Citation: *BP v Minister of Employment and Social Development*, 2024 SST 355

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	B. P.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated July 10, 2023 (issued by Service Canada)

Tribunal member:	Virginia Saunders
Type of hearing:	Teleconference
Hearing date:	March 14, 2024
Hearing participants:	Appellant
Decision date:	March 26, 2024
File number:	GP-23-1515

Decision

[1] The appeal is dismissed.

[2] The Appellant, B. P., isn't eligible for a Canada Pension Plan (CPP) survivor's pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant met N. L. (N. L.) in November 2006. At the time, she was living in California. N. L. was living in Surrey, BC. They were both divorced from their previous spouses. They began a relationship. The Appellant moved into N. L.'s apartment in August or September 2007. For the next seven years, she and N. L. lived together in BC.

[4] In 2014, the Appellant's son and daughter-in-law had a child. They asked the Appellant to move back to California so that she could provide childcare. She agreed. In October 2014, she moved into the in-law suite in her son's home in California. She still lives there.

[5] For the next five years, the Appellant and N. L. saw each other several times a year. She was last with him in October 2019. She would have visited him again in March 2020, but she had to postpone her trip because of the pandemic. Border closures and quarantine requirements continued to keep them apart after that.

[6] N. L. died on May 9, 2022. The Appellant applied for a CPP survivor's pension in November 2022.

[7] The Minister of Employment and Social Development (Minister) denied the application.[1] The Minister said the Appellant wasn't eligible for the survivor's pension, because she wasn't living with N. L. before he died.[2]

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[1] The Minister of Employment and Social Development (Minister) manages the Canada Pension Plan benefit programs for the Government of Canada.
[2] The Minister's initial and reconsideration decisions are at GD2-18-19 and GD2-18-19.

[8] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division. She says that, although she and N. L. did not live in the same residence, they were still common-law partners when he died.[3]

What the Appellant must prove

[9] For the Appellant to succeed, she must prove she is N. L.'s survivor, as defined in the *Canada Pension Plan*. This means she has to prove she was his common-law partner in the year immediately before his death.

[10] The Appellant must prove this on a balance of probabilities (that it is more likely than not).

Matters I have to consider first

I accepted documents sent in after the hearing

[11] The Appellant tried to file GD7 on March 15, 2024, the day after the hearing. However, the Tribunal couldn't open most of the document and wasn't able to reach the Appellant to ask her to re-send it until March 22, 2024. She sent it immediately.

[12] Although the Tribunal received the document after the hearing, I decided to accept it.[4] Most of it was an affidavit the Appellant had already filed.[5] While preparing for the hearing, I discovered that the pages of the affidavit were in reverse order and the first page was missing. The Appellant told me she hadn't noticed this until just before the hearing. I asked her to re-send the full affidavit so it would be complete and easier to follow. Since I asked for the affidavit to correct what might have been the Tribunal's clerical error, I accepted it.

[13] The other part of GD7 is a one-page written review of some of the evidence and a repeat of the Appellant's argument. Most of what the Appellant wrote is already in the

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[3] See GD1-6.
[4] Section 42(2) of the *Social Security Tribunal Rules of Procedure* (Rules) sets out what factors I must consider when deciding whether to accept late evidence. Under section 8(5) of the Rules, I can apply these factors to late submissions (arguments) as well, even though these aren't considered evidence. Section 5 of the Rules defines "evidence."
[5] See GD3-20-28. The new pages are GD7-4-14. The exhibits are at GD3-36-111.

file, or she said it at the hearing. I accepted this part of the document as well. The most relevant factors were that the Appellant is representing herself, she was nervous at the hearing, and she sent the document almost immediately after the hearing. She simply wanted to stress things she wasn't sure she had covered sufficiently at the hearing.

[14] There is no prejudice to the Minister because the Minister didn't go to the hearing, where it would have heard much of what was in the document. That is why I also decided not to give the Minister a chance to respond to the document. As a result, there is no significant delay in reaching my decision.

Reasons for my decision

[15] I find that the Appellant is not N. L.'s survivor. This means she isn't entitled to a CPP survivor's pension.

[16] The Appellant's evidence at the hearing was spontaneous and candid. I believe what she told me about her relationship with N. L. However, I have to base my decision on what the law says about common-law relationships. When I do that, I find that it is more likely than not that she and N. L. did not cohabit in a conjugal relationship for a continuous period of at least one year immediately before he died.

[17] I reached this decision by considering the following issues.

What "survivor" means

[18] A survivor is a person who was the common-law partner of a CPP contributor when they died.[6]

[19] A common-law partner is a person who is "cohabiting with the contributor in a conjugal relationship" for a continuous period of at least one year at the time of the contributor's death.[7] The one-year period is the whole year **immediately before** the

[6] See section 42(1) of the *Canada Pension Plan.* If there is no common-law partner, the survivor is a person who was married to the contributor when they died.
[7] See section 2(1) of the *Canada Pension Plan*.

contributor's death. It doesn't matter if a couple lived together for a whole year (or more) at a different time.[8]

[20] A conjugal relationship is similar to marriage. When I am deciding whether the Appellant and N. L. were in a conjugal relationship, I have to look at factors such as:

- shelter (whether they lived under the same roof)
- sexual behaviour (whether they had sexual relations and were faithful to each other)
- services (whether they prepared meals or performed other household tasks for each other)
- social (whether they participated together in neighbourhood and community activities)
- societal (whether they were seen as a couple by the community)
- support (whether they shared assets and finances)
- family (what kind of relationship they had with each other's children)[9]

[21] A couple doesn't have to meet all the "conjugal" characteristics. And they may meet them in varying degrees. I have to take a flexible approach in deciding whether there was a conjugal relationship at the relevant time.[10]

The Appellant is not a survivor as defined in the CPP

– The Appellant and N. L. were common-law partners up to October 2014

[22] I accept that the Appellant and N. L. were common-law partners before October 2014. They started living together in September 2007. For the next seven years, their relationship had many of the characteristics found in a common-law one.[11]

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[8] See *JR v Minister of Employment and Social Development*, 2021 SST 113.
[9] See *McLaughlin v Canada (Attorney General)*, 2012 FC 556.
[10] See *M v H*, [1999] 2 SCR 3 at paragraphs 59 and 60.
[11] The Appellant gave some of the evidence about this period at the hearing. I also looked at affidavits from the Appellant, friends, and family at GD7-4-14 (exhibits at GD3-36-111), GD3-112-114, GD3-116-118, GD3-121-123, and GD3-125-131.

[23] They had a common residence. From September 2007 to May 2008, they lived with N. L.'s brother in Surrey BC, where N. L. was already residing. Then they moved to a rental property in Kaleden in the BC Interior, where they lived for about 18 months while N. L. was off work because of a disability. When he was able to return to work, they moved back to Surrey and rented an apartment on X. They were both named on the leases for Kaleden and X. The Appellant opened some utility accounts in her own name.

[24] They shared household chores. The Appellant did most of the cooking and indoor housework. N. L. did most of the maintenance and yard work.

[25] N. L. supported the Appellant by paying all their expenses.

[26] The Appellant estimated that she spent about 10 months a year living with N. L. in BC. She went back to California for a few weeks every year to visit her children. She did not own or lease any property there. She stayed with her children. Occasionally, N. L. went with her.

[27] They had a sexual relationship. They always shared a bedroom when they were together. The Appellant did not have any other partners and, to her knowledge, neither did N. L.

[28] Family and friends viewed them as a close, committed couple. They socialized as a couple. They went to family weddings together. N. L. got along well with the Appellant's children, and the Appellant got along well with most of N. L.'s friends and relatives. The only exceptions were N. L.'s siblings. I placed no weight on this because almost every family has at least one strained relationship. It doesn't say anything about whether there is a common-law relationship.

– **They stopped being common-law partners in October 2014**

[29] I find that the Appellant and N. L. stopped being common-law partners in October 2014, when she moved to California. N. L. moved to a cottage he owned near

Princeton, BC, where he and the Appellant had regularly spent weekends and vacations.[12]

[30] The Appellant's move made a significant difference to the amount of time she and N. L. spent together. She came to Canada to see him about twice a year and stayed for three or four weeks each time. He usually went to California twice a year and stayed for four to five weeks each time.[13]

[31] A couple doesn't have to live under the same roof in order to co-habit in a conjugal relationship. I recognize that the Appellant and N. L. remained committed to each other. They planned to spend more time together in the future. They talked almost every day over Skype. N. L. was godfather to the Appellant's two granddaughters. They kept clothing and personal items at each other's homes. They each had access to the other's internet passwords. As far as they were concerned, the only thing that was different about their relationship was that the Appellant had to move to California for family reasons.

[32] However, the fact that the Appellant and N. L. were apart for long periods affected other aspects of their relationship. They didn't depend on each other for day-to-day support in the home. There was no significant financial interdependence, because N. L. didn't pay for the Appellant's household expenses except when she was in Canada. Obviously, they didn't socialize or appear as a couple as often.

[33] Other factors also suggested there wasn't a conjugal relationship:

- They had no joint bank accounts or jointly owned property.
- Neither of them had a will, so they hadn't named each other as a beneficiary or executor.

[12] The Appellant gave some of the evidence about this period at the hearing. I also looked at affidavits from the Appellant, friends, and family at GD7-4-14 (exhibits at GD3-36-111), GD3-112-114, GD3-116-118, GD3-121-123, and GD3-125-131.
[13] See GD3-27. The Appellant gave similar evidence at the hearing.

- N. L. had a life insurance policy, but he didn't name the Appellant as the beneficiary. The Appellant didn't receive any medical benefits or other coverage through N. L.
- N. L. didn't list his marital status as common-law on his income tax returns. The Appellant didn't file a tax return in the US or Canada. She told me that, to her knowledge, neither of them had ever declared themselves to be common-law spouses on any documents.

[34] The Appellant told me that N. L. didn't want to put her name on anything because he was afraid it might attract the attention of the government and complicate matters because she wasn't a Canadian citizen. For the same reason, they described each other as boyfriend and girlfriend when they crossed the border. N. L. was concerned that if they described a more permanent relationship, the Appellant wouldn't be allowed into Canada. He was also a procrastinator and didn't start talking about estate planning until just before he died.[14]

[35] N. L.'s concerns might have been valid. I accept that they were genuinely held beliefs. I also recognize that many people put off planning for their deaths. But the fact that the couple didn't address these issues means they didn't acknowledge their common-law relationship outside of their circle of family and friends. They didn't have any financial connection except for N. L.'s covering the Appellant's living expenses when they were together.

[36] I didn't place any weight on the fact that the Appellant and N. L. didn't see each other at all for two-and-a-half years before he died. This was due to pandemic restrictions. I believe that, if they had been able to, they would have visited each other. But they wouldn't have seen each other more often than they did in the preceding five years.

[37] The Appellant told me that she was considering spending more time in Canada with N. L. after August 2021. This was because her grandchildren were older, and her

[14] See GD3-126 and GD7-13.

childcare services wouldn't be needed as much. But she and N. L. wanted to wait until he retired, and he hadn't chosen yet when that would happen. So, nothing was decided.[15] As a result, I can't find that the pandemic was the only reason the Appellant and N. L. were living apart in the year before he died.

– **The Appellant didn't intend their common-law relationship to continue**

[38] The Appellant argued that the common-law relationship continued after October 2014, because neither she nor N. L. intended it to end. She based her argument on court decisions that interpreted provincial laws about spousal relationships for family law and succession purposes.[16]

[39] The *Canada Pension Plan* has its own definition of what constitutes a common-law relationship. The definitions in provincial laws don't apply. However, these decisions were useful because they follow the same line of reasoning as the Supreme Court of Canada in a decision that **was** based on the *Canada Pension Plan*. In that case, the Court said a common-law relationship does not end "if there was a mutual intention to continue." The common-law relationship ends "when either party regards it as 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."[17]

[40] I interpret this to mean that there must be an intention to end the common-law aspect of the relationship, not the relationship as a whole. A couple can continue to have a loving, committed relationship without it being common-law. That is what happened here.

[41] The main difference between this appeal and the decisions the Appellant relied on is that she and N. L. decided to live apart for a reason that wasn't related to their needs or their relationship. Neither of them had medical issues requiring them to be elsewhere. There was nothing stressful or unhealthy about their living arrangement such that it was reasonable for one of them to live somewhere else for the sake of the

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[15] See GD7-8.
[16] See GD2-24-25 and GD7-3.
[17] See *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65.

relationship. The Appellant wasn't taking a job somewhere else so that she could contribute financially to the common-law household.

[42] The Appellant may not have felt that she was ending the common-law relationship when she moved to California in October 2014. But she intended to make the move so that she could be with her son and his family. She knew it would mean that she and N. L. would spend most of the year apart. They would no longer have the close connection and mutual dependency that comes from living under the same roof or being together frequently. She would no longer have N. L.'s financial support for most of the time. In doing this, she showed that she intended to end the common-law relationship and replace it with a loving, long-distance one between two independent people.

[43] After October 2014, the Appellant and N. L. were a close, devoted couple. They spent as much time together as possible. When they were together, they behaved as common-law couples do. But they were only together for, at most, 25% of the year. They lived separately the rest of the time. Their relationship was no different than many other boyfriend-girlfriend bonds. They were not cohabiting in a conjugal relationship.

Conclusion

[44] I find that the Appellant isn't a "survivor" as defined in the *Canada Pension Plan*. As a result, she isn't eligible for a CPP survivor's pension.

[45] This means the appeal is dismissed.

Virginia Saunders
Member, General Division – Income Security Section