Citation: *BB v Minister of Employment and Social Development*, 2022 SST 1202

# Social Security Tribunal of Canada
## General Division – Income Security Section

# Decision

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| **Applicant:** | B. B. |
| **Respondent:** | Minister of Employment and Social Development |
| **Application regarding:** | The Social Security Tribunal (General Division – Income Security) decision dated November 23, 2021 |

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| **Tribunal member:** | Pierre Vanderhout |
| **Decision date:** | November 22, 2022 |
| **File number:** | GP-22-509 |

## Decision

[1] The application to rescind or amend the Tribunal's decision of November 23, 2021, is dismissed.

[2] The Applicant, B. B., remains ineligible for a Canada Pension Plan ("CPP") survivor's pension with respect to the late R. F. (the "Contributor"). This decision explains why I am dismissing the application.

## Overview

[3] The Applicant applied for the CPP survivor's pension in May 2020. She suggested she was in a common-law relationship with the Contributor at the time of his death. The Minister of Employment and Social Development (the "Minister") denied her application initially and on reconsideration. The Applicant then appealed to the Tribunal's General Division. In my decision of November 23, 2021 (the "Original Decision"), I dismissed the Applicant's appeal.[1] The Original Decision followed a hearing that took place on November 1, 2021 (the "Original Hearing").

[4] The Applicant applied to rescind or amend the Original Decision on March 9, 2022.[2] Section 66 of the *Department of Employment and Social Development Act* (the "DESD Act") allows such an application. I will call this an "R/A Application". The Applicant tried to submit evidence that she wished to characterize as "new material facts." However, she had trouble articulating these new material facts. Finally, on October 31, 2022, she purported to submit 13 new facts in support of her application (the "13 Facts").[3] This decision is based on that submission.

[5] The Applicant suggests the Original Decision did not consider the 13 Facts.[4] She also suggests that various people acted improperly following the Contributor's death.

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[1] The file number for that appeal is GP-21-1277.
[2] RA1-1
[3] See RA20-1 to RA20-3.
[4] RA1-1

[6] The Minister expressed preliminary concerns about the materials the Applicant filed in March 2022. The Minister said the Applicant had not provided any particulars. As a result, the Minister did not have notice of the case to be met. The Minister asked for specific new facts, as well as the evidence upon which the Applicant would establish those facts.[5]

## What the Applicant must prove

[7] For the Applicant to succeed, she must prove at least one new material fact that could not have been discovered before the Original Hearing with the exercise of reasonable diligence. If she proves any such fact, then I must determine the impact of the new material fact on the Original Decision.

[8] For the reasons set out below, I find that the Applicant has not proved at least one new material fact that could not have been discovered before the Original Hearing with the exercise of reasonable diligence.

## Reasons for my decision

[9] An R/A Application based on new facts is an exceptional process. It is an exception to the principle of finality that characterizes judicial and quasi-judicial decisions. The "rescind or amend" process exists to ensure procedural fairness.[6]

### *What is the test for rescinding or amending a decision?*

[10] I can only rescind or amend the Original Decision under certain conditions. The test set out in the DESD Act has two parts.[7]

[11] First, the Applicant must present a **new** fact that must **not** have been **discoverable** with the exercise of reasonable diligence. This fact must have existed at the time of the Original Hearing.[8] Exercising reasonable diligence means taking the

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[5] RA2-1
[6] See *Canada (Attorney General) v. Jagpal*, 2008 FCA 38, at paragraph 27.
[7] S. 66(1)(b) of the DESD Act.
[8] *Canada (Attorney General) v. Macrae*, 2008 FCA 82. This concerned s. 84(2) of the *Canada Pension Plan*, which applied before s. 66(1)(b) of the DESD Act came into force in 2013.

steps that a reasonable person would take to find evidence to support their case. The idea is that a person applying to rescind or amend a decision cannot rely on evidence that was readily available and could have been presented at the Original Hearing. The Applicant should give evidence of what steps she took before the Original Hearing, if any, to find evidence to support the fact she is now trying to prove. She should also explain why she could not have presented evidence of that fact at the Original Hearing.[9]

[12] Second, the fact must be **material**. A fact is material if it could have affected the outcome of the Original Hearing.[10]

[13] The test balances two important interests. The first interest is the fairness of adjudicating benefit eligibility. The second interest is securing the finality and enforcement of previous decisions.[11]

***The 13 Facts***

[14] I'll set out the Applicant's purported new facts below. I'll then determine whether they are actually new facts that were not discoverable by the Original Hearing.

[15] The Applicant submits that there are 13 new facts. She struggled to concisely identify these new facts. Despite repeated requests, she never provided a numbered list. Ultimately, she provided a narrative with numbers inserted. I note that she rarely uses punctuation. She also frequently reverses word order. As a result, I do not cite the 13 Facts verbatim from her materials. The 13 Facts set out below represent the best interpretation of those materials.

**Fact 1: The Applicant applied for the CPP survivor's pension as early as November 21, 2019, but the Minister only received the Contributor's will.**

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[9] See *Carepa v. Canada (Minister of Social Development),* 2006 FC 1319.
[10] *Canada (Attorney General) v. Macrae*, 2008 FCA 82.
[11] See *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297, paragraphs 37 to 39.

[16] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact involves actions she herself took in 2019. Before the Original Hearing, she also filed an e-mail that mentioned this issue.[12]

**Fact 2: In February 2021, J. G. and other apparent relatives of the Contributor did not acknowledge being related to him.**

[17] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about discussions involving the Applicant in early 2021.

**Fact 3: The Applicant said the funeral home asked her for a copy of the Contributor's will; the funeral home later denied this but said J. E. (the Contributor's sister) had a copy of the death certificate**.

[18] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about discussions involving the Applicant shortly after the Contributor's death. Before the Original Hearing, she also filed e-mails that mentioned these issues.[13] Furthermore, at the hearing itself, she mentioned the funeral home's request for a will.

**Fact 4: J. E. tried to question the Applicant's identity; the Applicant spoke to a lawyer named Peter Walgren who sent the Contributor's will to the Applicant (which confirmed that she was the Contributor's executor).**

[19] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about communications involving

[12] See GD2-67 and GD8-20 (GD8 is an unredacted version of the e-mail that starts at GD2-62). The Applicant also appears to mention this at GD2-69.
[13] See GD2-63 to GD2-64 (GD8-16 to GD8-17) for the funeral home information. GD2-41 to GD2-43 contains confirmation that J. E. had a copy of the death certificate.

the Applicant shortly after the Contributor's death. Before the Original Hearing, she also filed e-mails about these issues.[14]

**Fact 5: The Applicant sent J. E. a copy of the Contributor's will; J. E. wished her luck in finding any money.**

[20] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about her own discussions shortly after the Contributor's death.

**Fact 6: The Contributor was going to bring the Applicant's remaining personal belongings from British Columbia when he moved to New Brunswick.**

[21] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because it is about plans she made with the Contributor before his death.

**Fact 7: J. E. and/or the Contributor's landlord S.Fe threw out the Applicant's personal possessions in the Contributor's apartment; his last pension payment was never found either.**

[22] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. Before the Original Hearing, the Applicant also filed an e-mail that described these actions regarding the Contributor's property.[15]

**Fact 8: J. E. kept the Contributor's ashes for a long time before sending them to the Applicant on September 28, 2021.**

[23] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about something she received on September 28, 2021. Before the Original Hearing, the Applicant also filed a photo

[14] The e-mail thread at GD2-40 to GD2-41 includes questions about the Applicant's identity. The e-mail at GD2-62 to GD2-63 (GD8-16 to GD8-17) includes information about the will and the Applicant's discussions with Mr. Walgren. She also mentioned getting the will from Mr. Walgren at GD2-69.
[15] See GD2-66 (GD8-19).

showing the urn that contained the Contributor's ashes.[16] At the hearing itself, she said she had the Contributor's ashes.

**Fact 9: The hospital consulted the Applicant for the Contributor's end-of-life decisions; she was also given the phone numbers of J. E. and D. F. (the Contributor's siblings) if anything went wrong.**

[24] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about discussions she had before the Contributor's death on April 13, 2019. Before the Original Hearing, she also filed e-mails about the hospital's contact with her and having the phone numbers of the Contributor's family.[17]

**Fact 10: [Not provided by the Applicant]**

[25] The Applicant skipped the number 10 when she inserted numbers into the narrative in support of her application.

**Fact 11: The Contributor's family had very little contact with him, never saw him in Dawson Creek, and never knew or mentioned the Applicant (even though the Contributor and Applicant spent birthdays and holidays together).**

[26] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about what she observed and experienced before the Contributor's death on April 13, 2019. Before the Original Hearing, she also filed an e-mail noting the Contributor's lack of contact with his family.[18] At the hearing itself, she said the Contributor's family never acknowledged him until he passed away.

**Fact 12: The Applicant dealt with X, the pharmacy, and the hospital on the Contributor's behalf (or as his next of kin).**

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[16] GD7-2
[17] See GD2-38, GD2-62 (GD8-15) and GD2-64 (GD8-17).
[18] See GD2-62 (GD8-15) and GD2-65 (GD8-18).

[27] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about actions she took before (or shortly after) the Contributor's death on April 13, 2019. Before the Original Hearing, she also filed an April 2019 hospital admission form that showed her as the Contributor's contact person. In addition, she filed a BC Hydro form that said she closed the Contributor's account.[19]

**Fact 13: The Applicant did everything in her heart to allow the Contributor to rest in peace; they helped each other through sickness and health.**

[28] This is not a new fact. The Applicant already knew this by the Original Hearing on November 1, 2021. She knew this because the fact is about what she and the Contributor did for each other before the Contributor's death in April 2019. It is also about her feelings for the Contributor. Before the Original Hearing, she also filed an e-mail and a narrative setting out all she did to allow the Contributor to rest.[20]

***Findings about the 13 Facts***

[29] In this case, none of the 13 Facts were **new** facts that were **not discoverable** by the Original Hearing with the exercise of reasonable diligence. All 13 Facts were discoverable by the Applicant by the Original Hearing. In fact, she knew all 13 Facts by then. She also filed documents mentioning almost all of them before the Original Hearing. Further, she mentioned some of them at the hearing itself. As a result, her R/A Application cannot succeed. I do not need to consider the second part of the test (whether the new facts were material).

[30] I note that the Applicant pays considerable attention to the acts of various people after the Contributor's death. However, even if these had been new and undiscoverable facts, it is hard to see how they would be material in her appeal. She must ultimately show that she was the common-law spouse of the Contributor when he died. The actions of other people after his death contribute little to that issue. Nor is the Tribunal

[19] See GD2-39, GD2-64 (GD8-17), GD2-70, and GD12-2.
[20] See GD1-5, GD2-67 (GD8-20) and GD2-68.

considering whether the Contributor's relatives were in a common-law relationship with the Contributor when he died. However, the Applicant appeared to believe that the Contributor's sister J. E. had made such a claim.[21]

[31] I am not questioning the Applicant's statements about the Contributor's family. As I mentioned in the Original Decision, there did appear to be some distance between the Contributor and his family.[22] This distance was both geographic and emotional. It also appears to have lasted until the Contributor's death. However, that distance does not assist the Applicant in an application to rescind or amend the Original Decision.

[32] The Applicant seems to be trying to reargue the original appeal. However, an R/A Application not an opportunity to do that. In this application, the Tribunal's General Division cannot take another look at the same evidence that was available at the Original Hearing. The proper forum for that would be an appeal of the Original Decision to the Appeal Division.[23]

*Opportunities to substantiate the R/A Application*

[33] The Applicant has had many opportunities to substantiate this application. She filed her original Notice of Application in March 2022. However, it did not contain a list of new material facts.[24]

[34] In April 2022, I asked the Applicant to clarify the Notice of Application by providing a list of the alleged new facts. I also asked her to show why those new facts could not have been discovered through reasonable diligence by the hearing date.[25]

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[21] See GD2-65 (GD8-18). The Applicant may be confusing the CPP death benefit with the CPP survivor's pension.
[22] See paragraph 31 in the Original Decision.
[23] Even then, the Appeal Decision would not automatically take another look. The Appeal Division would only take another look at the same evidence under certain circumstances, such as a legal error in the Original Decision. A detailed description of the Appeal Division's role is beyond this decision's scope.
[24] See RA1-1
[25] See RA3-1 to RA3-2.

[35] The materials the Applicant filed in May 2022 did not include a list of alleged new facts.[26] I called a pre-hearing conference for June 16, 2022, to explain the process and clarify the Applicant's intentions.[27]

[36] At the pre-hearing conference, I explained the nature of an R/A Application, and how it is different from an appeal. I explained that an R/A Application was suitable for situations where a person learns of a new fact (or facts) after the hearing date. I also explained the person could only rely on new facts that could not reasonably have discovered by the hearing date. I explained the difference between facts and evidence. I asked the Applicant to provide a numbered list of new material facts before the matter proceeded. I also explained that there might only one new material fact. Finally, I set out all this information in the June 16, 2022, reporting letter (the "June 2022 Letter"). The June 2022 Letter was sent to both parties.[28]

[37] In July 2022, I reminded the Applicant that she only needed to provide a numbered list of the new material facts.[29] I granted three separate extensions to permit this. Each time, I urged the Applicant to follow the guidance in the June 2022 Letter.[30]

[38] In September 2022, the Applicant filed submissions.[31] However, once again, her submissions did not contain a numbered list of new material facts. On September 26, 2022, I sent another letter explaining this to her. I referred to the instructions given in previous letters, including the June 2022 Letter. I also said I intended to make a decision based on documents and submissions filed by October 28, 2022.[32]

[39] The Applicant provided a narrative of alleged new facts on October 31, 2022.[33] Although this was late and didn't strictly contain a numbered list, the narrative did at least contain some numbers to help identify the alleged new facts. I told the parties that

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[26] See RA6-1.
[27] See RA7-1 to RA7-2.
[28] See RA9-1 to RA9-2.
[29] See RA12-1.
[30] See RA12-1, RA14-1, and RA16-1.
[31] See RA17.
[32] See RA19-1.
[33] See GD20-1 to GD20-3.

I would receive the late document and would base my decision on it.[34] Based on what had been submitted, it was not necessary to hold a hearing or get further submissions from either party.

*Same member for both Original Decision and the R/A Application*

[40] Finally, I would like to mention that the Applicant briefly raised, and then appeared to abandon, a concern that the member who wrote the Original Decision was also assigned to handle this application. She raised this in a phone call with a Tribunal employee before the June 2022 pre-hearing conference. While she may have preferred a different member, she said she was content to have the same member handle this application as long as he was not biased.

[41] Out of an abundance of caution, I raised this at the June 2022 pre-hearing conference. I explained that the same member is often assigned to R/A Applications because the member will already be familiar with the factual background. I asked the Applicant if she had a specific concern about who was assigned to her application. She said she did not. She then began to raise concerns about the Contributor's family members and his sister specifically. These concerns were not related to the assigned member, but echoed the Applicant's submissions for the application generally. Since then, she hasn't mentioned any member-related concerns.

[42] In these circumstances, an informed person would not have a reasonable apprehension of bias. An informed person would not find it likely that the decision maker would decide unfairly.[35] As a result, I did not need to recuse myself from this matter.

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[34] See RA21-1
[35] See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 (at page 394).

## Conclusion

[43] I find that the Applicant has not presented any new facts that were not discoverable by the Original Hearing with the exercise of reasonable diligence. As a result, I do not need to decide whether any of those facts were material. It appears that the Applicant really wanted to pursue an appeal of the Original Decision, rather than an R/A Application.

[44] This means the application is dismissed.

Pierre Vanderhout
Member, General Division – Income Security Section