

Court File No. A-139-22

FEDERAL COURT OF APPEAL*Court Seal*

F I L E D	FEDERAL COURT	
	OF APPEAL	
27-JUN-2022		
Yoginder Gulia		
TOR	1	

B E T W E E N:

DAWN PENTESCO

Applicant

and

TRACEY FRASER

Respondent

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION for judicial review will be heard by the Court at a time and place fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: **June 27, 2022**

Issued by **YOGINDER GULIA**

Registrar

Address of
court office: 180 Queen Street West,
Toronto, Ontario M5V 1Z4

TO: **TRACEY FRASER**
12971 6th Line
Limehouse, ON. L0P 1H0

AND TO: **MINISTER OF EMPLOYMENT
AND SOCIAL DEVELOPMENT CANADA**
Legal Services Unit

AND TO: **ATTORNEY GENERAL OF CANADA**
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

APPLICATION

1. This is an application for judicial review of a decision rendered by the Appeal Division of the Social Security Tribunal on May 20, 2022. This decision was communicated to the Applicant on May 29, 2022.
2. The Applicant makes application for:
 - (a) an order in the nature of *certiorari* quashing the ruling dated May 20, 2022 awarding the survivor's pension to the Respondent;
 - (b) a Declaration that the Applicant is entitled to the survivor's pension pursuant to sections 42(1) and 44(1)(d) of the *Canada Pension Plan*, RSC 1985, c. C-8 ("the *Act*");
 - (c) a Declaration that the decision dated May 20, 2022 of the Appeal Division of the Social Security Tribunal was patently unreasonable;
 - (d) such injunctive or interlocutory relief as may be sought by the Applicant, until such time as this application can be determined on its merits;
 - (e) if required, an Order abridging the time prescribed for service of the application record, or alternatively, dispensing with service;
 - (f) costs of this Application on a substantial indemnity basis; and
 - (g) such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

3. The Contributor, Simon Fraser ("the Deceased"), passed away on May 16, 2017;

4. At the time of his death, the Deceased resided with the Applicant in Florida;
5. The Applicant and the Deceased began cohabitating in or around May 2014, and purchased a home together in October 2016;
6. The Applicant and the Deceased were engaged in October 2016;
7. Following the Deceased's death, the Applicant applied for the survivor's pension as the surviving common-law spouse of the Deceased;
8. The Minister of Employment and Social Development Canada ("the Minister") awarded the survivor's pension, to the Applicant;
9. The Deceased was separated at the time of his death. The Deceased separated from the Respondent, Tracey Fraser, in 2006;
10. The Respondent, Tracey Fraser, also applied for the survivor's pension. The Respondent's application was denied because the survivor's pension was awarded to the Applicant;
11. The Respondent appealed the Minister's decision to the General Division of the Social Security Tribunal, arguing that she was the surviving spouse entitled to the survivor's pension;
12. Following a series of oral hearings over several months, the Respondent was awarded the survivor's pension by the General Division;
13. The Applicant appealed the General Division's decision to the Appeal Division of the Social Security Tribunal, and was successful on appeal. The matter was returned to the General Division for a *de novo* hearing;

14. Following several additional oral hearings, on October 8, 2021, the General Division awarded the survivor's pension to the Applicant;

15. The Respondent appealed the General Division's decision, again. The parties attended a hearing before the Appeal Division on or about April 25, 2022.

16. On May 20, 2022, Member Nawaz of the Appeal Division found that the General Division committed an error when it disregarded a single piece of evidence, and awarded the survivor's pension to the Respondent;

17. The Appeal Division based its decision on a single piece evidence outside of the relevant time period, contrary to section 2(1) of the *Act*;

18. The Appeal Division also disregarded thousands of pieces of documentary evidence, written and oral testimony, and submissions made at seven (7) full-day oral hearings, as well as the General Division's findings of fact;

19. The Applicant brings this application for judicial review of the Appeal Division's decision;

20. The Applicant was at all relevant times the common-law spouse of the Deceased;

Psychiatric Evidence

21. The impugned Decision was based almost exclusively on the evidence of a psychotherapist whom the Deceased met with sporadically for four (4) years prior to his death;

22. Member Nawaz of the Appeal Division specifically addressed the psychotherapist's note, dated February 2016, wherein the Deceased allegedly calls the Applicant 'a friend';

23. This note pre-dates the relevant one-year time period that is the starting point of any analysis by the Social Security Tribunal when awarding a survivor's pension;
24. The impugned Decision is based exclusively on this evidence, despite thousands of pages of additional evidence found within the evidentiary record, including thousands of pages of emails, text messages, photos, medical evidence, contracts, a separation agreement, and witness testimony given at various oral hearings;
25. The Appeal Division states that the Applicant and the Deceased became intimate in May 2016, which is the start of the relevant one-year time period;

Grounds for the Present Application

26. The Applicant submits that the Appeal Division erred in law by incorrectly applying the test for a survivor's pension, when it determined that the Deceased and the Applicant were not common law spouses for one-year prior to the Deceased's death;
27. The Appeal Division rendered its decision exclusively on a fact outside of the relevant time period;
28. The Applicant further submits that the Appeal Division committed several errors of fact, including finding that the Deceased lived in Canada from February 2016 until October 2016, and ignoring a plethora of evidence and oral testimony from the Deceased and the Applicant's landlord, mortgage broker, neighbours, friends, and colleagues, in Florida. This evidence demonstrated that the Deceased unequivocally lived in Florida from February 2016, until May 2017, and played in a pool league regularly;
29. The Applicant further submits that the Appeal Division committed an error of procedural fairness, when it found that the General Division relied exclusively on the Applicant's witness testimony to find that she was the Contributor's common-law spouse at the time

of his death. The Respondent elected not to call any additional witnesses at the *de novo* hearing. Furthermore, the General Division's decision refers to the Respondent's evidence in over 15 paragraphs;

Other Grounds

30. The Applicant relies on the following statutes:

- (a) *Federal Court Act*, RSC 1985, c F-7;
- (b) *Department of Employment and Social Development Act*, SC 2005, c 34;
- (c) *Courts of Justice Act*, R.S.O. 1990, c. C. 43; and
- (d) *Judicial Review Procedure Act*, R.S.O. 1990;

31. Such further and other grounds as counsel may advise and this Honourable Court may permit.

32. **THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

- 1. All material filed in prior hearings;
- 2. The Application Record herein; and
- 3. Such further and other materials as counsel may advise and this Honourable Court permits.

June 27, 2022

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Applicant

-and-

TRACEY FRASER
Respondent

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