



Citation: *BK v Minister of Employment and Social Development*, 2023 SST 1412

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: B. K.

Respondent: Minister of Employment and Social Development

Representative: Anita Hoffman

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated June 6, 2022 (issued by Service Canada)

Tribunal member: James Beaton

Type of hearing: Teleconference

Hearing date: September 28, 2023

Hearing participants: Appellant
Appellant's witnesses
Respondent's representative

Decision date: October 16, 2023

File number: GP-23-384

Decision

[1] The appeal is allowed.

[2] The Appellant, B. K., is eligible for a Canada Pension Plan (CPP) survivor's pension in respect of the deceased contributor, J. L. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant and J. L. began their relationship in 2001.¹ J. L. died on July 29, 2021.² Between those dates, the Appellant and J. L. sometimes lived apart. This included the period from mid-August 2020 until J. L.'s death almost a year later, when J. L. lived in Ontario and the Appellant remained in Alberta.

[4] After J. L.'s death, the Appellant applied for a CPP survivor's pension. The Minister of Employment and Social Development refused her application. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[5] The Minister says the Appellant isn't eligible for a survivor's pension because she wasn't J. L.'s common-law partner when he died.

[6] The Appellant says she and J. L. remained common-law partners until his death, even though they lived apart for a time.

[7] I agree with the Appellant.

What I have to decide

[8] The law says only the survivor of a deceased contributor to the CPP is entitled to a survivor's pension.³ The *Canada Pension Plan* defines "**survivor**" as the common-law

¹ See GD2-17.

² See GD10.

³ See section 44(1)(d) of the *Canada Pension Plan*.

partner or (if there is no common-law partner) the married spouse of the deceased person.⁴

[9] Under the *Canada Pension Plan*, a **common-law partner** is someone who cohabited with the deceased person in a conjugal relationship for at least one year at the time of their death.⁵

[10] To decide whether two people are common-law partners, I must look at things like:⁶

- a) **shelter**—including whether they lived together or slept together, or whether anyone else lived with them or shared their accommodations
- b) **sexual and personal behaviour**—including whether they had sexual relations, maintained an attitude of fidelity to each other, communicated on a personal level, ate together, assisted each other with problems or during illness, or bought each other gifts
- c) **services**—including their roles in preparing meals, doing laundry, shopping, conducting household maintenance, and performing other domestic services
- d) **social**—including whether they participated together or separately in neighbourhood and community activities, and their relationship with each other's family members
- e) **societal**—including the attitude and conduct of the community toward them as a couple
- f) **support**—including their financial arrangements for the provision of their needs and for the acquisition and ownership of property
- g) **attitude and conduct concerning any children**

⁴ See section 42(1) of the *Canada Pension Plan*.

⁵ See section 2(1) of the *Canada Pension Plan*.

⁶ See *McLaughlin v Canada (Attorney General)*, 2012 FC 556.

[11] To succeed in her appeal, the Appellant must prove that she is J. L.'s survivor. She must prove this on a balance of probabilities (that it is more likely than not to be true).

Matters I have to consider first

[12] The Appellant submitted a Statement of Death for J. L. after the filing deadline.⁷ The Minister's representative didn't object to me accepting this late evidence, so I accepted it.

Reasons for my decision

[13] I find that the Appellant cohabited with J. L. in a conjugal relationship for more than a year when he died. This makes her his common-law partner and, therefore, his survivor.

[14] To explain my decision, I will:

- outline the Minister's arguments
- outline the Appellant's arguments
- explain the issue in this appeal
- explain why I agree with the Appellant

The Minister's arguments

[15] The Minister agrees that I must consider multiple factors to determine whether two people are common-law partners. The Minister also agrees that it is possible for two people to "cohabit in a conjugal relationship" even if they don't live together. The Supreme Court of Canada affirmed this in a case called *Hodge v Canada (Minister of Human Resources Development)*:

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. ... [A] common law relationship ends 'when either party regards it as

⁷ See GD10.

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.”⁸

[16] This is why the Minister’s submissions focus on whether the Appellant and J. L. separated **voluntarily**. The Minister believes that if their separation was voluntary, as opposed to involuntary, then they weren’t common-law partners anymore. According to the Minister:

Only in cases of employment, medical procedures or hospitalization, as well as some educational requirements, where it is clear that both parties intend for the common-law relationship to remain intact, can a case of involuntary separation be considered. In this case, the separation cannot be considered to be one of an involuntary nature as, due to a child protection order, it was not the mutual intention of both parties to continue the common-law relationship.

[17] The Minister’s submissions go on to say that “[t]he determination of an involuntary separation can only be based on factual and official documentation.”⁹

The Appellant’s position

[18] The Appellant argues that she remained J. L.’s common-law partner until his death. She maintains that both of them intended to continue the relationship.

[19] In August 2020, J. L. was “arrested for actions while intoxicated” and the police encouraged the Appellant to keep him away from their daughter.¹⁰ The Appellant convinced J. L. to move back to Ontario to stay with his parents, where she hoped he would get help for his drug and alcohol addictions. She would remain in Alberta with their daughter. Unfortunately, J. L. didn’t recover from his addictions and didn’t return to live with the Appellant before he died.

⁸ See *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 (*Hodge*) at paragraph 42.

⁹ See GD4-5 and 7.

¹⁰ See GD2-10.

The issue is whether the common-law relationship ended

[20] The Minister appears to accept that the Appellant and J. L. were in a common-law relationship until August 2020. That is why the Minister’s submissions focus on whether their separation in August 2020 was voluntary.

[21] The issue is whether the Appellant and J. L. were common-law partners for at least a year when he died—that is, whether they **remained** common-law partners from August 2020 until he died. But I don’t frame this issue exactly the same way as the Minister, for several reasons.

[22] First, the Supreme Court of Canada set out the test for determining whether a common-law relationship has ended. The test is clear. The test isn’t whether the separation was “voluntary.” The test is:

- 1) Did either the Appellant or J. L. regard the relationship as being at an end?
- 2) If so, did they convincingly demonstrate that their intention to end the relationship was settled (final)?

[23] In answering these questions, the factors that I listed earlier in this decision (shelter, sexual and personal behaviour, and so on) are relevant.

[24] Second, the Court didn’t limit the sorts of situations in which a common-law relationship might be said to continue. The Court didn’t say two people could continue to be common-law partners while living apart **only if** they live apart for medical, educational or vocational reasons. In fact, the Court acknowledged that even a physical separation due to verbal and physical abuse may not end the common-law relationship, and that couples may separate to “cool off” without ending their relationship.

[25] In the *Hodge* case, “[t]he respondent had lived in a common law relationship with the deceased contributor between 1972 and February 1993, at which point, because of his alleged verbal and physical abuse, she left. A brief reconciliation in early 1994 failed. She agrees that when she left for good in February 1994, she intended to and did end their relationship ...” The Court observed that “[s]uch periods of physical separation as

the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue.” It was only after reconciliation failed in February 1994 that the relationship ended.¹¹

[26] Third, I disagree with the Minister that only “factual and official documentation” can establish a continuing common-law relationship where there is a physical separation. The *Canada Pension Plan* and the *Canada Pension Plan Regulations* do not impose this requirement on the Minister or on the Tribunal. This means I can consider the testimony of the Appellant and her witnesses in making my decision.

Why I agree with the Appellant

[27] I agree with the Appellant that her physical separation from J. L. for approximately the year before his death didn’t end their common-law relationship. Their subjective intentions and their objective actions both support this conclusion.

[28] The Appellant’s testimony was consistent that she never considered her relationship with J. L. to have ended. She always hoped that they would live together again. Although she gave her relationship status as “separated” on her application,¹² that was because they were living in separate provinces and, in that sense, they were separated.¹³ I believe the Appellant was an honest witness and that she was trying to be accurate and honest on her application. At the hearing, she answered my questions in a direct and detailed way and admitted when she didn’t know something.

[29] Likewise, the Appellant testified that J. L. hoped to resume living with her. D. L., a lifelong friend of J. L., confirmed that this was his understanding of J. L.’s intentions.

[30] The Appellant’s and J. L.’s **actions** support their intention to continue the relationship during a temporary period of physical separation. It is true that they didn’t live together after August 2020 and, as a result, didn’t share in daily chores or attend social functions together. However:

¹¹ See *Hodge* at paragraphs 4 and 42.

¹² See GD2-16.

¹³ See the hearing recording.

- Neither of them began a romantic relationship with anyone else.¹⁴
- When talking to friends, the Appellant didn't describe her relationship as being over. Instead, she would tell her friends that there was an "incident" (without going into much detail) and that J. L. had left "to work on himself."¹⁵
- They communicated with each other daily. The Appellant would ask J. L. how he was doing. She would update them on their daughter's life. They also discussed more mundane things like paying bills. And they talked about their desire to live together again.¹⁶
- The Appellant sent J. L. cards and photos. On her birthday in July 2021, J. L. sent her \$100 as a gift.¹⁷
- The Appellant and J. L. maintained a joint bank account.¹⁸ The Appellant suspects that J. L. opened a separate bank account from which he withdrew money to pay for his drug and alcohol addictions.¹⁹ Despite this, he sent the Appellant money every month. Bank records show monthly transfers between September 2020 and July 2021 ranging from \$200 to \$3,100 and averaging \$1,678 per month.²⁰ There was no fixed amount. Rather, the Appellant and J. L. discussed their needs and determined an appropriate amount each month. The Appellant set aside some of this money each month for their daughter's college fund, with J. L.'s support.²¹
- J. L.'s mail continued to be delivered to their Alberta residence even after his death.²²

¹⁴ See GD1-33 and 34.

¹⁵ See the hearing recording.

¹⁶ See the hearing recording.

¹⁷ See the hearing recording.

¹⁸ See GD2-11.

¹⁹ See the hearing recording.

²⁰ See GD2-12 and 13.

²¹ See GD2-22 and the hearing recording.

²² See GD1-36, 38, 41, 43, and 46.

- J. L. left his truck and most of his personal property in Alberta when he moved to Ontario. He only took his clothes and some personal items with him.²³

[31] In addition, the Appellant and J. L. had separated at least once before, for similar reasons. This supports that they intended to resume living together after August 2020, too. About 15 years ago, the Appellant left J. L. to live in a women's shelter. She took their daughter with them. This arrangement lasted a couple years, but they ultimately resumed living together as a family.²⁴

[32] Lastly, the reasons for their August 2020 separation and the surrounding circumstances suggest a continuing relationship.

[33] The Appellant asked J. L. to go live with his parents after the incident. She did this because she thought it was in his best interests (to help him recover) and their daughter's best interests—not because she wanted to end the relationship. Contrary to the Minister's submissions, there was no child protection order in place, because the Appellant and J. L. agreed that he should move out, before child protective services got involved. Similarly, J. L. agreed to send the Appellant money each month without any involvement from the courts.

[34] All of this suggests a relationship that was under strain, but not finally broken.

[35] In summary, the Appellant and J. L. were in a common-law relationship before August 2020. The relationship looked different after that, but it was still a common-law relationship. The evidence shows subjectively and by their actions that neither of them considered the relationship to be at an end. Though not under the same roof, they continued to cohabit in a conjugal relationship for the year before J. L.'s death.

Therefore, the Appellant is J. L.'s survivor.

²³ See the hearing recording.

²⁴ See the hearing recording.

Conclusion

[36] I find that the Appellant is eligible for a CPP survivor's pension in respect of J. L. because she is his survivor.

[37] This means the appeal is allowed.

James Beaton
Member, General Division – Income Security Section