Citation: *LB v Minister of Employment and Social Development and EB*, 2024 SST 318

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	L. B.
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie
Added Party:	E. B.

Decision under appeal:	General Division decision dated March 20, 2023 (GP-21-2205)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	March 6, 2024
Hearing participants:	Appellant Respondent's representative Added Party
Decision date:	March 27, 2024
File number:	AD-23-427

Decision

[1] The appeal is dismissed. The Appellant and the Added Party separated as of January 2016. A division of unadjusted pensionable earnings (from here on referred to as a credit split) will be applied from 1984 to 2015.

Overview

[2] This case is about how a former couple's Canada Pension Plan (CPP) credits should be divided between them.

[3] The Appellant and the Added Party are both 68 years old. They have been married for 40 years, but it is fair to say that they are now estranged. They continue to live in the same house, but they have little contact with one another and inhabit separate zones that are clearly marked.

[4] In August 2020. The Added Party applied for a CPP credit split. In her application, she said that she and the Appellant were married in July 1984 and separated in January 2016.[1] The Minister granted the Added Party the credit split for the period requested.[2]

[5] The Appellant then appealed the Minister's decision to this Tribunal's General Division. The Appellant acknowledged that he and the Added Party were separated, even though they lived under the same roof. But he argued that the separation occurred in 2009, when they closed their joint account and opened separate ones.[3] Later, the Appellant argued that the separation actually began in 2005, when he and his wife moved into separate bedrooms.[4]

[6] The General Division held a hearing by teleconference and dismissed the appeal. It found that the Appellant and Added Party separated on January 1, 2016, the

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[1] See the Added Party's application for a CPP credit split dated August 24, 2020, GD2-36.
[2] See the Minister's reconsideration decision letter dated July 30 2021, GD2-9.
[3] See the Appellant's notice of appeal to the General Division dated October 20, 2021, GD1-3.
[4] See the Appellant's letter dated March 3, 2022, GD3-1.

date set out in a draft separation agreement prepared pursuant to a divorce proceeding that the Appellant initiated but later abandoned.

[7] The Appellant applied for permission to appeal to the Appeal Division. He alleged that the General Division ignored the following facts:

(i) He was still married to the Added Party;
(ii) He was still living under the same roof as the Added Party; and
(iii) He had never actually signed a separation agreement with the Added Party.

[8] Last May, one of my colleagues on the Appeal Division granted the Appellant permission to appeal because she thought he had raised at least an arguable case. Earlier this month, I held a hearing to discuss the parties' respective cases in full.

Issue

[9] The CPP provides for an equal division of pension credits between two parties during the time they were married or cohabited in a conjugal relationship.[5] The division occurs when the parties began living "separate and apart." That is determined by looking at factors such as:

- Whether the parties lived under the same roof and slept together;
- Whether they had a sexual relationship and were faithful to each other;
- Whether they performed domestic tasks together, such as shopping, preparing meals, etc.
- Whether they socialized together;
- Whether the community saw them as a couple; and
- Whether they had shared property and financial arrangements.[6]

[5] See the *Canada Pension Plan*, sections 55.1 and 55.2.
[6] See *R.H. v Minister of Human Resources and Skills Development*, (2008) CP 25329, and *Minister Employment and Immigration v Blais*, (1996) CP 4003. These decision, both from the now-defunct Pension Appeals Board, are not binding on me, although I do find them persuasive. See also *Taylor v*

[10] In this case, the Appellant and the Added Party don't dispute that they were married in July 1984, nor do they dispute that they continue to live in the same house. I note that the Appellant has changed his position in the year since the General Division hearing: whereas he had previously acknowledged that he and the Added Party separated as early as 2005, he now denies that any separation ever occurred.

[11] For this appeal, I had to decide whether the Appellant and the Added Party separated and, if so, when that separation occurred.

Analysis

[12] I have applied the law to the available evidence and concluded that the Appellant and the Added Party separated in January 2016. I have come to this conclusion for the following reasons:

The Appellant and the Added Party live separate and apart even though they inhabit the same house

[13] The Appellant insists that, because he and the Added Party continue to live in the same house and remain married, he is not subject to the credit split.

[14] I disagree. The bulk of the evidence strongly suggests that the Appellant and the Added Party are separated and remain married in name only. Although they continue to live in their former marital home, they no longer have anything resembling a marital relationship:

- They live in separate parts of the house that are marked by clear boundaries, either curtains or doors. There are common areas — the kitchen and dining room — but their mutual interactions within those areas is limited.
- They don't have conversations. They only talk to each other for the purpose of managing common household chores and expenses.
- They haven't had sexual relations in a decade.

Taylor, (1999) 5 R.F.L. (5th) 162 (Ont. S.C.). This decision is still cited today. See, for example, *Taylor v Oliver*, 2022 ONSC 7186 (Ont. S.C.J.).

- They buy their own groceries and cook separate meals. They might eat together but only when other family members are present.
- They have separate bank accounts and credit cards and have no common financial arrangements except for their co-ownership of the house and their mutual responsibility for its mortgage.
- They don't socialize or worship together.
- They often fall into conflict, and they have called the police on each other many times over the years.
- The Appellant has repeatedly referred to the Added Party as "his former spouse" in recent correspondence.[7]

[15] Possibly the best evidence that the Appellant and Added Party are no longer in a marriage-like relationship is the very fact that they are fighting over a CPP credit split. The Added Party said that she applied for a division of pensionable earnings three years ago because she wanted, as much as practically possible, to insulate herself from her husband's irresponsible spending habits. The Appellant has vigorously opposed his wife's claim at every step, but he has not explained why, if they are not effectively separated, she is seeking to maximize her financial independence from him.

[16] The Appellant asked, "If we hate each other so much, why are we still living together?" The Added Party had answers for that. She said that, when her husband was still employed, they continued to present themselves as a couple so that she could access his work-related benefits. She also said that, after years of financial mismanagement, neither of them could afford to live separately, as much as she wished they could. She added that, for some time, she was unwilling to face the fact that her marriage was over.

[17] The Appellant attempted to portray his marriage in a more positive light. He noted that he had looked after his wife after she underwent knee replacement in 2013.

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[7] See, for example, the Appellant's letters dated June 9, 2022, GD4-1 and GD4-3, and another letter dated only "2022," AD12-7.

He pointed to a recent occasion on which the Appellant joined him when he picked up a load of fertilizer and delivered it to their daughter.

[18] However, I didn't find either episode compelling evidence of a close relationship. The Added Party acknowledged that she and the Appellant briefly reconciled after her surgery, but she said that it was 10 years ago and that their relationship had been hostile ever since. She admitted that she was with the Appellant on the manure run, but she insisted that it was a one-time event and that her intent in coming along was to see her daughter, not to spend time with her husband.

[19] The Added Party's account was reinforced by testimony from her adult son, J. B., who recalled that his parents had been estranged for many years, going back to his childhood. He said that, in terms of emotion, he didn't see anything like a marriage. His parents were always arguing over money. They lived under the same roof for purely financial reasons.

[20] At both the General and Appeal Division hearings, the two parties described each other in harsh and unflattering terms. I had no difficulty in believing that, although they share common premises, they are leading separate lives. The Appellant and the Added Party are still married but, for all intents and purposes, they are no longer together.

The Appellant and Added Party separated in January 2016

[21] If the Appellant and the Added Party are no longer together, when did they separate? There are several possibilities, but only one that makes sense.

[22] At the General Division, the Appellant acknowledged a separation and argued it occurred in 2005 after an ugly domestic incident that saw the police forcibly remove him from the marital home. He said that he was eventually allowed to return but, from that point on, he slept in his son's former bedroom. The Added Party said that, although it

was the Appellant's choice to sleep in separate rooms, she was happy with the new arrangement, since it gave her "some peaceful nights free of verbal abuse."[8]

[23] The Appellant had previously argued that a separation occurred following another domestic incident in 2009, after which he and the Added Party dissolved their joint bank account. He also said that he started paying the mortgage by himself from that date. For her part, the Added Party denied that anything decisive happened in 2009. She claimed that she and her husband had separated their accounts four years earlier, after their first big marital crisis. She said that, at the time, he removed her name from her husband's accounts after she took an outside job against his wishes.

[24] There is no doubt that the Appellant and Added Party had a troubled relationship for many years, but that did not mean they were separated. I accept that they had separate bedrooms and bank accounts as early as 2005, but there is evidence that they still considered themselves a couple. For a time, they went to counselling in an effort to save their marriage. In 2013, the Added Party had a lawyer threaten the Appellant with separation if he did not change his behaviour, an act that by itself suggested she did not yet consider them separated. Eventually they did reconcile, if for only a short time, going as far as to execute a joint will in July 2014.

[25] However, the reconciliation was brief. In late 2015, the Appellant retained a lawyer, who took steps to negotiate a separation agreement. It remains unclear how far those negotiations went, but it does appear that both parties agreed that they separated as of January 2016.

[26] The Appellant maintains that he never signed anything agreeing to any separation date. I acknowledge that the file does not contain a fully executed separation agreement; however, it does contain a number of other documents that, considered together, strongly suggest that the Appellant and his wife agreed to a separation date of January 1, 2016, for instance:

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[8] See the Added Party's email dated October 25, 2022, GD7-2.

- Forms and declarations specifying January 1, 2016 as the date of spousal separation and joint asset valuation;[9]

- A letter from the Appellant to the Minister saying that he "signed onto the 2016 [separation date] out fear and confusion."[10]

- A letter from the Appellant confirming that he and the Added Party compromised on 2016 as their date of separation.

[27] The Added Party also points to letters between the Appellant's and her family lawyers discussing communal property valuations as of January 1, 2016. For example, the Appellant's lawyer wrote in late 2019:

> **These parties have been living separate and apart in the same home since January 1, 2016.** For the better part of two years, an agreement could not be reached on the valuation date, which I understand impacted upon property calculations, however the home should have long ago been listed for sale. Neither of the clients can afford to buy the other out... [emphasis added][11]

[28] Although a valuation date had not been solidified, the Appellant's lawyer, presumably acting on his instructions, acknowledged that the parties had been living separate and apart since January 1, 2016. Further evidence that this date marked a turning point can be seen in the two parties' income tax filings. In 2014 and 2015, both the Appellant and the Added Party filed returns listing their marital status as "married." In 2016, the Added Party's income tax return indicated that she was "separated."[12]

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[9] See pages from an undated Divorce Application (GD2-16); a partially executed Joint Declaration of Period of Spousal Relationship dated March 12, 2019 (GD2-18); and an undated Statement of Family Law Value (GD2-19).
[10] See Appellant's request for reconsideration dated December 23, 2020, GD2-33.
[11] See letter dated October 10, 2019 by Kathleen Robertson, barrister and solicitor, AD13-2.
[12] See the Appellant's income tax returns for 2014 and 2015 at GD2-20 and GD2-21, respectively. The Added Party's income tax returns for 2015 and 2016 are at GD27 and GD2-25, respectively.

[29] In short, the evidence shows that, although the Appellant and Added Party were in a bad marriage for many years, they didn't consider themselves separated until early 2016, after their reconciliation had irretrievably failed.

The Appellant has a credibility problem

[30] The Appellant did not help his case by repeatedly changing his position, apparently for self-serving reasons.

[31] The record shows that, after initiating divorce proceedings in early 2016, the Appellant provisionally agreed to a separation date of **January 1, 2016**.[13] He appears to have instructed his family lawyer to negotiate a settlement on that basis.

[32] However, the Appellant later had second thoughts about the separation date. As he later explained:

> In 2016 I mistakenly opened a letter addressed to my spouse. It read that she had a huge amount of money invested. My lawyer read it and suggested that my spouse was a good saver. This led me to believe that it was legitimate but four years later found that it was not.
>
> [W]e agreed that 2016 would be a good compromise for a separation date. Then shortly after signing for the separation date of 2016, I was informed by my former lawyer that my spouse's investments were only an investment proposal. My spouse didn't have that money that I thought she had.[14]

[33] The Appellant later said that he agreed to the January 1, 2016 separation date because he was ill and unable to think straight. However, it appears that he backed out of the agreed-upon date in a bid to ensure that the marital assets would include an imaginary inheritance that he mistakenly believed his wife had kept hidden from him.

[34] When the Added Party applied for the credit split in August 2020, the Appellant replied with a letter to the Minister claiming that the separation occurred in **2009**, the

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[13] See letter dated February 29, 2016 by Sarah Weisman, barrister and solicitor, GD2-31.
[14] See the Appellant's letter dated March 3, 2022, GD3-1.

year he recalled (possibly in error) closing his joint account with the Added Party.[15] When this matter came to the General Division, the Appellant changed his position again, dating the separation to **2005**, when he and the Added Party began sleeping in separate bedrooms.[16] After the General Division turned him down last year, the Appellant offered yet another version of events, arguing before me that a separation had **never** taken place, thereby disentitling the Added Party to a credit split altogether.

[35] Over the years, the Appellant has taken four different positions about whether and when he and the Added Party separated, with each shift seemingly tailored to give him a better financial outcome. Because the Appellant keeps changing his story for apparently self-serving reasons, I didn't place a great deal of weight on his statements.[17]

Conclusion

[36] The appeal is dismissed. The Appellant and the Added Party, who were married in July 1984, separated in January 2016. Although the file does not contain a document showing that the Appellant formally signed off on the latter date, the evidence, taken as a whole, suggests that is when he and the Added Party stopped being in a marriage-like relationship.

[37] That means the credit split shall apply from the years 1984 to 2015, inclusively.[18]

Member, Appeal Division

[15] See the Appellant's letter dated December 23, 2020, GD2-33.
[16] See the Appellant's letter dated March 3, 2022, GD3-1.
[17] Credibility is an issue when determining the date parties ceased to cohabit. See *Schlaepfer v Minister of Human Resources Development* (2003), CP 12615 (PAB).
[18] According to section 78.1 of the *Canada Pension Plan Regulations*, persons subject to a credit split shall not be considered to have cohabited at any time during the year in which they started living separate and apart.