[TRANSLATION]

Citation: *CT v Minister of Employment and Social Development and EM*, 2024 SST 1350

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	C. T.
Respondent:	Minister of Employment and Social Development
Representative:	Érélegna Bernard
Added Party:	E. M.
Representative:	K. O.

Decision under appeal:	General Division decision dated June 30, 2023 (GP-21-2195)

Tribunal member:	Jude Samson
Type of hearing	In person and videoconference
Hearing date:	April 16, 2024, and August 26, 2024
Hearing participants:	Appellant Respondent's representative Added Party Added Party's representative
Decision date:	November 5, 2024
File number:	AD-23-893

Decision

[1] I am dismissing the appeal. The Appellant, C. T., isn't eligible for any Allowance payments she has received since August 2015.

Overview

[2] C. T. applied for the Allowance, a benefit provided under the *Old Age Security Act* (OAS Act) to the spouse or common-law partner of a person who gets the Guaranteed Income Supplement (GIS). The Minister approved C. T.'s application based on her marriage to the Added Party, E. M., and paid her the Allowance from August 2015.

[3] After an investigation, the Minister concluded that C. T. and E. M. separated in 2013 and that C. T. wasn't eligible for the benefits she had received. C. T. appealed the Minister's decision to the Social Security Tribunal's General Division, but it dismissed her appeal.

[4] C. T. then appealed the General Division's decision to the Appeal Division, and I gave her permission to appeal. As a result, I have determined the appeal as a new proceeding.[1]

[5] The issue in this appeal is about when C. T. and E. M. separated. The answer will determine whether C. T. was eligible for the Allowance and for what period.

[6] On the one hand, C. T. and E. M. say that they separated in September 2017 when C. T. left the family home to move into an apartment. On the other, the Minister says that they separated in 2013 after an event that led the couple to sleep in separate bedrooms.

[7] While I have great sympathy for C. T., I am dismissing her appeal.

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[1] See section 58.3 of the *Department of Employment and Social Development Act* (DESD Act).

Preliminary observations

[8] The Minister's decision about the marital status of C. T. and E. M. has significant consequences for both of them. The decision determines C. T.'s eligibility for the Allowance benefits she received. It also affects the GIS amount E. M. has received.[2]

[9] But, and this is unusual in my experience, the Minister made its decision about the couple's marital status in C. T.'s file, but didn't apply it to E. M.'s file. Since C. T. was appealing the Minister's decision, it decided to wait for a conclusive finding in C. T.'s case before giving effect to the decision in E. M.'s file.

[10] The Minister's approach caused many issues, particularly since E. M. wasn't informed of, or invited to participate in, the various steps in the process (except at the very beginning of the Minister's investigation and after I realized the oversight, though it was unfortunately late in the process).[3]

[11] Specifically, E. M. doesn't have a clear idea of how the decision could affect him. Also, the Tribunal doesn't have a full picture of the file. For example, the Minister's arguments and the investigator's report refer to documents that aren't in the appeal file.[4] Despite the Tribunal's invitations, the Minister refused to put these documents in the appeal file.

[12] I encourage the Minister to reconsider its approach in the future.

Issue

[13] There is only one issue: for the purposes of the OAS Act, when did C. T. and E. M. separate? The answer to this question will determine whether C. T. was eligible for the Allowance during the period in question.

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[2] The rate for single persons is higher than the rate for couples.
[3] On this point, I note the Minister's responsibility under section 65(d) of the DESD Act. The way I handled this process is in various case conference minutes.
[4] For example, I am talking about E. M.'s tax returns, the obituary of E. M.'s mother, and a statutory declaration by E. M. signed on December 20, 2018. Although these documents aren't in the appeal file, E. M. hasn't denied anything that the investigator wrote in her notes and report.

Analysis

[14] Section 19 of the OAS Act says that a person between the ages of 60 and 64 who is married to a pensioner who gets the GIS may be eligible for the Allowance if that person "**is not separated from the pensioner**" and meets certain other criteria.[5]

[15] In this situation, the Minister says that C. T. and E. M. were separated even though they were still married and living under the same roof. So, how should the notion of separation (or being separated) be defined under the OAS Act?

[16] For the following reasons, I have concluded that the Allowance is intended to provide financial assistance to spouses **who are in a spousal relationship**. So, I find that a couple is separated when one of them considers the relationship to be over and their behaviour convincingly shows that their decision is final.

An interpretation that focuses on the text, context, and purpose of the law

[17] There are guidelines I have to follow when interpreting the concept of being separated in the OAS Act. I will summarize some of them here:

- I have to look carefully at the text, context, and purpose of the law.[6]
- I have to interpret the law generously and in a way that is most consistent with its purpose.[7]
- If the words in the definition are clear, I have to place significant weight on the ordinary meaning of those words.[8]

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[5] See section 19(1) of the OAS Act. The other eligibility criteria aren't relevant to this case.
[6] See decisions like *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 at para 121; and *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para 21.
[7] These principles are drawn from section 12 of the *Interpretation Act* and from *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466 at para 28; and *Ward v Canada (Human Resources and Social Development)*, 2008 TCC 25 at para 8.
[8] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 120.

- The English and French versions of the law have the same validity. If I find a definition somewhat ambiguous in one language, but clear and precise in the other, I normally have to adopt the clear and precise version.[9]

– **Purpose of the law: limited assistance to persons aged 60 to 64**

[18] The Federal Court has described the purpose of the OAS Act, including its altruistic purpose as follows:[10]

> I would describe the OAS regime as altruistic in purpose. Unlike the Canada Pension Plan [R.S.C., 1985, c. C-8], OAS benefits are universal and non-contributory, based exclusively on residence in Canada. This type of legislation fulfills a broad-minded social goal, one that might even be described as typical of the Canadian social landscape. It should therefore be construed liberally, and persons should not be lightly disentitled to OAS benefits.

[19] The courts have already explained the history of the OAS Act and the spouse's Allowance.[11] When the law was introduced, it was intended to reduce poverty among people aged 70 and over. Later, the threshold was lowered for those 65 years of age and older. Over time, Parliament expanded the number of recipients by paying benefits to limited groups of people between the ages of 60 and 64.

[20] The Federal Court of Appeal described the history of the spousal Allowance and summarized the objectives of the OAS Act in the following terms:[12]

> [14] The spouse's allowance was added to the *Old Age Security Act* [ss. 17.1 — 17.8] effective October 1, 1975 (S.C. 1974-75-76, c. 58, s. 5). It was payable, subject to an income test and certain requirements as to residence in Canada, to anyone 60 years of age or over but not yet 65 years of age, who was the spouse of a pensioner with whom he or she lived. Cohabiting couples were considered spouses for the purposes of this provision, if they publicly represented themselves as husband and

[9] See *R v Mac*, 2002 SCC 24 at paras 5 and 6.
[10] See *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466 at para 28.
[11] See *Collins v Canada*, 1999 CanLII 8833 (FC) at paras 6-11 and 98-117, confirmed by the Federal Court of Appeal in *Collins v Canada*, 2002 FCA 82 at paras 8-22.
[12] See *Collins v Canada*, 2002 FCA 82.

> wife for one year if neither had a legal spouse, or three years if one of them had a legal spouse.
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> [15] The spouse's allowance was intended to alleviate the financial hardship suffered by couples who had been living on the income of one working spouse. If the non-working spouse was not then 65, the couple would be compelled to live on a single old age pension and guaranteed income supplement when the working spouse retired at age 65. The spouse's allowance was set at a rate that ensured that a couple consisting of a pensioner and a non-pensioner would together receive the same amount as if they were both pensioners.
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> [22] By way of summary, the original objective of the Old Age Security Act was to alleviate poverty among retired persons (originally those over 70 and then those over 65). In 1975, Parliament extended benefits under the Old Age Security Act to low income persons who were over the age of 60 but not yet 65 who were spouses of pensioners, but not to persons in that age group who were separated, whose spousal relationship had ended in divorce or the death of the spouse, or who had never been anyone's spouse. In 1985, widows and widowers were included among persons between 60 and 65 years of age who could qualify for an income tested allowance.

[21] As the Federal Court has noted, the OAS Act doesn't provide a comprehensive financial assistance program for all Canadians in need between the ages of 60 and 64.

[22] The Allowance is a highly targeted benefit to help low-income spouses **in a spousal relationship**, only one of whom has reached the age of 65 while the other has reached the age of 60.[13] The Federal Court of Appeal has drawn an important parallel between those who are separated and those who have experienced a breakdown in their spousal relationship.[14]

[23] Also, the law provides little assistance to people who may face financial hardship because of their marriage breaking down. Since July 1, 1999, a person who receives

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[13] See *Egan v Canada*, 1995 CanLII 98 (SCC) at pages 534, 605, and 606. See also *Collins v Canada*, 2002 FCA 82, paras 45 and 46.
[14] See *Collins v Canada*, 2002 FCA 82 at para 36.

the Allowance may continue to receive it for a period of three months after a separation or divorce.[15]

– **The text and context of the law: a flexible definition**

[24] Section 19 of the OAS Act reads as follows:

Allocations	**Payment of allowance**
19 (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, il peut être versé une allocation pour un mois d'une période de paiement à l'époux ou conjoint de fait ou à l'ancien conjoint de fait d'un pensionné qui réunit les conditions suivantes :	**19(1)** Subject to this Act and the regulations, an allowance may be paid to the spouse, common-law partner or former common-law partner of a pensioner for a month in a payment period if the spouse, common-law partner or former common-law partner, as the case may be,
a) dans le cas d'un époux, **il ne vit pas séparément du pensionné**, sauf si la séparation a eu lieu après le 30 juin 1999 et ne remonte pas à plus de trois mois avant le mois visé;	**(a)** in the case of a spouse, **is not separated from the pensioner**, or has separated from the pensioner where the separation commenced after June 30, 1999 and not more than three months before the month in the payment period;
	[Emphasis added]

[25] Before November 30, 2000, the circumstances where a spouse was deemed to be separated under the OAS Act were set out in the *Old Age Security Regulations.* One of these circumstances was the following:

17 c) le conjoint et le pensionné sont séparés et vivent séparément en raison de l'échec du mariage	**17(c)** the spouse and the pensioner are living separate and apart as a result of marriage breakdown

[26] The Federal Court interpreted this earlier provision by considering whether the couple lived under the same roof.[16]

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[15] See section 19(1)(a) of the OAS Act; and para 19 of *Collins v Canada*, 2002 FCA 82.
[16] See *Canada (Minister of Human Resources Development) v Néron*, 2004 FC 101.

[27] But the law was significantly changed after that. By removing the detailed definition that existed before November 2000, Parliament moved away from rigid criteria and moved toward a more flexible definition that could take into account the complexity of modern-day relationships.

– **The French version of the definition is somewhat ambiguous, while the English version is clear and precise**

[28] On this point, I note that the current French version of the law is somewhat ambiguous because Parliament has retained the notion of being separated.

[29] But the English version removes any ambiguity in the definition. To properly interpret the definition of "not separated from the pensioner," we have to find the common meaning that exists in the English and French versions of the OAS Act. If the French definition can be interpreted in different ways while the English version is clear and precise, then the common meaning will be in the English version.[17]

[30] In the English version of the law, Parliament chose the term "separated." It avoided words like "divorced" and "living separate and apart." So, that tells me that spouses can be separated even if they live under the same roof.[18] Similarly, two people can be in a spousal relationship even if they live under different roofs, and two people living under the same roof don't necessarily live in a common-law relationship.[19]

[31] In terms of the context, I also note that the law refers to a "former common-law spouse" but not to a former spouse, which would imply the notion of divorce.

[32] Also, nowhere does the law treat a person differently because they have a roommate or live under the same roof as another person. On the contrary, the law treats people who are married or living together in a marriage-like relationship differently.

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[17] The Supreme Court of Canada described this principle in *R* v *SAC*, 2008 SCC 47 at paras 14 and 15.
[18] See *Kombargi v Canada (Social Development)*, 2006 FC 1511 at para 13.
[19] In *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, the Supreme Court of Canada made a distinction between cohabitation and co-residence.

– The Supreme Court of Canada set out the legal test for the failure of a spousal relationship in *Hodge*

[33] The next issue is when married people can be considered to be separated.

[34] Although the context is somewhat different, the legal test that the Supreme Court of Canada set out in *Hodge* does apply to this situation: A married couple is separated when either party considers the relationship to be over and their behaviour convincingly demonstrates that their decision is final.[20]

[35] Indeed, there is a strong similarity between common-law spouses who end their relationship and married couples who are separated.

[36] The legal test in *Hodge* is well suited to the complexities of modern-day marriages. For example, I find that married couples should not be considered separated each time they overcome a challenge, or even if they are forced to live apart for professional or medical reasons.

[37] While thinking about this, I considered—given the altruistic purpose of the OAS Act—whether a couple could be considered separated if one of them remained financially dependent on the other. But I found that the notion of being separated could not be based only on financial dependence. This is because former spouses often support each other financially for many years, even after they have separated or divorced.

C. T. and E. M. have lived apart since January 2013

– A triggering event happened on January 20, 2013

[38] C. T. and E. M. were married a long time. C. T. testified that, like with most marriages, they went through some challenging times. But they always reconciled in the end.

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[20] I am paraphrasing the legal test set out in *Hodge* v *Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para 42.

[39] Their marriage continued this way until January 20, 2013.

[40] C. T. and E. M. don't agree on what happened that night. But it is clear that this event provoked a strong reaction in C. T. She says that this was her breaking point.

[41] After this event, C. T. and E. M. slept in separate bedrooms, with her upstairs and him in the basement. The arguing got to the point where, around April 2013, E. M. moved to his sister's house. After about five months, he went back to the family home. C. T. and E. M. managed to find a way to live under the same roof given that the house belonged to E. M. and C. T. could not afford to move.

[42] Despite major changes in their relationship, C. T. and E. M. say that they didn't separate until C. T. left the family home on September 1, 2017.

[43] In support of their arguments, C. T. points out that this date is set out in the affidavit filed in support of her divorce proceedings.[21] Also, both are basing their arguments on the following:

- E. M. continued to pay household bills and financially support C. T.
- They did chores together in the family home.
- They shared domestic responsibilities like C. T. continuing to do laundry for E. M.
- They continued to attend the same family events, like weddings and birthdays.

[44] C. T. and E. M. acknowledged that their relationship changed after January 2013, but said it remained deep and important, especially because of the family they created together. After that month, C. T. testified that they had an untraditional relationship.[22]

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[21] See GD2-29.
[22] See document AD8 in the appeal file.

[45] It should be noted that it was often difficult to reconcile C. T.'s testimony with her position that she wasn't separated from E. M. To say the least, she painted E. M. in a very unfavourable light. So, when I tried to ask questions about how the two maintained their former relationship, she got upset and abruptly left the hearing. Also, she didn't attend the second part of the hearing.

– **C. T. ended the couple's spousal relationship and demonstrated that her decision was final**

[46] C. T. submitted that she didn't separate from E. M., but her testimony shows the opposite. She testified that the January 20, 2013, event was so traumatic that she immediately and permanently cut all emotional ties with E. M. This tells me that she would have moved the next day if her finances had permitted her to.

[47] C. T. testified that there was no possibility of reconciling with E. M. after the January 20, 2013, event. This is consistent with the testimony of E. M. and their daughter. They both suggested to C. T. that the couple could benefit from couple's therapy. But C. T. flatly refused.

[48] Although C. T. and E. M. focused on aspects of their relationship that they maintained after January 2013, the changes can't be understated. For example:

- C. T. chased E. M. out of the marital bed and ended their intimate life.
- Although they continued to attend family events together, E. M. testified that they each drove their own car.
- They stopped going on vacation together.

[49] The behaviour of C. T. and E. M. reinforce my finding that C. T. ended their spousal relationship. In this regard, I note the following points in particular:

- E. M. changed his address and telephone number with the Canada Pension Plan and Old Age Security as of April 3, 2013.[23]
- E. M. opened a new bank account on April 1, 2013, (C. T. isn't named on the account).[24]
- E. M. changed his marital status with the Canada Revenue Agency (CRA) on February 8, 2014, and reported that he was separated in the years that followed.[25]
- C. T. changed her marital status with the CRA on September 1, 2015, and reported that she was separated in the years that followed.[26]
- E. M. started a relationship with another woman.

[50] Although C. T. and E. M. deny being familiar with their tax returns, they remain responsible for their content. Then, the two testified that they were separated for several consecutive years.

[51] C. T. and E. M. both testified that few people knew about their marital problems before C. T. moved in September 2017. But this is contradicted by the person who manages their tax returns and by the obituary of E. M.'s mother that was published in May 2014. It refers to a girlfriend and the fact that C. T. is the mother of his children.[27]

[52] In summary, I find that C. T. ended his spousal relationship with E. M. on January 20, 2013. In this case, I placed significant weight on C. T.'s testimony that there

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[23] See investigator's report at GD2-48.
[24] See GD2-47. I acknowledge that E. M. declared himself married on the application form. But E. M. named one of his daughters as the beneficiary, not C. T.
[25] See pages GD2-48, GD2-63, and GD2-64. Although E. M.'s tax returns aren't part of the appeal file, he has never denied this information.
[26] See GD2-47, GD2-63, GD2-64, and GD2-67 to GD2-80.
[27] See GD2-58.

was no possibility of reconciliation after that date. Also, the couple's behaviour after that date convincingly shows that the decision was final. Instead of married people living together, C. T. and E. M. were more like two people with a common history, forced to live together for financial reasons.

– **The Tribunal cannot rewrite or circumvent the law**

[53] At the hearing, C. T. argued for compassion. She spoke of many extremely difficult situations that she has faced throughout her life.

[54] I have great sympathy for C. T. I understand that it will be very difficult to pay back the amount she is being asked to repay and that it could even affect her health.

[55] But, in coming to my decision, I can't consider factors like sympathy, suffering, and financial need. Instead, I am required to interpret and apply the provisions as they are set out in the OAS Act. I cannot rely on principles of fairness or consider extenuating circumstances to rewrite or circumvent the law or to grant Allowance benefits.

[56] In these difficult circumstances, C. T. could ask the Minister to write off the debt, partly or entirely, or to establish a reasonable repayment plan.

Conclusion

[57] I am dismissing C. T.'s appeal. I find that she has been separated from E. M. as of January 20, 2013. This means that C. T. isn't eligible for the Allowance payments she has already received. This means that, for the years where E. M. was eligible for the GIS, it has to be paid to him at the rate for a single person.

Jude Samson
Member, Appeal Division