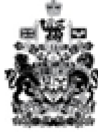

Citation: *TL v Minister of Employment and Social Development,* 2021 SST 663

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | T. L. |
| **Respondent:** | Minister of Employment and Social Development |
| **Decision under appeal:** | General Division decision dated October 10, 2021 (GP-21-1401) |
| **Tribunal member:** | Janet Lew |
| **Decision date:** | November 5, 2021 |
| **File number:** | AD-21-356 |

## Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

## Overview

[2] The Applicant, T. L. (Claimant), is appealing the General Division decision. The General Division found that the Claimant and her former spouse G. S. were not common-law partners at the time of his death in September 2020. Therefore, the General Division concluded that the Claimant was not entitled to a Canada Pension Plan survivor's benefit.

[3] The Claimant argues that the General Division made an important error of fact by ignoring important evidence. She argues that the General Division applied an "antiquated definition" in finding that she and G. S. were not common-law partners. She says that, by relying on an "antiquated definition," the General Division member discriminated against her, on the basis of her family status.[1]

[4] I have to decide whether the appeal has a reasonable chance of success.[2] Having a reasonable chance of success is the same thing as having an arguable case.[3]

## Issues

[5] The issues are as follows:

- Is there an arguable case that the General Division ignored important evidence regarding the Claimant's relationship with her former spouse?
- Is there an arguable case that the General Division relied on an "antiquated definition" when it decided that she was not a common-law spouse?

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[1] See Claimant's Application to the Appeal Division – Appeal Division, filed October 26, 2021, at AD1-4.
[2] Under s. 58(2) of the *Department of Employment and Social Development Act* (DESDA), I have to refuse permission if I am satisfied, "that the appeal has no reasonable chance of success."
[3] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

## Analysis

[6] The Appeal Division must be satisfied that the appeal has a reasonable chance of success before it gives an applicant permission to go ahead with their appeal. A reasonable chance of success exists if there is a certain type of error.[4] These errors are about whether the General Division:

(a) Failed to make sure that the process was fair;

(b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;

(c) Made an error of law; or

(d) Based its decision on an important factual error. (The error has to be perverse, capricious, or without regard for the evidence before it.)

[7] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error and, if so, decides how to fix that error.

### Is there an arguable case that the General Division ignored important evidence?

[8] The Claimant argues that the General Division ignored important evidence, although she did not identify any of this evidence.

[9] The Claimant listed some of the reasons she says establish that she was the deceased's common-law spouse:[5]

- They never annulled their marriage with their church, so the Catholic church still considered them married. Neither married other people or lived with anyone else.

[4] See DEDSA, s. 58(1).
[5] See Claimant's letter, at GD2-31 to GD2-32.

- They held a joint bank account
- She listed him as her spouse on her employer's benefits plan when she worked up North for 10 years
- The deceased named her as his executrix/trustee in his wills, before and after their divorce.
- He proposed to her several times after they divorced.
- He gave her money each month.
- They ate meals together and he often brought her food.
- He cut her lawn and snowplowed her driveway each winter.
- They spent every Christmas together as well as most holidays. He brought gifts and held birthday parties for her. She also gave him birthday gifts and celebrated his birthday with him.
- They co-parented their children and grandchildren.

[10] When the Claimant filed her appeal with the General Division, she added the following considerations:

- She lived in the deceased's house at various times after their divorce. She stayed with him during holidays, summers, during recovery from her hysterectomy, and on other occasions.
- She did household chores for him when he needed help. She refinished his oak cupboards, painted his house, and did some light housekeeping. He took care of her house when she taught up North.
- Although they were divorced, they maintained a loving relationship. He always wanted to support her.

- They saw each other several times a week and constantly spoke on the phone.

- He gave her money for a down payment on her first house. In his final year, he bought a washer for her house and paid to have her roof redone.

- She organized his funeral and coordinated a “celebration of life” for family and friends.

[11] The Claimant and deceased’s children made a declaration, confirming much of what their mother wrote about her relationship with their father. They described their parents’ relationship as one that was “unique and loving.”[6]

[12] The General Division considered most, if not all, of this evidence when it assessed whether the Claimant and her former spouse were common-law partners for a continuous period of at least one year, up to the time of his death.

[13] The General Division accepted that the Claimant and G. S. spent much time together, including with their children, at holidays and other times. The General Division also accepted that they performed household chores for each other, and that G. S. gave her money for a down payment on her home, paid for the roof, bought and installed a washer, and sent her money “here and there.” The General Division accepted the fact that the Claimant and G. S. had a joint bank account, but the member noted that they had not used it since their separation in 2003.

[14] The General Division also accepted that G. S. had named the Claimant the executor and beneficiary of his will. But, he made this will in 1993, long before they separated. The General Division also accepted that G. S. prepared a second will, naming the Claimant as the executor, and their children as beneficiaries, but G. S. never signed this second will. The General Division noted the Claimant’s testimony that, after G. S. passed away, she signed documents transferring G. S.’s assets to their children.

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[6] See declaration dated May 25, 2021, at GD1-15.

[15] The General Division also accepted the Claimant's evidence that she stayed at G. S.'s house after they got divorced. But, the General Division found that she did not stay there during the relevant period. And, G. S. never stayed at the Claimant's home. The General Division also accepted the fact that the Claimant was considering G. S.'s two marriage proposals in 2020, but that he died unexpectedly.

[16] The only evidence that the General Division did not mention was the fact that the Claimant and G. S. did not seek an annulment of their marriage. The member was aware that the Claimant and G. S. did not get their marriage annulled.[7] But, the member noted that he did not find this fact relevant. He explained that the lack of an annulment did not give the Claimant and her former spouse any status for the purposes of the *Canada Pension Plan*. The Claimant does not otherwise suggest that this singular fact was so significant that the member should have addressed it in his decision.

[17] As the General Division addressed all of the other facts that the Claimant and her children raised (other than the annulment issue), I am not satisfied that the General Division ignored important evidence.

[18] It may be that the Claimant is suggesting that the General Division should have placed more weight on certain factors, such as the fact that G. S. financially supported her and had proposed to her. It is well established, however, that the assignment of weight lies with the General Division as the trier of fact.[8]

[19] I am not satisfied that the Claimant has an arguable case that the General Division ignored important evidence.

## Is there an arguable case that the General Division relied on an "antiquated definition" of a common-law spouse?

[20] The Claimant argues that the General Division relied on an "antiquated definition" when it decided that she was not a common-law partner.

[7] At approximately 52:20 of the audio recording of the General Division hearing.
[8] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[21] The Claimant does not have an arguable case on this point. Until the *Canada Pension Plan* is amended, the General Division had to apply the definition of a common-law partner set out in the *Canada Pension Plan*, even if the Claimant says it is outdated.

[22] The *Canada Pension Plan* defines "common-law partner" as follows:

> In relation to a contributor, 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. For greater certainty, in the case of the contributor's death, the "relevant time" means the time of the contributor's death.[9]

[23] The General Division recognized that unmarried couples have almost infinite variations in their arrangements. Indeed, the General Division acknowledged that separation because of an abusive relationship would not interrupt the common-law relationship, as long as there was a mutual intention to continue in a marriage-like relationship. But, as the General Division properly recognized also, the *Canada Pension Plan* requires an "element of cohabitation with the contributor in a conjugal relationship."

[24] The Claimant also argues that the definition for a "common-law partner" is discriminatory. She argues the definition should be expanded, so it recognizes relationships such as hers. She was married to G. S. for 20 years and neither remarried. He wanted to remarry her. She maintained a close relationship with him.

[25] However, this is the first that the Claimant has argued that the definition of a "common-law" partner is discriminatory. Generally, claimants should not raise these types of arguments for the first time on appeal to the Appeal Division.

[26] There is some discretion in allowing an applicant to raise an issue for the first time on appeal to the Appeal Division. This requires considering all the circumstances, including the "state of the record, fairness to all parties, the importance of having the

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[99] See *Canada Pension Plan*, s.2(1).

issue resolved ..., its suitability for decision and the broader interests of the administration of justice.[10]

[27] Here, there is little to no evidence on this issue and the General Division did not make any findings of fact on the issue. It is not sufficient to allege discrimination. The Minister would likely face some prejudice if the appeal were to proceed in the constitutional issue at this point. I note also that the Claimant has not fulfilled the notice requirements under section 20(1)(a) of the *Social Security Tribunal Regulations*, though this factor alone would not have decided whether this issue should go ahead or not.

[28] Taking all of these factors into consideration, it would be inappropriate to determine the constitutional issue at this point.

## Conclusion

[29] The Claimant does not have an arguable case that the General Division made any legal or factual errors. Therefore, permission to appeal is refused. This means that the appeal will not be going ahead. This ends the Claimant's appeal at the Appeal Division.

Janet Lew
Member, Appeal Division

[10] See *Guindon v Canada*, 2015 SCC 41, at para. 20.