



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. R. v Minister of Employment and Social Development*, 2019 SST 677

Tribunal File Number: AD-19-13

BETWEEN:

C. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: July 22, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] C. R. (Claimant) married in 1973, separated in 1993 and divorced in 1997. His ex-wife applied for a division of unadjusted pensionable earnings (credit split) in 1994, which was done. The Claimant applied for a reversal of the credit split in 2014. The Minister of Employment and Social Development (Minister) refused the application. The Claimant appealed this decision to the Tribunal and argued that the relevant provisions of the *Canada Pension Plan* (CPP) violate sections 8 and 15 of the *Canadian Charter of Rights and Freedoms* (Charter), the *Canadian Bill of Rights*, and was outside of the federal government's jurisdiction under the *Constitution Act, 1867*.

[3] The Tribunal's General Division dismissed the appeal, deciding that the relevant provisions did not breach section 15 of the Charter, and that he had not produced sufficient evidence to support his claim that section 8 of the Charter was breached, that the *Bill of Rights* was breached or that the legislation was outside the federal government's jurisdiction.

[4] Leave to appeal was granted because the appeal had a reasonable chance of success on the basis that the General Division may have based its decision on an erroneous finding of fact without considering all of the material that was before it. The General Division did not base its decision on an erroneous finding of fact. However, it made an error in law when it decided that there was insufficient evidence for the Claimant's constitutional claims to be adjudicated. In spite of this, when all of the evidence and arguments are considered I reach the same conclusion, that the CPP does not violate the Charter, the *Constitution Act, 1867* or the *Canadian Bill of Rights*. Therefore, the appeal is dismissed.

PRELIMINARY MATTERS

[5] The Claimant did not serve the Attorney General of Canada or the Attorneys General of the provinces with a Notice of Constitutional Question before the hearing of the appeal. I gave

him the opportunity to do so after the hearing of the appeal. The Claimant then served all of the Attorneys General, and none of them stated that they would participate in the appeal.

[6] The Claimant states in documents filed with the Tribunal that he is not appealing the General Division's decision regarding section 15 of the Charter.¹ At the Appeal Division hearing, the Claimant again confirmed that he was not pursuing the appeal on this basis. Neither party therefore made submissions on this issue, and it is not part of this appeal.

ISSUES

[7] Did the General Division base its decision on an erroneous finding of fact because statements made in paragraphs 1 and 23 of the decision are inconsistent?

[8] Did the General Division base its decision on an erroneous finding of fact that the parties agreed to a credit split?

[9] Did the General Division make an error in law because it failed to consider court decisions that confirm that pensions are property?

[10] Did the General Division make an error under the DESD Act because it framed the issues before it incorrectly?

[11] Did the General Division make an error in law because it failed to consider whether the credit split provisions of the CPP infringe on section 92(13) of the *Constitution Act, 1867*?

[12] Did the General Division make an error in law because it failed to consider whether the credit split provisions of the CPP violate the *Canadian Bill of Rights*?

ANALYSIS

[13] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of

¹ AD2-7

fact made in a perverse or capricious manner or without regard for the material before it.² The Claimant's arguments are considered in this context below.

[14] The Claimant argues that the General Division based its decision on a number of erroneous findings of fact. In order for an appeal to succeed on the basis of an erroneous finding of fact, the Claimant must prove three things: that a finding of fact was erroneous (in error); that the finding of fact was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact.³

Issue 1: Inconsistent statements in the decision

[15] The first finding of fact that the Claimant says was erroneous is that statements made in paragraphs 1 and 23 of the decision are contradictory: in paragraph 1, the General Division decision says the legislation does not allow the return of pension credits as the Claimant requested. Paragraph 23 states this again, then states, “[the Claimant] could only be successful if he can show the relevant provisions violate his Charter rights”.

[16] However, these statements are not inconsistent. It is correct that the CPP does not permit the return of pension credits after a credit split has occurred. It is also true that the only way such a remedy might be granted is if the Claimant successfully demonstrates that the CPP provisions that permit a credit split are unconstitutional. Therefore, the General Division made no erroneous finding of fact in this regard, and the appeal fails on this basis.

Issue 2: Agreement to a credit split

[17] The Claimant also argues that the General Division based its decision on an erroneous finding of fact that he and his ex-wife agreed to divide their CPP credits according to law. He argues that he did not agree to this; he was told by his lawyer that he had no choice but for this to happen. However, the General Division decision states, “The [separation] agreement stated it was made under the law of the Province of Ontario. The former spouses’ *Canada Pension Plan*

² DESD Act s. 58(1)

³ *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

(CPP) contributions would be divided according to applicable law”.⁴ The Claimant signed the agreement. This shows that he agreed with its terms.

[18] In addition, the General Division did not base its decision on the wording of the Claimant’s separation agreement.

[19] Therefore, the appeal fails on this basis.

Issue 3: Failure to consider whether pensions are property

[20] In addition, the Claimant argues that the General Division did not consider any of the numerous documents that he had presented to establish that CPP credits are property. These documents included decisions of courts in family law matters that confirmed that pensions are property and subject to division in matrimonial litigation, scholarly articles on this issue, and dictionary definitions of tangible and intangible property.⁵ These documents are not specifically mentioned in the General Division decision. However, these documents are not evidence, but part of the Claimant’s submissions. The General Division considered his submissions in reaching its decision. In addition, the General Division is presumed to have considered all of the evidence that was before it. Each piece of evidence or argument need not be mentioned in the written decision.⁶ Therefore, the mere fact that this information was not specifically mentioned does not establish that the General Division made an error.

[21] Furthermore, the nature of CPP credits – whether property or not – was not in question before the General Division. The Minister agreed that CPP credits are property. What the General Division had to decide was not the nature of CPP contributions as an asset, but whether the CPP credit split⁷ was unconstitutional or violated the *Canadian Bill of Rights*. Therefore, the General Division made no error when it failed to mention the nature of CPP credits. The appeal fails on this basis.

⁴ General Division decision at para. 2

⁵ For example, GD18-15, Gd2102017, GD13-118, GD26-4, 6, 13, GD21-2106, 2521, AD3-5 tabs 4-7

⁶ *Canada v. South Yukon Forest Corporation*, 2012 FCA 165

⁷ The Claimant refers to sections 55 and 55(2) of the CPP, however the relevant provisions for him are sections 55.1 and 55.11

Issue 4: Framing of issues

[22] The Claimant also argues that the General Division erred when it set out the issues that it had to decide. The decision states:

The issues that were addressed by the parties in their evidence and submissions can be described as follows.

1. Are the Credit Split provisions *ultra vires* because pension credits are property and the provinces have exclusive power over property.
2. Does the Credit Split violate the Bill of Rights because they result in a loss of property without due process?
3. Does the fact the Credit Split is compulsory constitute an unreasonable seizure and therefore violate section 8 of the Charter?
4. Does the Credit Split violate the Claimant's equality rights under section 15 of the Charter?⁸

The Claimant contends that issues 1 and 2 are misstated, and the General Division should, instead have considered: 1. Whether sections 55 and 55.2⁹ infringe in s. 92(13) of the *Constitution Act, 1867*, and 2. Whether these sections contravene sections 1(a), 1(b) and 2(b) of the *Canadian Bill of Rights*.

[23] Section 92 of the *Constitution Act, 1867* provides that each province may exclusively make laws in relation to a number of listed subjects. Number 13 in that list is property and civil rights in the Province. The General Division's framing of issue number 1, referring to whether credit splits are within provincial jurisdiction because it is property is the same thing. Therefore, this statement of the issue is not erroneous.

⁸ General Division decision at para. 20

⁹ See my comment in footnote 7 above

[24] The *Canadian Bill of Rights* states

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

The General Division framed issue 2 before it as whether the credit split violates the *Bill of Rights* because it results in a loss of property without due process. This is a summary of the rights guaranteed in the sections of the *Bill of Rights* the Claimant refers to. Therefore, the General Division made no error in how it framed this issue.

[25] The appeal fails on the basis of this argument.

Issue 5: Violation of the *Constitution Act, 1867* and the *Canadian Bill of Rights*

[26] I have reviewed the written record, including the Claimant's written submissions to the General Division. The Claimant provided evidence of his marriage and separation, and the amount of reduction in pension that resulted from the credit split.¹⁰ He also filed volumes of case law on various legal issues, as well as other documents to support his claim (including scholarly articles and dictionary definitions). It is clear from these documents that one of the Claimant's

¹⁰ GD12

central arguments before the General Division was that the federal government was without legal authority to enact the credit split provisions in the CPP, and that these provisions breached the *Canadian Bill of Rights* and the Charter. The General Division dismissed these claims, stating only that the Claimant had filed insufficient evidence to support them.¹¹ The decision provides no indication about what evidence would be required or why what the Claimant produced was insufficient.

[27] Counsel for the Minister argues that evidence is “facts” and that there were no facts presented upon which the General Division could have adjudicated this matter. However, the facts are straightforward: the Claimant was married in 1973, separated in 1993 and a CPP credit split was performed in 2014. This resulted in the Claimant receiving a reduced CPP retirement pension. The Claimant’s presentation of additional materials and arguments that supported his claims were sufficient for them to be adjudicated. However, the General Division decision makes no mention of the scholarly articles or the Claimant’s arguments about CPP credits being property and that their division at the end of a marriage being properly under provincial jurisdiction. It provided no reasons for not addressing this. The failure to do so is an error in law. Therefore, the General Division erred under the DESD Act, and the Appeal Division should intervene.

REMEDY

[28] The DESD Act sets out what remedies the Appeal Division can give when a ground of appeal has been established. This includes giving the decision that the Appeal Division should have given.¹² The DESD Act also gives the Tribunal legal authority to decide questions of law and fact that are necessary to dispose of an appeal.¹³ I have reviewed the written record and heard the parties’ submissions. The record before me is complete. The facts are not disputed.

[29] The *Social Security Tribunal Regulations* also require that appeals be concluded as quickly as the circumstances and the considerations of fairness and natural justice permit.¹⁴ The

¹¹ General Division decision at para. 6

¹² DESD Act s. 59(1)

¹³ DESD Act s. 64(1)

¹⁴ *Social Security Tribunal Regulations* s. 3(1)

Claimant applied for a reversal of the credit split in 2014, some five years ago. If this matter were returned to the General Division for reconsideration there would be a further delay.

[30] It is therefore appropriate that I give the decision that the General Division should have given.

[31] The error that the General Division made was that it failed to consider whether the credit split provisions of the CPP contravene the *Constitution Act, 1867*, the *Canadian Bill of Rights* or section 8 of the Charter. These issues are considered below.

The *Constitution Act, 1867*

[32] The Claimant argues that the CPP credit split provisions contravene the *Constitution Act, 1867* because that legislation states, clearly, that property rights are within the exclusive jurisdiction of the provinces. However, s. 94A of the *Constitution Act, 1867* makes an exception to this. It states :

The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

This means that although the provinces have jurisdiction regarding property rights, the federal government may also make legislation regarding old age pensions and supplementary benefits. The CPP does this. Therefore, on its face the Federal Government had constitutional authority to enact the CPP and so did not breach the *Constitution Act, 1867*.

[33] However, if I am wrong on this, I must consider the pith and substance of the legislation;¹⁵ that is the purpose and effect of the credit split provisions of the CPP.

[34] The purpose of the credit split provisions is to balance spouses' CPP contributions upon divorce, and to ensure that spouses with lower or not contributions during the marriage would

¹⁵ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 ; *Rogers Communications Inc. v. Châteauguay (City)* 2016 SCC 23

receive equal benefit of all CPP contributions made during the marriage. The law intends to recognize the contribution of unpaid work in a family.¹⁶ It clearly does not infringe on the jurisdiction of the provinces to make laws regarding provincial old age pensions and supplementary benefits.

[35] The effect of the legislation is to divide CPP pension credits earned by both spouses at the end of their marriage and to ensure that their contributions are equalized upon divorce, in recognition of their monetary and non-monetary contributions during the relationship. The CPP permits provinces to opt out of this mandatory credit split scheme. Some provinces have elected to do so, although Ontario (the relevant province in this case) has not. Therefore, again, the CPP does not infringe on a province's jurisdiction to legislate regarding property.

[36] The Pension Appeals Board confirmed this in the *Blackwood*¹⁷ decision when it specifically considered whether a former spouse could apply for a credit split in the face of a separation agreement that stated the parties would not do so. The court decided that the Federal Government's power to enact the CPP credit split provisions comes from s. 94A of the *Constitution Act, 1867*. The court concluded that the giving of an option to provinces to opt out of the credit split scheme avoids any conflict between provincial and federal legislation.

[37] Therefore, the *Constitution Act, 1867* has not been violated, and the appeal fails on this basis.

The Canadian Bill of Rights

[38] The Claimant argues that because the Canada Pension Plan program does not permit any kind of hearing before it splits credits earned during a marriage, sections 1(a), 1 (b) and 2(b) of the *Canadian Bill of Rights* has been violated. Section 1 states:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

¹⁶ General Division decision at para. 10

¹⁷*Minister of National Health and Welfare v. Blackwood* CP 2326 (May 4, 1992)

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

The Claimant argues that because he was not given an opportunity to oppose the credit split, some of his CPP credits were “taken” without due process, resulting in a loss of enjoyment of property. However, The Supreme Court of Canada teaches that the *Canadian Bill of Rights* only protects rights that existed when it was enacted in 1960.¹⁸ The CPP was enacted in 1967, so no rights existed regarding CPP credit splitting at that time. Therefore, the *Canadian Bill of Rights* does not assist the Claimant.

[39] The Claimant also says that he should have had the opportunity to have some kind of hearing before he was deprived of CPP credits by operation of the credit split. However, due process and the principles of fundamental justice do not require a hearing in every case.¹⁹ What is required depends on the nature of the decision to be made and the process followed to do so.²⁰

[40] The principles of fundamental justice are concerned with ensuring that a party affected by legislation has the opportunity to know and understand the law, and to have it applied fairly. The Claimant has not presented any evidence that suggests that these principles were not observed. He knew that all of the CPP credits he and his ex-wife earned during the course of their marriage would be split equally. If an error was made in this calculation, there was recourse to fix it. While he was not offered a hearing specifically on this issue, this is not required in order for due process to be followed.

[41] Therefore, there has been no breach of section 1 of the *Canadian Bill of Rights*.

Section 2 of the *Canadian Bill of Rights* says

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian

¹⁸ *Authorson v. Canada (Attorney General)* 2003 SCC 39

¹⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

²⁰ *Ibid.*

Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does

not understand or speak the language in which such proceedings are conducted.

[42] The meaning of subsection 2(b) is taken from its wording in context. This subsection is in the part of the *Canadian Bill of Rights* that deals with rights guaranteed to those involved in a criminal law process; not those whose financial situation is affected by the operation of law. There has been no breach of this section of the *Canadian Bill of Rights* because it does not apply to this situation.

[43] In addition, nothing before me suggests that there has been any cruel or unusual punishment or treatment. The Claimant was not treated any differently than any other separated or divorced spouse whose CPP credits were divided in accordance with the law.

[44] Therefore, the CPP credit split provisions do not violate the *Canadian Bill of Rights*.

The Charter

[45] The Claimant contends that the CPP credit split provisions violate section 8 of the Charter. This Charter section states that everyone has the right to be secure against unreasonable search or seizure. The purpose of this is to protect a reasonable expectation of privacy.²¹ In addition, the Supreme Court of Canada teaches that where property is taken by governmental action for reasons other than administrative or criminal investigation a seizure under the Charter has not occurred.²² Therefore, there must be the taking of something as well as an administrative or criminal investigation that has an impact on privacy for a seizure to have occurred under the Charter.

[46] In this case, there has been no impact on the Claimant's privacy. The Claimant's CPP credits were created by the government, which created and administers the program. That same government body performed the credit split. The Claimant's privacy expectations were not compromised because his personal information was already known to the government body who performed the credit split.

²¹ *Quebec (AG) v Laroche*, 2002 SCC 72

²² *Ibid.*

[47] In addition, there was no administrative or criminal investigation involved in the credit split. The credits that the Claimant and his ex-wife earned during their marriage were divided according to the CPP process for doing so. Therefore, there was no seizure of property.

[48] Therefore, there was no breach of the Charter.

CONCLUSION

[49] Although the General Division erred in law when it stated that there was insufficient evidence to support the Claimant's claims under the *Constitution Act, 1867*, the *Canadian Bill of Rights* or the section 8 of the Charter, when all of the evidence and submissions are considered I reach the same conclusion as the General Division.

[50] The appeal is therefore dismissed.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	April 24, 2019
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	C. R., Appellant Marcus Dirnberger, Counsel for the Respondent