



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *DC and TC v Minister of Employment and Social Development*, 2021 SST 265

Tribunal File Number: AD-21-52

BETWEEN:

**D. C.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

and

**T. C.**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Neil Nawaz

DATE OF DECISION: June 8, 2021

Canada

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed. I am returning this matter to the General Division for another hearing.

### OVERVIEW

[2] This case involves a dispute between parents over the disabled contributor's child's benefit (DCCB).

[3] The Appellant and the Added Party were married for 20 years and had two children together. In 2014, the Appellant began receiving the Canada Pension Plan (CPP) disability pension. At the same time, he began receiving the DCCB on behalf of the children, who at the time were still under the age of 18.

[4] In November 2017, the Added Party applied for the DCCB herself. She declared that the children had been in her custody and control since June 2016. After an investigation, the Minister agreed with the Added Party and awarded her the DCCB. The Minister also determined that the Appellant had been receiving a benefit to which he had not been entitled since July 2016. It assessed him with an overpayment of nearly \$7,500.

[5] In March 2019, the Appellant appealed the Minister's decision to the Tribunal's General Division. He maintained that he continued to have custody and control over the children, and he argued that the DCCB should be rightfully coming to him.

[6] The General Division decided that an oral hearing was unnecessary. Over the Appellant's objections, it conducted the hearing by way of written questions and answers. On December 1, 2020, it allowed the appeal in part. In written reasons, the General Division found that, while the parties may have had joint legal custody of the children until May 2018, the Added Party assumed *de facto* custody and control of the children as of December 28, 2016, when they left the family home.

[7] The Appellant then requested leave to appeal from the Tribunal's Appeal Division. Among other things, the Appellant alleged that the General Division denied his right to a full and fair hearing by proceeding via the written question and answer format.

[8] Earlier this year, I gave the Appellant permission for this appeal to proceed because I thought he had raised an arguable case.

[9] The Added Party maintains that the General Division acted properly and that its decision should stand.<sup>1</sup> The Minister concedes that the General Division broke a rule of procedural fairness and asks that this matter be returned to the General Division for a new hearing.<sup>2</sup>

[10] In this appeal, I saw no need to hold an oral hearing and made my decision based on a review of the existing documentary record. I find that the General Division failed follow a rule of procedural fairness by denying the Appellant an opportunity to testify on his own behalf.

### **PREMINARY MATTER**

[11] On May 28, 2021, the Appellant submitted an application to rescind or amend the General Division's December 2020 decision—the very decision that is the subject of this appeal. With this application, the Appellant enclosed a large volume of material related to ongoing court proceedings with his former spouse. He claims that none of this material was discoverable when the General Division decided to award the Added Party the DCCB.

[12] The Appeal Division usually suspends appeals of decisions that are at risk of being rescinded or amended, but I see no need to do so here. By the time I learned of the Appellant's application, I had already decided to overturn the General Division's decision and order a new hearing. That means the decision that the Appellant is seeking to rescind or amend has been rendered invalid and no longer has any legal force.

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<sup>1</sup> See Added Party's written submissions dated May 28, 2021, AD07. A large part of these submissions focused on family law matters that are not the subject of this appeal.

<sup>2</sup> See Minister's letter dated May 7, 2021, AD06.

## ISSUES

[13] There are four grounds of appeal to the Appeal Division. A party must show that the General Division

- (i) did not follow procedural fairness;
- (ii) made an error of jurisdiction;
- (iii) made an error of law; or
- (iv) based its decision on an important factual error.<sup>3</sup>

[14] In this appeal, I had to answer these questions:

Issue 1: Did the General Division make any errors?

Issue 2: If so, what is the right remedy?

## ANALYSIS

### **Issue 1: Did the General Division make any errors?**

[15] Justice demands that a party be heard. This means that someone with an interest in the outcome of a court or tribunal proceeding has a right to present their best case. I have decided that the General Division deprived the Appellant of that right.

[16] The Appellant argues that written Q&A is a “vastly inferior” hearing format that does not allow one to test the credibility of witnesses. He also argues that, contrary to the General Division’s finding, there was no court order that precluded him from appearing with the Added Party in a legal proceeding.

[17] The Added Party disagrees. She notes that a February 2020 probation order<sup>4</sup> barred the Appellant from contacting or communicating with her “in any way, either directly or indirectly, by any physical, electronic or other means” except pursuant to a family court order or “for the purpose of conducting or defending family court proceedings.” The Added Party maintains that the Appellant’s claim for the DCCB had nothing to do with family court. She says that, since

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<sup>3</sup> *Department of Employment and Social Development Act* (DESDA), s 58(1).

<sup>4</sup> Ontario Court of Justice Adult Probation Order dated February 21, 2020, GD7-3.

there is no family court order to the contrary, the Appellant is not allowed any communication with her, either directly or indirectly.

[18] As mentioned, the Minister's position is that the General Division acted unfairly when it chose to hold its hearing by way of written questions and answers. It argues that proceeding this way prevented the Appellant from fully making his case that he had custody and control of the children between June 2016 and November 2017.

[19] I agree with the Appellant and the Minister.

[20] I am usually reluctant to interfere with the General Division's discretion to decide on an appropriate form of hearing, but I see reason to make an exception in this case. The *Social Security Tribunal Regulations* permit the General Division to choose among several hearing formats,<sup>5</sup> but this authority cannot be exercised without regard for procedural fairness. The Appellant insists that, since December 2016, he has had more control over the children than what the record indicates.

[21] I found the General Division's reasons for holding a paper hearing contradictory. The General Division acknowledged that the February 2020 probation order influenced its decision to proceed solely by way of a documentary review. At the same time, the General Division did not completely rule out an oral hearing. It held out the possibility of continuing by teleconference if it had "concerns about the parties' ability to present their case in writing."<sup>6</sup> This suggests that the General Division did not regard itself as subject to the probation order.

[22] In my view, the February 2020 probation order did not apply to the Appellant's DCCB claim, which I must assume the Appellant initiated in a good faith effort to recover benefits to which he believes he is entitled. I note that the Appellant first challenged the Minister's decision to terminate his DCCB many months before the issuance of the probation order. The order prohibited the Appellant from communicating with the Added Party except for the purpose of conducting or defending family court proceedings. However, the dispute over the DCCB is essentially an extension of the Appellant and Added Party's family court proceedings. It is about

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<sup>5</sup> *Social Security Tribunal Regulations*, s 21.

<sup>6</sup> General Division decision, para 9.

who has custody and control over the children and who should receive a benefit intended to cover their basic needs, such as shelter, food, and clothing. By preventing the Appellant from testifying or calling witnesses, the General Division effectively denied him his right to be heard.

**Issue 2: What is the right remedy?**

[23] The Appeal Division has the power to fix the General Division's mistakes. I have found that the General Division ignored a rule of procedural fairness, so that leaves me with essentially two options. I can refer this matter back to the General Division for a new hearing, or I give the decision that the General Division should have given.<sup>7</sup>

[24] The Minister has recommended that I return this matter to the General Division for a new hearing. I agree.

[25] There isn't enough information on file to allow me to decide this matter myself. That's because the General Division declined to hear testimony from either the Appellant or Added Party on the question of who had custody and control over their children. Unlike the Appeal Division, the General Division's primary mandate is to hear evidence and make findings of fact. As such, it is better positioned than I am to decide whether the Appellant or the Added Party was eligible for the DCCB.

**CONCLUSION**

[26] I am allowing this appeal because the General Division denied the parties their right to be heard. I am returning this matter to the General Division for a new hearing, to be held by either teleconference or videoconference.

[27] This dispute is over one government benefit, but it is also part of a larger, emotionally charged battle over a range of family law matters. At this Tribunal, the Appellant and the Added Party have sometimes found it difficult to refrain from arguing over things that have little or nothing to do with the issue at hand: DCCB entitlement.

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<sup>7</sup> DESDA, s 59(1).

[28] For that reason, I am also directing the General Division to carefully screen subsequent submissions for relevance. The General Division is to admit only those documents that, in its judgment, are directly related to who had custody and control of the children after July 2016. The Appellant and the Added Party are hereby notified that any documents that fail to address this question will not be considered.



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Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	D. C., Appellant T. C., Added Party Suzette Bernard, Representative for the Minister