. That is not the law. In any case, allowing him to succeed on less than a balance of probabilities would simply shift the burden of proof to the Added Party, who faces similar difficulty in obtaining evidence, through no fault of hers. As the person asserting the existence of a common-law relationship, the Appellant must prove it.

[46] I am not persuaded that the parties cohabited in a conjugal relationship at any time except between February and October 1984. The weight of the evidence supports that the Appellant moved in with the Added Party in February 1984, and moved out that October. Although he and the Added Party continued a romantic and sexual relationship, the Appellant moved in with his parents and stopped contributing financially to the household he had shared with the Added Party. He expressed no plans to return.

[47] By these actions, the Appellant demonstrated that he intended to end the common-law arrangement. There is no convincing evidence that this state of affairs changed after that. Furthermore, other features of a conjugal relationship were absent, particularly after October 1984. For example, there were no shared assets; there is no evidence they were public recognized as a common-law couple; nor did they declare themselves as such. They were simply a young couple who lived together for a time and then stopped. They did not break off their relationship, but lived separately and independently until they married in October 1987. They were not common-law partners.

No credit split is available for the common-law relationship

[48] If the common-law relationship had existed up to the date of the marriage, those periods of cohabitation would have been included in the Credit Split[43]. However, it ended three years earlier, and so must be considered as a relationship separate from the marriage.

[49] There are several reasons why there cannot be a Credit Split for the common-law relationship:

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[42] *F.H. v. McDougall*, 2008 SCC 53; *A.P. v. Minister of Employment and Social Development*, 2017, SSTADIS 64
[43] CPP Regulations section 78.1

- First, I have found that the parties did not cohabit in a conjugal relationship for a continuous period of at least one year.

- Second, before section 55.1 of the CPP was enacted, common-law partners could not apply for a Credit Split. Section 55.1 applies only to common-law partners who separated after July 31, 2000[44].

- Even if that were not the case, unless both former partners agree in writing, the application for the Credit Split must be made within four years after the day they commenced to live separate and apart[45]. The common-law relationship ended in October 1984, almost eight years before the Appellant's application in June 1996.

CONCLUSION

[50] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security

[44] Section 55.11 of the CPP states that section 55.1 applies only to common-law partners who separated after it came into force on July 31, 2000 (SI 2000-76)
[45] CPP sub-paragraph 55.1(1)(c)(ii)