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

Citation: *S. J. v Minister of Employment and Social Development and S. A.*, 2020 SST 578

Tribunal File Number: AD-20-20

BETWEEN:

**S. J.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

and

**S. A.**

Added Party

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: June 30, 2020

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed. The credit split remains in effect. There is no change to the Canada Pension Plan (CPP) retirement pensions.

### OVERVIEW

[2] S. J. (Appellant) and S. A. (Added Party) married in January 1977 and divorced in August 2018.[1] In October 2018 the Added Party applied for a CPP credit split, also known as a division of unadjusted pensionable earnings or DUPE. The credit split took effect in August 2019.

[3] Back in 2014, the Appellant and the Added Party had reached an agreement that was formalized as a court order. The Appellant submitted this agreement in 2019, but Service Canada[2] decided that it did not prevent the credit split.

[4] The Appellant appealed to the Social Security Tribunal. The General Division summarily dismissed his appeal. The Appellant then appealed to the Appeal Division. In an interim decision dated April 30, 2020, I found that the General Division had made an error of law in its decision. In this decision, I conclude that the credit split must be maintained.

### ISSUE

[5] After finding an error at the General Division, the Appeal Division can decide the underlying issue itself, or it can refer the matter back to the General Division to be decided again.[3] The Appellant and the representative for the Minister asked me to decide the credit split issue. I agree that this is appropriate. There is enough information in the General Division file for me to decide this issue, and the parties have now had an opportunity to make their arguments. Returning the matter to the General Division would unnecessarily delay resolving this appeal.

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[1] In AD14-1, the Appellant stated that the divorce was in July 2018. The court order is dated July 3, 2018, but the divorce took effect on August 3, 2018 (see GD2-8).
[2] On behalf of the Minister of Employment and Social Development (Minister).
[3] Sections 59(1) and 64(1) of the *Department of Employment and Social Development Act* outline this authority.

[6] Accordingly, this decision addresses the question of whether the credit split must be reversed or maintained.

## ANALYSIS

[7] This appeal is about credit splitting. However, the pension sharing that was in place at the time of the spousal agreement provides important context. I will start by describing pension sharing and credit splitting, and how each occurred in this case.

### Pension Sharing

[8] Pension sharing is a way for couples to share their CPP retirement pensions, so that their income taxes are lower. One or both spouses[4] assign a portion of their CPP retirement pension to the other, leading to an adjustment of both monthly pensions.

[9] Pension sharing is for couples who are together; it is supposed to end after divorce or one year's separation. It also ends on the request of both spouses, or on the death of one spouse.[5]

[10] The Appellant started receiving his CPP retirement pension in 2008. He assigned a portion of his pension to the Added Party.[6] The pension sharing arrangement meant that his pension was lower than it would have been otherwise, the Added Party's pension was higher, and the couple paid less taxes overall.

[11] The pension sharing was still in effect when the couple separated, and when the spousal agreement was made in 2014. Neither the Appellant nor the Added Party cancelled the pension sharing arrangement after their separation. Service Canada was not aware of the separation until September 2018, after the couple divorced. Service Canada then cancelled the pension sharing. As a result, the Appellant's pension increased in October 2018 and the Added Party's pension decreased, because their pensions were then based solely on their own CPP contributions.

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[4] These provisions also apply to common-law partners.
[5] *Canada Pension Plan*, s 65.1.
[6] The pension sharing application is not on file. It is unclear whether the Added Party also assigned a portion of her pension to the Appellant. Pension sharing is usually two-way sharing. This detail is not important to the outcome of this appeal.

**Credit Splitting**

[12] Credit splitting refers to the equal division of CPP credits accumulated during a couple's relationship. Credit splitting happens only after separation or divorce, not during the relationship. Pension credits (unadjusted pensionable earnings) earned while the spouses lived together are added together and divided, with 50% of the credits given to each spouse.[7] These credits are recorded on each spouse's CPP Record of Earnings, and they are used to calculate the CPP retirement pension. Credit splitting is permanent; it does not end, even when one spouse dies.

[13] Credit splitting does not mean that both spouses get the same retirement pension. This is because the monthly amount depends on the pension credits as well as other factors (for example, retirement age and the use of drop out provisions).[8]

[14] In this case, the Appellant and the Added Party were together for the entire period of valid CPP contributions (1981 to 2007). For the credit split in August 2019, the Appellant and the Added Party each received half of their combined CPP pension credits.[9] As a result, the Appellant's pension decreased and the Added Party's pension increased.

**A credit split doesn't depend on whether, or how much, each person contributed to the CPP.**

[15] The Appellant argues that the Added Party was not entitled to a credit split because she didn't contribute, or didn't contribute enough, to the CPP. Documentation on file states that the Added Party contributed to the CPP in 1981, 1982, and 1983. The fact that she contributed less, and for fewer years, than the Appellant is not a reason under the law to prevent a credit split. Even if the Added Party hadn't contributed at all to the CPP, this would not prevent a credit split.

[16] The *Canada Pension Plan* says that credit splitting is mandatory following divorce, with limited exceptions. The relevant section says:

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[7] *Canada Pension Plan*, s 55.2(5). Some credits are not split, such as those earned outside the contributory period or those below an annual threshold.
[8] See Part II, Division B of the *Canada Pension Plan.*
[9] This can be seen in the chart titled "Divided UPE" at GD2-21. For example, in 1981, the Appellant had 14700 credits and the Added Party had 6872, for a total of 21572. After the credit split, each had 10786 credits for that year. Another way to express this is that half the Added Party's credits (3436) were transferred to the Appellant, and half the Appellant's credits (7350) were transferred to the Added Party. In later years when only the Appellant was working, half of his credits (which were then the total credits) were transferred to the Added Party each year.

> **55.1(1)** Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings **shall take place** in the following circumstances:
>
> **(a)** in the case of spouses, **following a judgment granting a divorce** or a judgment of nullity of the marriage, on the Minister's being informed of the judgment and receiving the prescribed information;
>
> [emphasis added]

[17] There is no exception for someone whose spouse did not contribute, or did not contribute much, to the CPP. Indeed, the purpose of credit splitting is "to provide the lower income-earning spouse with a measure of protection by potentially increasing his or her access to pension benefits in the event of marital breakdown."[10] In other words, credit splitting is actually designed for situations where one spouse contributed less than the other during their relationship.

[18] Since the law doesn't allow for a credit split to be avoided (or reversed) based on the level of contributions, I reject the Appellant's argument.

**There is an exception to the mandatory credit split for certain spousal agreements.**

[19] There is an exception to credit splitting if a spousal agreement meets certain requirements. The requirements are found in section 55.2(3) of the *Canada Pension Plan*:

> **55.2 (3)** Where
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> **(a)** a written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986, contains a provision that expressly mentions this Act and **indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1**,
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> **(b)** that provision of the agreement is expressly permitted under the provincial law that governs such agreements,
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> **(c)** the agreement was entered into
>
> **(i)** in the case of a division under section 55 or paragraph 55.1(1)(b) or (c), before the day of the application for the division, or

[10] See *Runchey v Canada (Attorney General)*, 2013 FCA 16.

> **(ii)** in the case of a division under paragraph 55.1(1)(a), before the rendering of the judgment granting a divorce or the judgment of nullity of the marriage, as the case may be, **and**
>
> **(d)** that provision of the agreement has not been invalidated by a court order,
>
> that provision of the agreement is binding on the Minister and, consequently, the Minister **shall not make a division** under section 55 or 55.1.
>
> [emphasis added]

[20] All of the requirements must be met to prevent the credit split.

**The 2014 spousal agreement does not meet one of the requirements to prevent a credit split.**

[21] The spousal agreement says, in paragraph 7: "The benefits paid to each Party under the Canadian Pension Plan and the Old Age Security pension are their own individual property."[11]

[22] As stated in section 55.2(3)(a), the agreement must indicate the intention that there be no division of unadjusted pensionable earnings, in order to prevent a credit split. The question here is whether, by saying that CPP benefits are their own individual property, this indicates an intention that there would be no credit split. I conclude that it does not.

The parties' positions about the spousal agreement

[23] At the hearing, the Appellant did not argue that this requirement was met. But, in an earlier letter to Service Canada, he said that "the consent order confirms that the CPP & OAS are their own individual property. Therefore, there is no division of the CPP pension."[12]

[24] The Added Party argues that the agreement did not deal with the division of pension credits, and meant only that she was "not entitled to any part of the CPP he is paid."[13]

[25] The Minister's representative submits that the provision in the agreement "is sufficiently clear to demonstrate the parties' intention not to share their CPP credits."[14] She points to a

[11] GD2-19.
[12] GD2-13.
[13] AD32-2.
[14] AD8-4.

decision of the Pension Appeals Board (*Osadchuk*[15]) and a decision of the Appeal Division (*ML*[16]). I agree with the principle of those decisions: a spousal agreement doesn't have to specifically mention that there be no division of unadjusted pensionable earnings.

[26] While I agree with the principle in *Osadchuk* and *ML*, I don't find the results of those cases to be relevant. The language used in the Appellant's and Added Party's agreement, and the surrounding circumstances, are substantially different from those in *Osadchuk* and *ML*. The question of whether a provision in a spousal agreement indicates the intention that there be no credit split depends on the facts.

The plain meaning of paragraph 7

[27] Paragraph 7 of the agreement says that the CPP and Old Age Security (OAS) benefits paid to the Appellant and the Added Party are their own property. It does not say anything about credit splitting, unadjusted pensionable earnings, a division of pension credits, the DUPE, or the related sections of the *Canada Pension Plan*.

[28] While a pension can be described as a benefit,[17] paragraph 7 specifies "the benefits paid to each Party under" CPP and OAS. I agree with the Added Party that paragraph 7 refers to the monthly payments paid to the Appellant and the Added Party, and not to the pensions themselves. This interpretation is supported by the inclusion of OAS benefits, because an OAS pension is not an asset that can be formally divided between former spouses.[18]

[29] The plain meaning of paragraph 7 is simply that each spouse keeps their monthly CPP and OAS payments to themselves, and neither is obliged to pay any portion of the monthly benefits to the other.

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[15] *Osadchuk v Osadchuk*, 2002 CarswellNat 5578.
[16] *ML v Minister of Human Resources and Skills Development*, 2014 SSTAD 138.
[17] Under British Columbia's *Family Law Act*, which governed the spousal agreement. This was noted by the Minister's representative.
[18] See Part I, *Old Age Security Act*.

Paragraph 7 does not otherwise indicate the intention of the Appellant and Added Party that there be no division of unadjusted pensionable earnings.

[30] The Minister's representative points out that a credit split affects the dollar amount of the CPP benefits paid to each party, and thereby prevents the Appellant and the Added Party from retaining their individual benefit entitlements under the agreement. She asks me to infer an intention in paragraph 7 that neither spouse could make a claim on the other's CPP benefits through credit splitting.

[31] The Minister's representative says that the pension sharing arrangement is not relevant. However, the context of the 2014 agreement (including the couple's expectations at the time and afterwards) helps me to understand what paragraph 7 might indicate beyond its plain meaning.[19]

[32] I find that the Appellant's and the Added Party's intention in 2014 was to continue to each receive their monthly retirement pensions under the existing pension sharing arrangement. I make this finding, on a balance of probabilities, because:

a) The Appellant and the Added Party were receiving their monthly CPP retirement pensions under a pension sharing arrangement when they signed their agreement in 2014, and had been for many years;

b) The Appellant appears to have understood the pension sharing arrangement as permanent. He repeatedly described having legally transferred $250 or $281.61 to the Added Party from his CPP fund;[20]

c) The Appellant's argument was that the retirement pensions were "to remain as is" after the spousal agreement, and that neither the spouses nor their lawyers knew that pension sharing was supposed to end;[21]

d) Neither the Appellant nor the Added Party took any steps to cancel the pension sharing following their separation or after their spousal agreement. This continued for over four years after the agreement was signed;[22]

[19] Considering the context, and the parties' common intention, may be necessary when the words in an agreement are unclear. This is explained in *Athwal v Black Top Cabs Ltd*, 2012 BCCA 107.
[20] GD4-1, for example.
[21] AD4-3, AD4-6, oral arguments.

e) The pension sharing continued despite the fact that the Appellant would have benefited significantly from the end of pension sharing. It continued despite the fact that there were other legal proceedings related to the couple's separation;

f) It was Service Canada that cancelled the pension sharing arrangement after being notified of the divorce in 2018;[23] and

g) The Appellant was surprised to have received a higher pension in 2018/19 after pension sharing was cancelled (before the credit split took effect).[24]

[33] Having found that the Appellant and the Added Party expected pension sharing to continue, I also find it unlikely that they turned their minds to the question of whether a credit split should or should not occur. Nothing in the agreement or the surrounding circumstances suggests that they did so.

[34] While the Minister's representative points to the fact that the Appellant and Added Party had legal counsel at the time, I cannot infer from this that they negotiated or considered the question of a credit split. The quality of the drafting, along with the fact that the Appellant and the Added Party were left with the understanding that pension sharing would continue, counter any assumption that they must have considered credit splitting because they had representation. And, given that pension sharing is a different way to divide retirement pensions, I cannot assume that they would have rejected credit splitting in 2014 if they had understood that pension sharing could not continue.

[35] Moreover, it was the end of pension sharing, rather than the credit split, that foiled the couple's intention to retain their CPP retirement pensions as they were. The fact that the dollar amount of the monthly pensions would change again with credit splitting does not signal an intention, in 2014, to prevent a credit split.

[36] I conclude that paragraph 7 does not indicate any intention of the Appellant and the Added Party about credit splitting, nor can any intention (either that a split should happen or

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[22] GD1A8-14. Whether or not Service Canada reversed the pension sharing retroactively in 2019 is irrelevant to the intentions and understanding in 2014.
[23] GD2-16.
[24] GD1A-7.

should not happen) be inferred. Therefore, the spousal agreement does not meet the requirement found in section 55.2(3)(a).

**I don't need to consider the other requirements in section 55.2(3).**

[37] The spousal agreement must meet all of the listed requirements in section 55.2(3) to prevent or reverse a credit split. Since one requirement was not met, it doesn't matter whether the other requirements were met. I need not address any submissions about those other requirements.

**The credit split remains in effect.**

[38] As set out above, there is no exception to the mandatory credit split on the facts of this appeal. The credit split that took effect in August 2019 is maintained. This means that I am dismissing the Appellant's appeal.

**I can't address the other concerns the Appellant raised.**

[39] The Appellant has raised a number of other concerns. These include: possible collusion by the lawyers in 2014; Service Canada's failure to contact him in a timely manner in 2018; his interest in having a detailed statement of the Added Party's employment history and CPP contributions; whether it is fair for the Added Party to have a higher CPP retirement pension than his; and why the Minister's representative said that he had received a large retroactive payment associated with the reversal of pension sharing when he has no record of this.[25]

[40] My task was to decide whether the credit split should be reversed or maintained under the *Canada Pension Plan.* The above concerns are not relevant to that question, and I have no authority to address them. On the latter point, the Minister's representative advised the Appellant to contact Service Canada about the retroactive payment.

[25] See AD1-1, AD14-1, AD18-1, AD19-1, and AD36-1.

**CONCLUSION**

[41] The appeal is dismissed.

Shirley Netten
Member, Appeal Division

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| HEARD ON: | April 27, 2020 and May 27, 2020 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | S. J., Appellant<br><br>Suzette Bernard, Representative for the Respondent<br><br>S. A., Added Party |