Citation: *SR v Minister of Employment and Social Development and CR*, 2024 SST 91

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	S. R.
Respondent:	Minister of Employment and Social Development
Respondent's representative:	Anita Hoffman
Added Party:	C. R.
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated November 14, 2022 (issued by Service Canada)
Tribunal member:	Shannon Russell
Type of hearing:	Teleconference
Hearing date:	January 9, 2024
Hearing participants:	Appellant Respondent's representative Added Party
Decision date:	January 26, 2024
File number:	GP-22-1892

Decision

[1] The appeal is dismissed.

[2] The Appellant, S. R., can't cancel or reverse the division of unadjusted pensionable earnings (DUPE or credit split) that was done under the *Canada Pension Plan* (CPP).

Overview

[3] The Appellant and the Added Party used to be married. They separated in September 2013 and divorced in December 2015.[1]

[4] In March 2022, the Added Party applied for a credit split. In her application, she said that she began living with the Appellant on July 6, 1996 (the date of their marriage) and she last resided with the Appellant on September 6, 2013.[2]

[5] The Minister approved the application and granted the credit split for the years 1996 through 2012.[3]

[6] The Appellant asked the Minister to reconsider its decision. He said that he and the Added Party signed a Matrimonial Settlement Agreement (MSA) in December 2014 and that the MSA prevents the Added Party from applying for the credit split.[4]

[7] The Minister reconsidered, and decided to maintain the original decision to approve the Added Party's application.[5]

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[1] The date of separation is set out in the Matrimonial Settlement Agreement (page GD2-14). The Certificate of Divorce is at page GD2-91.
[2] See page GD2-84.
[3] The CPP Credit Split Approval is at page GD2-11. For CPP purposes, cohabitation is deemed to have begun with the first month in the year in which the marriage took place or in which the parties began cohabiting in a conjugal relationship, whichever occurs first. Parties are also deemed not to have cohabited at any time during the year in which they separated. This is set out in subsection 78.1(1) of the CPP Regulations.
[4] The Appellant's request for reconsideration is at page GD2-6.
[5] The Minister's reconsideration decision of November 14, 2022 is at pages GD2-4 to GD2-5.

[8] The Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal's General Division.

[9] The Appellant says that the Minister was wrong to approve the application for credit splitting. This is because the parties already dealt with the division of their property in the MSA, and the MSA says the Added Party is not entitled to any equalization of his CPP credits.

[10] The Minister says the credit split should remain in effect. This is because credit splitting is mandatory for couples who divorce. The Minister also says that the Appellant can't use the MSA to opt out of the mandatory credit splitting regime. This is because the MSA does not indicate a clear intention that there be no credit splitting.

[11] The Added Party says the credit split was done correctly. She adds that the MSA is clear and easy to understand. She believes she applied for the credit split in accordance with what the MSA allows.

What the Appellant must prove

[12] To succeed with his appeal, the Appellant must prove that the Minister should not have performed the credit split.

Reasons for my decision

[13] The Appellant hasn't proven his case. The credit split remains in effect. Before I turn to my findings, I will explain what credit splitting means.

– What credit splitting means

[14] Credit splitting is intended 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.[6]

[6] See *Runchey* v. *Canada (Attorney General)*, 2013 FCA 16 at paragraph 44.

[15] When a credit split happens, the unadjusted pensionable earnings (UPE) of each party are totalled together and divided by two for each year of cohabitation. The equally divided UPE are then assigned to each party's CPP account.

[16] There is a suggestion in one of the Appellant's letters that he believes the Added Party's pension credits were not subject to the credit split.[7] If this is indeed what the Appellant believes, then I should point out that it wasn't only the Appellant's UPE that were divided. The Added Party's UPE were divided too. And in some years, the credit split was to the Appellant's advantage.[8]

– What the law says about credit splitting

[17] The CPP legislation says that the credit split is **mandatory** for couples who divorce on or after January 1, 1987.[9]

[18] The Federal Court has explained the mandatory nature of the credit split this way:[10]

> A plain reading of subsection 55.1(1)(a) provides that the Minister was required to perform the credit split upon notification of the divorce judgment and receipt of the required information. The use of "shall" means it is imperative for the Minister to perform the credit split. "Shall" confers no residual discretion on the decision-maker…

– When a spousal agreement is binding

[19] The general rule is that spousal agreements between parties who are subject to a credit split are **not** binding on the Minister.[11]

[20] There is an exception. The CPP legislation allows parties, in certain circumstances, to agree in a spousal agreement that there be no credit split. But the

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[7] See page GD1-10.
[8] See the table at page GD2-11. This table shows what the Appellant's pensionable earnings were before the division and what they were after the division.
[9] See paragraph 55.1(1)(a) and subsection 55.11(a) of the CPP.
[10] See *Mohammed* v. *Social Security Tribunal of Canada*, 2022 FC 1124 at paragraph 37.
[11] See subsection 55.2(1) of the CPP.

requirements to do so are strict. A spousal agreement will **only** be binding on the Minister where:[12]

> (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,
>
> (b) that provision of the agreement is expressly permitted under the provincial law that governs such agreement,
>
> (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 date of the application for the division, or
>
> 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.

– The parties' spousal agreement doesn't meet the requirements to opt out of the mandatory credit split regime

[21] The Appellant and the Added Party signed an MSA in Alberta in December 2014.[13] Alberta is one of four provinces in Canada that allows parties to opt out of the mandatory credit split regime.[14]

[12] See subsections 55.2(2) and (3) of the CPP.
[13] The MSA is at pages GD2-13 to GD2-74.
[14] See subsection 82.2 of the Alberta *Family Law Act*. The other three provinces that allow parties to opt out of the mandatory credit split are British Columbia, Saskatchewan, and Quebec.

[22] The Appellant says the MSA shows that his CPP pension credits were considered and dealt with as part of the parties' division of property. He also says the MSA precludes the Added Party from being entitled to any equalization of CPP credits whatsoever. The Appellant relies largely on sections 160, 167, 185, 197, and 200 of the MSA.

[23] I disagree with the Appellant. I will address each of the provisions in question, starting with section 185. I'm starting with section 185 because it is the most relevant provision about CPP credit splitting. The paramountcy rules of interpretation say that specific provisions prevail over general ones.[15]

[24] Here is what section 185 and its respective subtitle say:[16]

> **Canada Pension Plan**
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> 185. Either C. R. or S. R. may apply for the equalization of the parties' unadjusted pensionable earnings earned during their cohabitation under the Canada Pension Plan on the first anniversary of this Agreement or on a divorce, whichever event occurs first.

[25] I acknowledge that a spousal agreement can show the necessary intention to opt out of the mandatory credit split regime even if it doesn't explicitly reference a DUPE or credit split.[17]

[26] However, in this case, the MSA doesn't show an intention that there be no credit split. In fact, it shows the opposite. Section 185 expressly says that either party **may apply** for equalization of the parties' UPE under the CPP.

[27] The Appellant says that if the Added Party had a right to make a request for a credit split (which he disputes), then her right expired on December 11, 2015. This is because December 11, 2015, was the first anniversary of the MSA and this event happened before the Certificate of Divorce.[18] He adds that if the parties intended that

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[15] Sometimes this rule is referred to by the Latin term *Generalia specialibus non derogant*.
[16] See page GD2-48.
[17] See, for example, the decision from the Tribunal's Appeal Division in *S.J.* v. *The Minister of Employment and Social Development* and *SA*, 2020 SST 578 at paragraph 25.
[18] See pages GD2-8 and GD1-9.

either of them could apply for the credit split at any point in the future then they would have said so by using the word "from" the earlier of the two dates and adding wording such as "and in future without limitation."[19]

[28] Again, I disagree with the Appellant. A plain reading of the provision shows that the parties simply intended that if either of them chose to apply for the credit split, they could only do so on or after the earliest of two events – namely, the first anniversary of the MSA or a divorce.

[29] If the parties intended for the events to represent a deadline by which an application had to be made, then they could have easily signalled that intention by replacing the words "on" with something like "by" or "no later than."

[30] Even if I'm wrong, and there was an intention to set a deadline or date upon which an application had to be made, such intention would have no binding effect. As I explained earlier, the general rule about spousal agreements is that they are **not** binding on the Minister. The CPP legislation **only** allows parties, in certain circumstances, to agree that there be no credit split. The CPP legislation doesn't allow parties to set deadlines by which an application for a credit split needs to be made. The CPP doesn't even require an application to be made by parties whose relationship ends in divorce on or after January 1, 1987.[20]

[31] I turn now to sections 160 and 167 of the MSA. Here is what those sections and their respective subtitles say:[21]

> **Registered Assets**
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> …
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> 160. The parties agree that the value of their registered assets has been considered in the ultimate division of their matrimonial property. C. R. and S. R. hereby release and waive their interest in the other party's registered assets, now and in the future.

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[19] See pages GD2-8, GD1-9, and GD1-10.
[20] See paragraph 55.1(1)(a) and subsection 55.11(a) of the CPP.
[21] See page GD2-43.

> **Non-registered Assets**
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> …
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> 167. The parties agree that the value of their non-registered assets has been considered in the ultimate division of their matrimonial property. Except as set out in this Agreement, C. R. and S. R. hereby release and waive their interest in the other party's non-registered assets, now and in the future.

[32] The Appellant argues that his CPP pension credits are part of his registered assets or, in the alternative, his non-registered assets. He says that in sections 160 and 167, the Added Party forever waived any entitlement to his pension credits. He explains that as part of the settlement of matrimonial property, the Added Party chose to keep the substantial asset of the matrimonial home. However, because she was unable to pay the Appellant his equity share in the home, they agreed that the Appellant would keep the value of his registered retirement savings **and pension plans**, thereby reducing the Added Party's financial obligation to the Appellant.[22]

[33] The Minister says that the CPP pension credits are neither registered assets nor non-registered assets.[23]

[34] I don't need to determine whether the CPP pension credits are registered assets, non-registered assets or otherwise. This is because even if they could somehow be considered registered assets or non-registered assets, the Appellant's argument would still fail.

[35] First, section 156 of the MSA says that the parties' registered assets are set out in Appendix "A" to the MSA.[24] The CPP pension credits are not listed anywhere in Appendix "A".[25] This tells me that neither party considered CPP pension credits to be a registered asset. This is especially true given that section 11 of the MSA says that the

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[22] See pages GD2-77 and GD2-78.
[23] See page GD2-4.
[24] See page GD2-42.
[25] See pages GD2-54 to GD2-55.

parties agree that the listing of property set out in Appendix "A" represents an accurate disclosure of their matrimonial property.[26]

[36] Second, the release and waiver in section 167 can't override the express intention of the parties set out in section 185. This is because section 167 uses the words "Except as set out in this agreement." These words mean that the waiver and release in section 167 don't apply if another provision in the MSA sets out the parties' intention that there be no waiver or release of the asset or property in question. Section 185 shows that the parties did not intend to waive or release their interest in the other party's CPP pension credits.

[37] Third, as I explained before, because section 185 specifically deals with the parties' intention about the CPP pension credits, that provision is paramount (it takes priority) over any other provision in the MSA that refers more generally to the parties' intention about their pension property.

[38] I turn now to sections 197 and 200 of the MSA. Here is what those sections and their respective subtitles say:[27]

> **PART VI – GENERAL MATTERS**
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> **General Release and Indemnity**
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> 197. This Agreement is a full and final settlement of all issues between C. R. and S. R. and all rights and obligations arising out of their marital relationship and any cohabitation that may have existed prior to marriage. C. R. and S. R. acknowledge and agree that each gives up all claims at law, in equity or by statute against the other including, without restricting the generality of the Wills and Succession Act, the Divorce Act, the Family Law Act, the Dower Act, and the Matrimonial Property Act with respect to:
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> a. support,
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> b. property,
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> c. succession rights

[26] See page GD2-16.
[27] See pages GD2-49 and GD2-50.

> d. trusts,
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> e. quantum meruit and unjust enrichment, and
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> f. any other matter arising from their marriage and prior cohabitation.
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> **This Agreement and the Parties' Estates**
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> …
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> 200. Subject to the terms of this Agreement, each party gives up all claims at law, in equity, or by statute against or to the estate of the other, which they may have had, now have or may acquire in the future, including any claim under any law of Alberta, or any other jurisdiction in which any part of the estate of the other may be located.

[39] Section 197 doesn't support the Appellant's position. It's simply a general release and indemnity clause. It doesn't override the specific wording of section 185 about the parties' intention to allow an application for a CPP credit split.

[40] Section 200 doesn't help the Appellant either. It's about what the parties can't claim against the other's estate. Both parties are alive, and so this provision doesn't apply here. Even if it did, it doesn't override the express intention of section 185.

Other Matters

– Interlocutory decision

[41] Shortly after the Appellant filed his appeal, he wrote to the Tribunal and formally objected to the Minister being a party in this proceeding.[28]

[42] I dealt with this objection in an interlocutory decision of February 19, 2023. I determined that the Minister is a proper party in this proceeding.

[28] The Appellant's objection is at pages GD3-2 and GD3-3.

– I excluded a document

[43] The filing deadline was November 22, 2023, being one year after the Appellant filed the appeal with the Tribunal.[29]

[44] A filing period can be extended by 30 days if a party files documents or submissions within 30 days before the end of the filing deadline.[30]

[45] None of the parties filed evidence or submissions within the 30 days before November 22, 2023. This means the filing deadline should not have been extended. Despite this, Tribunal staff told the Added Party (and the Appellant) that they could file documents up to December 22, 2023.

[46] On December 22, 2023, the Added Party filed a Witness Information Form and a letter that she wrote on December 20, 2023.

[47] The Appellant objected to these documents. The Appellant's concern about the last-minute notice of a witness was resolved during the hearing. This is because the Added Party clarified at the hearing that the person identified on the Witness Information Form was attending the hearing as a support person and not as a witness.

[48] The Appellant raised concerns about the Added Party's letter of December 22, 2023. His main concern was that the letter contains statements that he believes are derogatory and inflammatory towards him.

[49] During the hearing I said that I would not exclude the Added Party's letter simply because it was late. I explained that it wouldn't be fair to exclude it on this basis alone, given that the Tribunal had mistakenly told the parties the deadline was December 22, 2023.

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[29] See subsection 27(1) of the *Social Security Tribunal Regulations*, SOR/2013-60. This appeal was filed before December 2022, and so the 2013 version of the *Social Security Tribunal Regulations* applies.
[30] See subsection 27(2) of the *Social Security Tribunal Regulations,* SOR/2013-60.

[50] However, knowing that a late document must be relevant to the appeal, I determined that I would exclude the document because it was not of probative value and contained statements that are irrelevant and potentially prejudicial to the Appellant.

Conclusion

[51] The credit split remains in effect.

[52] This means the Appellant's appeal is dismissed.

Shannon Russell
Member, General Division – Income Security Section