



Citation: *MM v KM and Minister of Employment and Social Development*, 2022 SST 575

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: M. M.

First Respondent: K. M.

**Second Respondent:
Representative:** Minister of Employment and Social Development
Ian McRobbie

Decision under appeal: General Division decision dated October 28, 2021
(GP-20-1428)

Tribunal member: Neil Nawaz

Type of hearing: Teleconference

Hearing date: April 26, 2022

Hearing participants: Appellant
First Respondent
Second Respondent's representative

Decision date: June 27, 2022

File number: AD-22-110

Decision

[1] The appeal is dismissed. The General Division did not make any errors. Its decision stands.

Overview

[2] The Appellant (M. M.) and the First Respondent (K. M.) were married for 26 years before divorcing in 2011. They had four children together.

[3] The Second Respondent (Minister) approved M. M. for a Canada Pension Plan (CPP) disability pension. In October 2018, M. M. applied for a disabled contributor's child's benefit (DCCB) on behalf of his youngest daughter, who was born in 2004. The Minister approved the application.

[4] K. M. applied for the DCCB on behalf of her daughter in June 2020. The Minister denied her application because it had already begun paying the DCCB to M. M. The Minister said that its policy was to pay the DCCB to the disabled contributor provided they had at least **some** custody and control of the child.

[5] K. M. appealed the Minister's refusal to the Social Security Tribunal's General Division. She argued that M. M. had no custody or control over the child.

[6] The General Division held a hearing by teleconference and, in a decision dated October 28, 2021, allowed the appeal. It agreed with K. M. that she, and not M. M., had custody and control of the child. It found that the Minister's policy was not compliant with the law.

[7] M. M. then asked the Tribunal's Appeal Division for permission to appeal. He alleged that the General Division committed errors when it decided that K. M. was entitled to receive the DCCB on the child's behalf, specifically:

- It misunderstood the meaning of "custody and control," as defined by the *Canada Pension Plan*; and

- It violated his right to be heard by asking him demeaning and irrelevant questions that left him rattled and unable to offer a proper defence.

I gave M. M. permission to appeal because I thought he had an arguable case. In April, I held a hearing by teleconference to discuss his allegations in full.

Issue

[8] There are four grounds of appeal to the Appeal Division. An appellant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use those powers;
- interpreted the law incorrectly; or
- based its decision on an important factual error.¹

[9] My job is to determine whether either of M. M.'s allegations fall into one or more of the permitted grounds of appeal and, if so, whether either have merit.

Analysis

[10] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that neither of M. M.'s reasons for appealing justifies overturning the General Division's decision.

The General Division did not deny M. M.'s right to be heard

[11] M. M. alleges that during the hearing the General Division member asked him demeaning and irrelevant questions that left him rattled and unable to, as he put it, "offer a proper defence." He insists that the General Division intimidated and deterred him from presenting his full case.

[12] Fairness demands that a party be heard. This means that anyone with an interest in the outcome of a tribunal or court proceeding has the right to present their best case.

¹ *Department of Employment and Social Development Act (DESDA)*, section 58(1).

Having listened to the full recording of the General Division hearing, I fail to see how M. M. was silenced:

- M. M. alleges that the General Division failed to appreciate that, since he suffers from acute anxiety, he was incapable of adequately defending himself. I heard nothing in the hearing recording to suggest that M. M. was placed at a disadvantage. It is true that M. M.'s voice broke occasionally when he was discussing his difficult relationship with his daughter,² but he otherwise managed to communicate his position without any significant difficulty. I don't doubt that M. M. was nervous, but that would be true of anyone in his position. It is never easy for a person without legal training or experience to represent themselves before a government tribunal. Yet M. M. managed to do so, and do so effectively.
- M. M. is an atheist, and he says that he was offended by the presiding member's question about who provided his daughter's "spirituality." Again, I don't see any breach of the rules of procedural fairness here. M. M. may not believe in a higher being, but religion is nonetheless a part of many people's lives. In a proceeding that revolved around issues of custody and care, it was a relevant question, posed with other questions intended to elicit information about the child's everyday life and routine. It was reasonable for the General Division to want to know who, if anyone, took responsibility for shaping her outlook. In my review of the record, I saw and heard nothing to suggest that the presiding member passed judgment on M. M.'s beliefs.
- M. M. complains that he was forced to discuss his disabilities in front of his former wife. He alleges that the General Division permitted her to make false claims against him. I can understand why M. M. found K. M.'s testimony upsetting, but I am not persuaded that the General Division committed an injustice by allowing it. This was an adversarial proceeding and necessarily so. Just as M. M. was permitted to make his case, K. M. was permitted to

² For example, refer to the General Division hearing recording at 101:30.

make hers. She had a number of painful things to say about what she regarded as M. M.'s neglect of their daughter, but I did not find any of her comments gratuitous or irrelevant. All of them went to the key issue in this case, which was who had custody and control of the child. Moreover, M. M. had ample opportunity to present his own evidence to counter K. M.'s claims.

[13] As might be expected, the hearing was sometimes contentious, but the presiding member tightly controlled the proceedings, warning M. M. and K. M. on several occasions to keep their remarks focused on the central question of who had custody and control of the child. Throughout it all, the member was firm but polite. He asked the parties many questions, some of them uncomfortable, all of them relevant, but he was never overbearing or domineering. He often cautioned M. M. and K. M. to not dwell on irrelevant details but otherwise gave them both a chance to speak.

The General Division correctly interpreted the meaning of “custody and control”

[14] In this case, much depends on what it means to have custody and control of a child who is eligible to receive the DCCB.

[15] The DCCB is a flat-rate monthly benefit that is paid for the child of a person receiving the CPP disability pension.³ The *Canada Pension Plan* says that the DCCB shall be paid to the person having custody and control of the child. If the disabled contributor is living with the child, they are presumed to have custody and control of the child.⁴

[16] The Minister's policy is to grant the DCCB to a disabled contributor if they have **any** degree of custody or control over a child. M. M., backed by the Minister, argues that this policy accurately reflects the true meaning of the *Canada Pension Plan*. He maintains that the General Division made a legal error by siding with K. M. and

³ See *Canada Pension Plan*, section 44(1)(e).

⁴ See *Canada Pension Plan*, sections 74–75.

discarding the Minister's policy. He says that the General Division undermined the purpose of the DCCB by awarding it to the child's "primary" care-giver:

[T]he intent of the monies is for the child. In her mom's home, nothing has changed. There has been no financial hardship caused by my disabilities. Why, then, would [the child] require these funds, there? On the other hand, my disabilities, have, and continue to cause financial hardship, in [the child's] home, with me [...] My ex-wife still receives every penny I am obligated to pay her. It was never reduced. Where is the sense in giving her extra money, when no financial hardship took place? On the contrary, I will now have to sell my downsized home, because of the arrears and the fact I lost that stipend. How does that help [the child]?⁵

[17] Having carefully examined the law surrounding custody and control, I have concluded that the General Division made no error.

– **The DCCB first goes to the person with custody and control of the child**

[18] Section 75 of the CPP sets out who receives the DCCB:

Where a disabled contributor's child's benefit is payable to a child of a disabled contributor or an orphan's benefit is payable to an orphan of a contributor, **payment thereof shall**, if the child or orphan has not reached eighteen years of age, **be made to the person or agency having custody and control of the child** or orphan, or, where there is no person or agency having custody and control of the child or orphan, to such person or agency as the Minister may direct, and for the purposes of this Part,

- (a) the contributor, in relation to a disabled contributor's child, except where the child is living apart from the contributor, and
- (b) the survivor, if any, of the contributor, in relation to an orphan, except where the orphan is living apart from the survivor,

shall be presumed, in the absence of any evidence to the contrary, to be the person having custody and control of the child or orphan.

⁵ See Appellant's notice of appeal dated February 15, 2022, AD01-3-4.

[19] For the sake of clarity, I have highlighted certain words and clauses in the above provision. They make it clear that, first and foremost, the DCCB goes to a person or agency having custody and control of the child. There is a presumption that the disabled contributor has custody and control, but that presumption is rebutted where the child is living apart from the contributor. If the disabled contributor lives apart from the child, as in this case, then the question of who has custody and control would come down to what, on balance, the evidence shows.

– **The Minister’s policy is to award the DCCB to a disabled contributor with any custody and control over the child**

[20] The General Division asked the parties for submissions on the correct interpretation of section 75, in particular, information relating to the section’s legislative history. The Minister responded with brief written argument on the subject, along with extracts from House of Commons debates, relevant case law, and the Minister’s policy direction on payment of the DCCB.⁶

[21] According to the Minister’s argument, section 75 has remained virtually unchanged since the *Canada Pension Plan* was introduced in 1965.⁷ It appears that for decades the Minister’s practice was to pay the DCCB to the person having **primary** custody and control over the child. Several years ago, the Minister put this practice under review:

In 2014, the Minister began looking at the way DCCB applications were being adjudicated, and determined that the practice of paying the DCCB based on the child’s primary residence or time spent with the child did not align with the legislation nor the intent of the DCCB. The intent of the DCCB is to defray costs associated with raising and caring for a child and these costs remain even if the disabled contributor has minimal custody and control. Disabled contributors incur costs related to food and housing for the child whether the child resides with them all or some of the time.⁸

⁶ See Minister’s Addendum dated July 26, 2021, GD18-2.

⁷ Section 75 was formerly numbered section 78 but, except for minor changes in wording, it has remained the same.

⁸ See Minister’s Addendum, GD18-4.

[22] The Minister says that the shift in its position was confirmed by a 2015 General Division decision called *G.T.*⁹ That decision arose from competing claims for the DCCB between the biological mother and stepmother of twins. The twins' biological mother and their father, a disabled contributor, shared legal custody; their stepmother, who married the father, testified that she was primarily responsible for their care.

[23] The General Division awarded the DCCB to the twins' stepmother, noting that more than one person can have custody and control of a child.¹⁰ The General Division said that nothing in the legislation required a DCCB recipient to prove that the children resided with them more than 50 percent of the time.¹¹

[24] In 2016, the Minister issued a policy direction providing interpretation of section 75, and directions to ensure payment of the DCCB to the correct payee. This policy direction clarified that, for the purposes of the administration of section 75, a child's place of residency did not determine who had "custody and control." A disabled parent with any custody and control of their child, however minimal, would be paid the DCCB.¹² This policy went into effect in August 2018.

– **The Tribunal is divided on the meaning of custody and control**

[25] In the decision that is the subject of this appeal, the General Division noted that a Ministerial policy has no force of law. It then proceeded to interpret the statutory provision governing the DCCB and, in particular, define what it means to have custody and control of a child. In doing so, the General Division referred to what it saw as a split within the Tribunal: One Appeal Division decision agreed with the Minister that the DCCB is payable to a disabled contributor who has **any** custody and control of the child,¹³ but another Appeal Division decision rejected the Minister's policy.¹⁴

⁹ See *G.T. v Minister of Employment and Social Development*, 2015 SSTGDIS 106.

¹⁰ See section 74(3) of the *Canada Pension Plan*.

¹¹ See *G.T.* note 9, paragraph 33.

¹² See Minister's Addendum, GD18-5.

¹³ See *L.S. v Minister of Employment and Social Development and D.S.*, 2021 SST 75.

¹⁴ See *R.M. v Minister of Employment and Social Development and R.O.*, 2021 SST 478.

– **The General Division followed the appropriate rules of statutory interpretation**

[26] Understanding a complex legislative provision such as section 75 of the CPP requires decision-makers to follow certain guiding principles:

- They must closely look at the provision’s text, context, and purpose;¹⁵
- They must give significant weight to the ordinary meaning of the words in the provision;¹⁶
- They must interpret the provision generously and in a way that is most compatible with its purposes;¹⁷ and
- They must give equal weight to the English and French versions of the provision.¹⁸

[27] In this case, I saw no indication that the General Division failed to comply with the above rules. Citing a Supreme Court of Canada case called *Rizzo*, the General Division began its analysis by pledging to apply the “modern principle” of statutory interpretation: “This means that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹⁹

[28] In the end, the General Division concluded that the Minister’s policy was incompatible with the true meaning of the CPP’s section 75. In this, I agree with the General Division.

¹⁵ See decisions like *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 121 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at paragraph 21. For an approach to statutory interpretation in the context of the *Canada Pension Plan* in particular, see *Canada (Attorney General) v Burke*, 2022 FCA.

¹⁶ See *Vavilov*, note 15, at paragraph 120.

¹⁷ These principles come from section 12 of the *Interpretation Act* and paragraphs 26 to 29 of *Villani v Canada (Attorney General)*, 2001 FCA 248.

¹⁸ See *R. v Mac*, 2002 SCC 24, paragraphs 5 and 6.

¹⁹ See *Rizzo*, note 15.

– **A plain reading of the text of section 75 suggests that it does not automatically award the DCCB to the disabled contributor**

[29] In reading a statute, it must be assumed that “each term, each sentence and each paragraph have been deliberately drafted with a special result in mind. Parliament chooses its words carefully: it does not speak gratuitously.”²⁰

[30] Section 75 gives the DCCB to, above anyone else, “the person ... having custody and control of the child.”²¹ The provision does not say that the person has to be the **disabled contributor**. It does not even say that the person has to be the **parent** of the child. The provision only says that a decision maker must grant the DCCB to **the person** who has custody and control of the child.

[31] There are two things to note here. First, the provision uses the definite article: **the** person—not **a** person. Second, the provision uses a singular noun: the **person**—not **persons**. These choices suggest that, for the purpose of receiving the DCCB, only one person can have custody and control of the child.²²

[32] I also note that there is no article before “custody and control.” Section 75 could have said, “**the** custody and control.” It could have said, “**any** custody and control.” “It could have said, “**primary** custody and control.” It says none of those things. Instead, it uses what’s known in grammar as the null article. What does the null article signify? It usually refers to commodities, such as sugar or oil, but it also refers to something that is generic, conceptual, abstract.

[33] In this case, section 75 is referring to custody and control in the abstract. Its use of the term in this sense is an implicit acknowledgement that, while custody and control in some form may have been previously recognized for other purposes, it must be established anew for the purpose of awarding the DCCB. As discussed, that custody

²⁰ *Hills v Canada (Attorney General)*, [1988] 1 SCR 513, paragraph 106, quoting *The Interpretation of Legislation in Canada*, 1984, by Pierre André Côté at p. 210.

²¹ Section 75 refers to “person or agency.” For the sake of clarity and directness, I will disregard references to the second term since no “agency” is involved in this case.

²² The significance of the singular noun was also discussed in *Berendt v Willard* (December 21, 2006), CP 24179 (PAB) and *Minister of Social Development v Willard* (December 21, 2006), CP 24238 (PAB). See also *K.W. v Minister of Employment and Social Development*, 2016 SSTGDIS 91.

and control cannot be divided or jointly held. It can only belong to one person, and it is the job of the decision-maker, whether the Minister or the General Division, to look at the evidence and determine who that person is.

[34] Section 75 establishes a presumption that the disabled contributor gets the DCCB, but that presumption only applies if “no person” has custody and control of the child. If “no person” has custody and control, only then can the Minister can step in and exercise her discretion to direct the disabled contributor to receive the DCCB.²³

[35] In this case, there are two persons with plausible claims to custody and control of the child. There is K. M., who provides most of the child’s care and to whom a court order gives legal “custody.”²⁴ There is also M. M., who is involved in the child’s life and to whom the court order gives visitation rights.

[36] According to a plain text reading of section 75, the decision-maker was obliged review the evidence supporting the respective claims of M. M. and K. M. and choose the **one** person with the best claim to having custody and control of the child.

[37] But what does “custody and control” mean for the purposes of the DCCB? A good place to start is by looking at dictionary and legal definitions of the term.

– **Definitions of “custody and control” suggest proximity and responsibility**

[38] As the General Division noted, neither the *Canada Pension Plan* nor the *Canada Pension Plan Regulations* define custody and control. Decision-makers must look to the ordinary definition of those words, to case law that has defined those words in other settings, and to related statutory provisions that may provide clues about the words’ meaning.

²³ In the absence of custody and control, the Minister’s discretion to award the DCCB is not open-ended: She must presume that the disabled contributor has custody and control of the child **except** where the contributor is living apart from the child **and** in the absence of any evidence to the contrary. In this case, there was evidence that M. M. was living apart from his daughter.

²⁴ See Ontario Superior Court of Justice order dated June 3, 2011, GD2-27.

[39] Custody means the protective care or guardianship of persons who cannot look after themselves.²⁵ It is alternatively defined as the immediate charge and control (as over a ward) exercised by a person or an authority.²⁶

[40] The Supreme Court of British Columbia has defined custody as follows:

In the narrow sense of the word, custody means physical care and control or day-to-day care and control of a child. In the broad sense of the word, “custody” means all of the rights and obligations associated with physical day to day care and control of a child as well as the right and obligation to nurture the child by ensuring, providing for, and making decisions in relation to, a child’s physical and emotional health, education, religious or spiritual development, and all other matters that affect the welfare of the child.²⁷

[41] Although this definition was conceived in a family law context, it is relevant to custody and control as it relates to the DCCB. It has been endorsed by this Tribunal in many decisions.²⁸

[42] Control is a related term that encompasses the right to supervise, regulate, induce or, potentially, force. It describes having power over someone, to exercise restraining or directing influence over them.²⁹ In a case called *Warren*, the Pension Appeals Board decided that the parent who took responsibility for the child’s maintenance, schooling, and participation in sports, and who was financially responsible for the child’s welfare retained “control” of the child.³⁰

[43] A common element in these definitions is responsibility. A person having custody and control over a child is one who must answer for their day-to-day welfare. That in turn suggests an element of physical proximity to the child—the kind that is necessary to understand and fulfill the child’s needs.

²⁵ Link to www.lexico.com/definition/custody.

²⁶ Link to www.merriam-webster.com/dictionary/custody.

²⁷ See *Abbott v Abbott*, 2001 BCSC 232.

²⁸ See, among others, *K.B. v Minister of Employment and Social Development*, 2017 SSTADIS 245 and *L.S. v Minister of Employment and Social Development and D.S.*, 2021 SST 75.

²⁹ Link to www.merriam-webster.com/dictionary/control.

³⁰ See *Minister of Human Resources Development v Warren* (December 10, 2001) CP 14995 (PAB).

– **Section 75 appears in a context that goes against the Minister’s policy**

[44] As noted, the essential ingredients of custody and control are proximity to, and responsibility for, the child. That interpretation is reinforced by the context in which the provisions governing the DCCB appear:

- Under section 75 of the *Canada Pension Plan*, the disabled contributor is presumed to have custody and control, but even here the *Canada Pension Plan* sends a message that proximity to the child is an important consideration in awarding the DCCB. The provision mandates a presumption in favour of the disabled contributor **except** (i) where the child is living **apart** from the contributor or (ii) where there is other evidence to the contrary. The effect of these conditions is to require the Minister (or, as the case may be, the Tribunal) to determine whether the child is in fact living with the contributor. If not, then the decision-maker must consider the evidence as a whole and make a determination about who, on balance, has custody and control.
- Section 74 sets out who the DCCB is for and who can apply for it. As is evident in its very name, the DCCB is the **child’s** benefit.³¹ It does not belong to the parent who is disabled and from whom the benefit derives. From this, one can assume that the DCCB is structured in a way that maximizes the odds of the child actually benefitting from it. Section 74 also says that an application for the DCCB may be made “by the child... or by any other person or agency to whom the benefit would, if the application were approved, be payable...” What’s notable here is that **anyone** can make an application on behalf of the child—not just the disabled contributor or someone authorized to act in their name. The presumption aside, the fact that disabled contributors aren’t favoured when it comes to applying for the DCCB suggests that they aren’t similarly favoured when it comes to administering the DCCB.

³¹ See *Williams v Williams*, 1995 17843 (ON SCDC) and *Sipos v Sipos*, 2007 ONCA 126.

- Section 76 of the *Canada Pension Plan*, which outlines the circumstances in which the DCCB ceases to be payable, provides limited insight into the correct meaning of custody and control. Not surprisingly, the provision focuses on the status of the disabled contributor, since it is their disability that is the ultimate source of the DCCB. Among other instances, paragraph 76(1)(e) says that the DCCB stops when a disabled contributor ceases to have custody and control of the child. The Minister argues that this provision is consistent with its policy because, where a disabled contributor is receiving the DCCB, it can only be cut off where there is **no** custody and control of the child.³² I don't see it that way. Unlike the other paragraphs in the subsection, paragraph 76(1)(e) specifically applies to a child as defined in section 42(1). That definition specifically includes an "individual" under 21 years of age, of whom the deceased contributor had, either legally or in fact, custody and control. This suggests that paragraph 76(1)(e) is meant for a specific situation—one in which a disabled contributor has assumed custody and control of a child, perhaps as a step-parent, but later ceases to have custody and control for some reason, such as the parental relationship breaking up or the child reaching the age of 21. Since it presupposes that custody and control already exists, the paragraph tells us nothing about what it takes to acquire custody and control in the first place.
- The *Canada Pension Plan Regulations* set out information that must be provided to the Minister if requested when a DCCB application is made. This includes information about whether the child is legally or **in fact** in the custody or control of the applicant or the disabled contributor and whether the child is living apart from the disabled contributor.³³ It also includes information about the extent to which the child is or was being **maintained** by the disabled contributor,³⁴ with maintenance precisely defined as not less than the amount of the DCCB payable.³⁵ These provisions, read together, suggest

³² See Minister's submissions dated April 14, 2022, paragraph 28, AD3-12.

³³ See *Canada Pension Plan Regulations*, section 52(i)(iii).

³⁴ See *Canada Pension Plan Regulations*, section 52(i)(vi).

³⁵ See *Canada Pension Plan Regulations*, section 65.1(b).

that the *Canada Pension Plan* requires disabled contributors to prove that they have more than just a “sliver” of custody and control before they become entitled to the DCCB.

[45] The *Canada Pension Plan*’s approach to custody and control can also be glimpsed in how, until recently, it addressed spousal survivors who happen to be left with minor dependents. Before 2019, section 44(1)(d) granted a survivor’s pension to the widowed spouse of a deceased contributor—but only if that spouse was 35 years or older.³⁶ However, an exception to the minimum age requirement was made if, at the time of death, the widowed spouse was a “survivor with dependent children.” That term is precisely defined as one who “wholly or substantially maintains one or more dependent children.”³⁷ “Wholly or substantially” is further defined as “more than 50 percent of the maintenance provided for such children.”³⁸ The benefit, like the DCCB, is meant to assist children who have lost a parental income, and it goes to the person who is already providing significant support (“wholly or substantially maintains”) to the child or children. In doing so, the *Canada Pension Plan* again favours the person who is in fact responsible for the child and whose ties to that child are presumably strongest.

[46] The net result of these provisions is a scheme that is concerned with, above all else, ensuring that funds earmarked for children are directed to the household in which the child receives a preponderance of care. This can be seen across the *Canada Pension Plan*, not just in one aspect of the survivor’s pension, and it must inform any reading of the provisions governing the DCCB.

– **The purpose of the DCCB suggests that Parliament intended it to go to the person having actual custody**

[47] The Supreme Court of Canada has said that legislation must be interpreted with the intention of Parliament in mind.³⁹ That means I have to consider the objective of the DCCB and avoid interpretations that defeat or undermine that objective.

³⁶ Eligibility for the CPP survivor’s pension is no longer based on age or parenthood. See section 44(1)(d)(ii).

³⁷ See *Canada Pension Plan*, section 42(1).

³⁸ See *Canada Pension Plan Regulations*, section 65.

³⁹ See *Rizzo*, note 15.

[48] The Minister submits that the purpose of the DCCB is to provide financial assistance to the dependent children of a disabled contributor that the contributor would otherwise have provided if they were able to work.⁴⁰ I agree. However, that does not mean the *Canada Pension Plan* defaults to the disabled contributor as the appropriate person to receive the DCCB.

[49] As noted, the DCCB belongs to the child, not the disabled contributor or any other person. The DCCB is intended to compensate for income lost when a child's parent becomes disabled. It is meant to offset the costs associated with caring for the child.⁴¹

[50] If the benefit is for the child, as Parliament intended, then it stands to reason that the benefit should go to the parent who is actually raising the child—the one who feeds her and provides a roof over her head, the one who takes care of her day-to-day requirement, the one who talks to her teachers. That parent is in the best position to know the child's needs. That parent is most likely to spend the benefit on the child. It makes no sense to give the benefit to a parent with only the thinnest of custodial rights and then hope that they will do right by their child.

[51] The Minister has very frankly admitted that its policy is driven by expediency as much as anything else. The Minister says that it has no mandate to make “complex assessments” of who has “primary” custody and control over a child. She argues that to require her to do otherwise would “create confusion, putting an individual's entitlement to receive DCCB benefits in question for years before they could be paid subject to appeals at the Tribunal's General Division and Appeal Division, and later subject to judicial review at the Federal Courts.”⁴²

[52] I don't see it that way. There is no doubt that the Minister's policy makes it easier to decide who gets the DCCB. A disabled contributor need only show that they have **any** custody and control of a child, as opposed to primary or actual custody and control. The Supreme Court of Canada has held that, while the “child's best interests” is not a

⁴⁰ See Minister's Addendum, GD18-4.

⁴¹ See Minister's Addendum, GD18-4.

⁴² See Minister's submissions dated April 14, 2022, AD3-17.

fundamental principle of justice, it is an important legal principle that carries great power in many contexts.⁴³ I would submit that the child's interests are at least as important as the Minister's desire for administrative efficiency.

[53] Oddly enough, the Minister acknowledges that, until fairly recently, it interpreted and applied section 75 in precisely the way that I recommend. The DCCB has existed since the enactment of the *Canada Pension Plan* in 1965. It has not changed in any significant way since then. The Minister's policy only came into effect in August 2018. Before August 2018, the Minister considered which parent spent the most time with the child and the residence of the child. It would pay the DCCB to the non-disabled parent if it determined they spent more time with the child or if the child's primary residence was with them.⁴⁴ Other than a reference to *G.T.*, the 2015 General Division case,⁴⁵ the Minister has never adequately explained why, after 53 years, it adopted such a sudden and drastic change in its policy.

[54] The parliamentary debates leading up to the passage of the CPP are instructive. They show that the language of section 75 was modified to include "agencies" as well as "persons," in recognition that children can be in the care of institutional authorities even when their parents retain legal guardianship.⁴⁶ This suggests that Parliament intended actual, rather than legal, custody to be the essential factor in determining who should receive the DCCB.

[55] In this case, evidence indicates that M. M. does not reside with his daughter. He does not even have legal custody of her—only access in the form of visitation rights. Yet the Minister regards such marginal involvement as "custody and control," entrusting him with the entire amount of the DCCB on his daughter's behalf. I have no reason to doubt that M. M. is a responsible father who does his best to contribute toward his daughter's welfare an amount equal to or greater than what he receives in DCCB. But it is a reality that some parents are not so conscientious. Many of them may be living some distance

⁴³ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76.

⁴⁴ See Minister's Addendum, GD18-4.

⁴⁵ See Minister's Addendum (GD18-5) referring to *G.T.*, note 9.

⁴⁶ See House of Commons Debates, February 11 – March 16, 1965, GD18-26.

from their children and may be tempted to pocket the amount. Under the Minister's policy, it is possible for a disabled contributor to apply, and be approved, for the DCCB with a custodial parent being unaware that the government had for years been paying out a monthly benefit on behalf of their child. This is by no means a hypothetical scenario; in fact, this very fact situation was the subject of a case that came before the Appeal Division last year.⁴⁷

[56] For that reason, it makes sense that Parliament intended, as far as possible, to direct the DCCB to the household where the child predominantly resides. The purpose of the DCCB suggests that the person having "custody and control" should be the person who is most intimately acquainted with the child's needs. If Parliament had intended the disabled contributor to get the DCCB with **any** custody and control, it could have said so in direct terms. It could have simply said the DCCB goes to the disabled contributor unless there is evidence that they are living apart from the child.

– **The balance of case law does not support the Minister's interpretation**

[57] To date, the courts have not provided any guidance on how to interpret section 75 or what "custody and control" means in the context of the *Canada Pension Plan*. To be sure, there have been many decisions on these issues, but they have all come from the General and Appeal Divisions of this Tribunal or the old Pension Appeals Board, which was abolished in 2013. Although these decisions are not binding on me, they are persuasive and offer assistance in helping me understand the nature and purpose of the DCCB.

[58] Nearly all of the decisions I've reviewed took it for granted that section 75 required an investigation into who, in fact, exercised custody and control over the child.⁴⁸ They all considered what it means to assume responsibility over a child. They all reviewed the evidence around whether it was the disabled contributor, the other parent, or some other person who was housing the child, feeding and clothing the child,

⁴⁷ See *R.M. v Minister of Employment and Social Development and R.O.*, 2021 SST 478.

⁴⁸ See *Minister of Human Resources and Development v Warren* (December 12, 2001), CP 14995 (PAB); *Bajwa v Minister of Human Resources and Development* (April 4, 2002), CP 14184 (PAB); *P.E. v Minister of Human Resources and Social Development* (November 10, 2008), CP 25371 (PAB).

educating the child. None of the cases that I saw adopted the approach that the Minister later took by imputing custody and control from minimal contributions to the child's welfare. The Minister herself did not point to any decisions that explicitly took this approach.

[59] I fail to see the significance of *G.T.*, which the Minister credits with pushing it to change its policy.⁴⁹ In that case, as noted, the General Division awarded the DCCB to the children's stepmother over their disabled contributor birth mother because "living separate and apart merely rebuts the presumption of custody and control but does not preclude providing custody and control over a child by a person with whom a child does not reside."⁵⁰ But the evidence in *G.T.* overwhelmingly showed that the children did, in fact, reside with their stepmother and that she was their primary caregiver.⁵¹ The Minister says that *G.T.* confirmed its interpretation of section 75,⁵² but the party that prevailed in that case was found to have far more than "any" or "some" custody and control over the children.

[60] The Minister also points to another Appeal Division decision that it says supported its interpretation of section 75. *L.S.* was a case similar to this one, except that it was the child's mother who was the disabled contributor and not, as in this case, the father.⁵³ In the end, the Appeal Division awarded the DCCB to the disabled contributor after finding that she had custody and control of the child, but it did not do so because it followed the Minister's policy.⁵⁴ The Appeal Division did not presume that the disabled contributor had custody and control of the child but instead conducted an assessment of the available evidence. It ultimately decided that the disabled contributor was entitled to DCCB, not because she had "any" custody and control, but because she had factual as well as legal custody and control. In short, the Appeal Division found that the disabled

⁴⁹ See *G.T.*, note 9.

⁵⁰ See *G.T.*, note 9, paragraph 35.

⁵¹ The children's biological mother did not give evidence in *G.T.*

⁵² See Minister's Addendum, GD18-5.

⁵³ See *L.S.*, note 13.

⁵⁴ The Appeal Division did not explicitly endorse the Minister's policy in *L.S.* but merely observed that its decision was "consistent with the Minister's policy to pay the benefit to the disabled parent on behalf of the child so long as they have custody and control of the child, no matter how minimal." See paragraph 48.

contributor's claim to custody and control, on balance, outweighed the father's. That approach is functionally no different from what my interpretation of section 75 requires.

The General Division is entitled to weigh the evidence

[61] I am satisfied that the General Division correctly interpreted the law governing the DCCB. I am also satisfied that, having done so, the General Division did not make any errors in how it assessed the available evidence. The General Division found that the child did not live with M. M. It also determined that the child was in K. M.'s custody and control based on the following findings:

- K. M. provided the child with her primary home;
- A court order gave legal custody of the child to K. M., compared to two days per week of visitation for M. M.;
- M. M. went long periods in which he did not see the child or pay for her support; and
- K. M. spent more time than M. M. on tasks related to the child's upbringing, such as preparing her meals, buying her clothes, setting rules, and helping her with her schoolwork.

[62] The General Division also considered M. M.'s evidence about his claim to custody and control:

- He and K. M. made **joint** decisions about the child's life;
- He did not see his daughter for some time because of his mental health issues and his former wife's ongoing hostility toward him;
- He participated in her extra-curricular activities when he was healthy enough to do so;
- He takes the child on vacations and buys her Christmas and birthday gifts every year; and
- He is no longer in arrears for child support.

[63] In the end, the General Division found that, while M. M. was involved in his daughter's life and had good reasons for not being involved more, what ultimately mattered was who **in fact** had actual day-to-day responsibility for the child's welfare. The General Division concluded that the balance of the evidence pointed to K. M., and not M. M., as having custody and control of the child.

[64] Faced with sometimes contradictory evidence, the General Division simply decided that K. M.'s evidence was more compelling. I can't see how the General Division erred in coming to this decision.

[65] One of the General Division's roles is to establish facts. In doing so, it is entitled to some leeway in how it weighs evidence. The Federal Court of Appeal addressed this topic in a case called *Simpson*,⁵⁵ in which the claimant argued that the tribunal attached too much weight to selected medical reports. In dismissing the application for judicial review, the Court held:

[A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[66] In this case, the General Division made what strikes me as a full and genuine effort to sort through the relevant evidence to assess its quality. I see no reason to second-guess its findings, especially since it offered a considered explanation for how it came to those findings.

M. M. can ask the Minister to forgive overpayment

[67] I can see why M. M. is frustrated. He is disabled. He applied for the DCCB in good faith. When the Minister approved his application, he understandably assumed that the Minister had done so in compliance with the law. He is now being told that the Minister followed an incorrect policy. He is now being told that he may have to repay nearly two years of benefits that he thought were rightfully his.

⁵⁵ *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[68] While I sympathize with M. M., I also have to interpret the law in the way that I think is correct. In my view, the Minister's policy does not reflect the true meaning of section 75. That means M. M. accepted the DCCB based on a misinterpretation of the law.

[69] If, after this decision, the Minister chooses to assess him with an overpayment, M. M. can ask the Minister to forgive it. Under section 66(3) of the *Canada Pension Plan*, the Minister may cancel all or part of a debt to the Crown if she is satisfied that repayment would cause undue hardship to the debtor. Whether to cancel such debt would be a discretionary matter for the Minister and the Minister only.

Conclusion

[70] To summarize, the General Division did not base its decision on any legal or factual errors. It conducted a fair hearing. It interpreted the *Canada Pension Plan* and its associated regulations correctly. It made a full and genuine effort to weigh relevant evidence and apply the law. I see no reason to second-guess its conclusions.

[71] The appeal is therefore dismissed.



Member, Appeal Division