Citation: *E. S. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 46

Appeal No: GT-114936

BETWEEN:

E. S.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	John Eberhard
HEARING DATE:	November 25, 2014
TYPE OF HEARING:	In person
DATE OF DECISION:	December 22, 2014

PERSONS IN ATTENDANCE

Appellant	E. S.
Husband of the Appellant	C. S.

DECISION

[1] The Tribunal finds that a full Old Age Security pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a pension under the Old Age Security Act (OAS Act) was date stamped by the Respondent on January 28, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was in person for the reasons given in the Notice of Hearing dated June 30, 2014.

[4] The Appellant's application states that she has lived in Canada from April 19, 1968 to March 5, 2010 (and thereafter) and worked in Canada from 1968 to July 2001.

[5] The Respondent denied the application for full benefits. It approved the application for partial Old Age Security pension calculated at the rate of 1/40th of the full pension for each complete year of residence in Canada after the age eighteen stating that the minimum period of residence necessary to qualify for a partial pension is 20 years of residence for applicants who live abroad. This determination was based on the information from her application and residency in Canada, as determined by the Respondent, from April 19, 1968 to August 30, 2001. This would result in 33 years and 134 days thus qualifying her for a 33/40ths of the OAS pension. The finding of the Respondent was based on an earlier OCRT decision in which her husband was the Appellant (Applicant for benefits).

[6] The Appellant had been present at that Review Tribunal (OCRT) proceeding in which her husband had applied for similar benefits to those under appeal in this hearing. This Appellant was noted to be an "added party" in those proceedings. The application was dismissed and the Appellant's husband was found not to be a resident in Canada between August 2001 and February 2003 (when Mr. C. S. turned 65 years of age). The Review Tribunal concluded that he was not residing in Canada for the year preceding his 65th birthday. His application failed. He did not appeal. There is no mention in that decision to the status of his wife, the Appellant herein. Aside from one reference, the Review Tribunal's decision in that application was silent as to the residence status of the Applicant here. There was no finding regarding her eligibility for OAS benefits.

THE LAW

[7] Section 257 of the Jobs, Growth and Long-term Prosperity Act of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[8] The general requirement for a full OAS pension as set out in paragraph 3(1)(c) of the OASA is to have accumulated 40 years of residence in Canada after the age of 18. However, paragraph 3(1)(b) of the OASA sets out the criteria to be met in order for an individual to qualify for a full OAS pension without having 40 years of residence. It provides as follows:

> Payment of full pension
>
> **3.** (1) Subject to this Act and the regulations, a full monthly pension may be paid to
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> […]
>
> (b) every person who
>
> (i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,
>
> (ii) has attained sixty-five years of age, and

> (iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved;

[9] If an individual cannot qualify for a full OAS pension, he or she may qualify for a partial pension under subsection 3(2) of the OASA. For a partial pension, the individual must have resided in Canada for at least 10 years and must have been a resident on the day proceeding the day on which the application is approved. If the individual did not reside in Canada on the day preceding the day on which the application is approved, the individual must have resided in Canada for at least 20 years. Subsections 3(2) to 3(5) provide as follows:

> Payment of partial pension
>
> 3. (2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and
>
> (a) has attained sixty-five years of age; and
>
> (b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.
>
> Amount of partial pension
>
> (3) The amount of a partial monthly pension, for any month, shall bear the same relation to the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining eighteen years of age and prior to the day on which the application is approved, determined in accordance with subsection (4), bears to forty years.

Rounding of aggregate period

(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.

Additional residence irrelevant for partial pensioner

(5) Once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person under this Part may not be increased on the basis of subsequent periods of residence in Canada

For individuals who have already established residence in Canada, subsection 21(4) of the OAS Regulations protects their residence by ensuring that temporary absences from the country do not interrupt their period of residence:

The OAS Regulations provide:

Residence

21. (4) Any interval of absence from Canada of a person resident in Canada that is:

(a) of a temporary nature and does not exceed one year,

(b) for the purpose of attending a school or university, or

(c) specified in subsection (5)

shall be deemed not to have interrupted that person's residence or presence in Canada.

Finally, subsection 21(1) of the OAS Regulations explains the difference between "residence" and "presence" for purposes of OAS eligibility. It states:

21. (1) For the purposes of the Act and these Regulations,

(a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and

(b) a person is present in Canada when he is physically present in any part of Canada.

ISSUE

[10] The only issue on appeal before the Tribunal is a determination of the Appellant's duration and periods of residency in Canada for the purposes of determining whether she should be entitled to receive a full or partial OAS pension.

EVIDENCE

[11] The Appellant told the Tribunal that she was born in March 5, 1945 in X, Portugal, and had turned 65 in 2010. On April 19, 1968, the Appellant and her 3 year old daughter joined her husband in Canada. She was 23 years of age. He had immigrated in 1967.

[12] The couple had a son born in Canada shortly after her arrival. Both children were educated in X and both graduated from the University of X. Both have children. The daughter has one disabled son (now age X) and the son, who now lives in X, has 4 children. The Appellant is a proud grandmother.

[13] Both husband and wife worked in the X area until August 2001. The Appellant, a young woman at the time, started as a cleaner and worked for several companies. She started her own small cleaning business in 1998. "E. Cleaners" primarily did contract work for local banks. She stopped working in her business in the summer of 2001.

[14] In an undated letter to Canada Customs and Revenue Agency in 2002, the Appellant states in part:

> "I, had business going only for the two first periods of 2001 from january 01/2001 to June 30/2001 after This date X, take over my business." (sic)

[15] She explained that her business was not purchased but since her contract with the banks was not renewed she was "out of business".

[16] In the spring of 2001, the couple sold their house as the husband was then on a WSIB related work injury and absent from work. They used the proceeds of the sale to assist their son to buy a residence at X X Boulevard in X – a duplex. From June 2001 until August 2001, Mr. and Mrs. S. lived in the downstairs unit of the duplex. On August 30, 2001 they travelled

to Portugal to be present with the Appellant's father and brother who were both sick. They returned six months later on March 1, 2002. Her father died in January 2003, and her brother died in November 2003.

[17] The Appellant testified that she and her husband had previously taken four or five trips to Portugal since coming to Canada in some 33 years. The earlier trips would be five, six, or seven weeks because of work commitments. They were able to take the longer trip starting in August 2001 because they were no longer working. Since then they have made several additional trips ("vacations") to Portugal. These include:

a) 2005 – 6 months

b) 2007 – 3 months and 2 months (to visit sick relatives)

c) 2008 – 2 months

d) 2009 - 2 months

e) 2011 – 3 months

[18] The Applicant stated she was last in Portugal in 2011 for 3 months but will not go back again as her health is failing.

[19] The Appellant applied for a Portuguese "Identity Card of National Citizen", and one was issued on July 9, 2001 for E. N. D. N. S., showing a Portugal address. Both the Appellant and her husband in their evidence explained that this was a birth certificate indicating the place and date of birth and not intended to represent residency, domicile or intention of staying in Portugal.

[20] The Appellant applied for and received Canadian Citizenship on July 18, 2001. Her Canadian Passport was issued on August 2, 2001. Mr. C. S.'s Canadian Passport was issued on August 3, 2001. These were renewals and have since been renewed again. The Appellant stated that her becoming a citizen at this time was a coincidence. She was always too busy to have applied before but was proud to finally become a formal Canadian at this time.

[21] Following their return from Portugal in 2002, they moved to the first floor unit of the two-level duplex. Their son, F. S., was often on the road with work, eventually settling in X in 2006 with a female partner (since married) who had two children. They now have four children. He no longer resides at the X residence. The Appellant and her husband moved to the second floor and have been there ever since he moved out. They continue to care for the residence. This is the "home" where their grandchildren come to visit. It has since been transferred into the names of the Appellant and her husband and daughter. The lower apartment has been rented to others. They have lived there alone since their son has moved away. They continue to look after all the operating expenses, maintenance and repairs. She testified that they have done this since 2001. In 2010, the house was transferred to the Appellant and her husband who continue to occupy and pay taxes. The son has no connection with the house other than his occasional visits.

[22] From the time they moved into the house, the Appellant and her husband have paid phone bills (although these are in the name of their son), paid electrical bills and taxes. They gave money to their son from time to time in lieu of rent (when they were living on the lower level).

[23] They continue to operate a bank account with X in X or as they have done since 1968.

[24] Asked about comments from a neighbour at X X who is alleged to have said that the S. "lived in Portugal and visited their son a few times a year", the Appellant stated there is no explanation as to why she would say this. This neighbor ("who we really did not know at all") would have "no idea about our plans or our life. That statement is just wrong", testified the Appellant.

[25] The Appellant purchased a car in 2004 to replace an old car which was given away by the husband as "junk". She continues to be licensed to drive in the Province of X and her license has not lapsed in the past 14 years. They pay insurance on their cars just as they have always done with their house (previously in the name of their son). Neither has any need to be registered as a business in the city of X since she stopped work in 2001.

[26] A note of June 29, 2006 from a X Pastor of "Our Lady of Perpetual Help", Reverend N. M. C., indicated that the S.' spent some time in Canada each year. A follow-up noted in the file indicates that Father C. was the pastor at the church from 2004 onward. He prepared the June 29, 2006 letter at the request of the S., who volunteered the information that they spend half of the year in X and half the year in Portugal. In a letter dated July 18, 2006 (at page 79), the President of the Portuguese Community Club indicates that the S. are members of his organization and have participated in the annual festival for the last three years. In a Department follow-up with the President of the Portuguese Community, a report dated April 19, 2007 indicates that President B. could not quantify how much time the S. spend in X and how much time they spend in Portugal. Mr. C. S. testified that he was the President of this club in X from 2009 to 2011.

[27] It is of interest that for the past 15 years, the Appellant has been looking after her disabled grandson. He is now 32 years of age but she still drives him to and from the hospital. She even was able to have him do menial jobs cleaning ashtrays for her on the job when she had the cleaning company. She continues to help out her working daughter by regularly being with him. She cooks and shops for him. "He is dependent on me". This connection has continued throughout the period when the Respondent states that she was not a resident of Canada between 2001 and 2010. She testified that she has a loving and ongoing relationship with her children and grandchildren. Her home is here in Canada where her family is close by. When, on the occasions that she and her husband have travelled to Portugal, she has had to make arrangements with friends and her daughter to look after her grandson.

SUBMISSIONS

[28] The Appellant submitted that she qualifies for a full OAS pension because:

a) She regards Canada as her home and has not changed this since her arrival some 45 years ago.

b) She spends more time in Portugal now (since her retirement) with her extended family but does not regard it as her permanent or country "residence".

[29] The Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The Appellant was a party to a Review Tribunal (RT) hearing with her husband in February 2008 with regards to her Canadian residency. Based on the Tribunal ruling made on January 29, 2009 the Respondent regards this application and hearing in the nature of Res Judicata concluding that her Canadian residency had been established up to that point in time because of the finding with respect to her husband. Therefore as of August 30, 2001, it is argued that the Appellant ceased to be considered a resident of Canada.

b) The Tribunal decision in 2009 was final and binding and cannot be changed or altered, therefore the Appellant's Old Age Security application was considered to be made by a non-resident, rather than a resident Canadian citizen.

c) Numerous requests have been made to allow the Appellant the opportunity to prove that she has made a permanent return to Canada.

d) The Appellant has provided copies of utility bills which show that she began to pay for some of the expenses at her son's house but this does not prove residency.

ANALYSIS

[30] The Appellant must prove on a balance of probabilities that she qualifies for the full OAS benefits for which she has applied. The Respondent chose to regard her as a non-resident from 2001for the purpose of applying the Old Age Security Act and Regulations.

[31] The Tribunal is reminded that for individuals who have already established residence in Canada, subsection 21(4) of the OAS Regulations protects their residence by ensuring that temporary absences from the country do not interrupt their period of residence. (OAS section 21 (4).

[32] The Tribunal accepts the evidence that in 2001, the S. sold their home of many years. The Appellant stopped working at age 56 and closed her cleaning business. She got her Canadian Citizenship and Canadian passport. She obtained a Portuguese Identity card (issued

in July 2001). She and her husband moved into the lower apartment in their son's duplex temporarily. They did not update the X directory or phone book with their new contact information. They have an extended family in Portugal, a bank account in Portugal, and a pension (being paid to the husband) into the Portuguese bank account. The Appellant helped to finalize the estates of her father and brother in Portugal. These facts are confirmed and explained by the Appellant and her witness, husband.

[33] . Father C. wrote a letter that indicated the S. spent half their time in Portugal. The Tribunal does not accept this as an accurate reflection of the facts. The evidence of the Appellant clarifies this statement. The facts of travel times, airline tickets and passport stamps cast doubt on the assertion.

Impact of Ruling related to Husband of the Appellant

[34] Decisions of the Review Tribunal were final and binding, just as they are in the decisions of the Social Security Tribunal. It is therefore necessary to consider the argument of the Respondent that the matter before this Tribunal is precluded from consideration because of the judicial principal of Res Judicata, a prohibition from reconsidering a matter that has already been judged.

[35] For Res Judicata to be binding, several factors must be met. The issue, the parties, the cause of action and the full and fair opportunity to be heard on the issue all must be present.

[36] In the Federal Court of Canada, the decision of Chy Deuk (Applicant) and Minister of Citizenship and Immigration 2006 CanL11 60834 (CA IRB) – 2006-02-27 provides a useful consideration of this principal from another Tribunal in which a decision is “final and binding”.

[37] On February 27, 2006, the Immigration and Refugees Board of Canada dismissed the appeal of a decision, similar to one earlier adjudicated on the ground of Res Judicata. This was an application for judicial review of that decision. The legal concept of Res Judicata arose as a method of preventing injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of resources in the court system. Res Judicata does

not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion.

[38] The Deuk case raised the following issue: did the IAD err in finding that there were no exceptional circumstances to justify not applying the doctrine of Res Judicata?

[39] The Court pointed to decisions of the Supreme Court of Canada which note three essential criteria for Res Judicata to be successfully argued. The decision by the IAD on the first appeal was final, the parties are the same and the issue is the same. The applicant contended that even if all the conditions for Res Judicata have been met in this case, the doctrine does not apply where there are special circumstances (Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460 and Apotex Inc. v. Merck & Co., 2002 FCA 210 (CanLII), [2003] 1 F.C. 242). The applicant also submitted that the Supreme Court of Canada held in Danyluk that the doctrine of Res Judicata is not to be applied mechanically.

[40] In the Supreme Court of Nova Scotia decision of Campbell and the Minister of Community Services (Hfx No. 272059), June 3, 2009. Judicial review of Decision of the Assistance Appeal Board the preliminary issue was whether Res Judicata applies.

[41] Ms. Campbell requested “special needs” assistance from the Department of Community Services to pay for medical marihuana. The Department denied her request, and the Assistance Appeal Board (“Board”) affirmed the denial in a 2005 Decision. The Applicant subsequently provided additional information; the Department did not change its conclusion and the Board dismissed a second appeal in 2006. Ms. Campbell sought judicial review of the Board’s 2006 decision dismissing the second appeal, and the Court raised a preliminary issue whether the Board had jurisdiction to hear the second appeal, or whether Res Judicata barred it from doing so. Justice John D. Murphy framed the issue by the question: is the second appeal before the Board Res Judicata, so that the judicial review proceeding should not continue? The Court declined to find the matter was Res Judicata before the second Board, and ruled that the judicial review proceeding may continue. The Court concluded Res Judicata may apply in administrative matters:

[42] "Pre-conditions to application of issue estoppel (Res Judicata) are that the same question is to be decided, that the decision creating the estoppel was final, and that the parties to the proceedings are the same. Once the pre-conditions are established, application of issue estoppel/Res Judicata is discretionary, and the discretion is broad in relation to decisions by administrative tribunals".

[43] There are several problems with the argument of the Respondent that arise from the decision of the Review Tribunal itself. Firstly, it is not clear from the decision that the issues in this application are the same as the one in which the Appellant's husband was found not to be a resident of Canada between August 2001 and February 2003. There is evidence that has been presented which was not available to the Review Tribunal that assists this Tribunal in more fully understanding the nature of the family circumstances at the relevant times.

[44] This Tribunal does know that on January 29, 2009, Mrs. E. S. was an added party to a Review Tribunal (RT) hearing. An issue there was her husband's status of his Canadian residence. The Respondent argues that based on the Review Tribunal decision in that case a finding was made that her (this Appellant's) Canadian residence was established to be from April 19, 1968 to August 30, 2001. Having read the decision, this Tribunal cannot agree. The decision focuses on C. S. even though the Review Tribunal makes reference to this Appellant in the time frame only between August 2001 and February 2003.

[45] The decision is unclear as to how this Appellant was in some way associated with her husband's application. There is no reference in the decision as to the nature of the appeal by the added party. Indeed, there is no indication as to why she was added as a party to the proceedings. There are some references to her in the decision but no indication as to whether or not she was given an opportunity to testify and if so what relevance that evidence might have had for the issue before this Tribunal.

[46] After focusing on the evidence of the husband or the husband and wife in the context of his evidence, that a finding is made that simply says:

> "--- the review Tribunal is not convinced, on a balance of probabilities,
> that the S. resided in Canada between August 2001 and February 2003
> (when Mr. C. S. turned 65)". (Paragraph 55)

[47] The decision than goes on to note only that Mr. C. S. was not residing in Canada on his 65th birthday. This reference excludes any mention of the residency issue of Mrs. E. S. and certainly does not focus on the issues that are before this Tribunal dealing with a time frame up to 2010.

[48] This contradictory finding in the application for similar benefits made by the husband of the Appellant needs to be segregated from the issues involving this Appellant. It would be entirely unfair to preclude this Appellant from testifying or answering the issues raised by the Respondent only by virtue of indirect references to her circumstances in the case of her Husband.

[49] In the Federal Court decision in Roger J. Duncan v. the Attorney General of Canada, 2013 FC 319 (CanL11) - March 27, 2013, The Honourable Mr. Justice de Montigny noted :

> "----Tribunal is required to examine the whole context of the individual and, just as a claimant cannot establish residency on the basis of his or her intentions alone, the Applicant cannot deny residency if the facts establish otherwise."

[50] In that case, the issue, in part, revolved around the Applicant who admitted he was not a resident of Canada for income tax purposes but was still eligible for OAS benefits.

[51] Here, the overall picture is simply observed in the context of a person who has never given up residency on the basis of an application in Portugal for a birth certificate. For individuals who have already established residence in Canada, subsection 21(4) of the OAS Regulations protects their residence by ensuring that temporary absences from the country do not interrupt their period of residence

[52] The Tribunal is satisfied that the argument based on Res Judicata fails and the matter has properly proceeded on its own facts. The requirement for procedural fairness calls for this Tribunal to adjudicate the case of the Appellant on its own merits.

Indicia of Residency

[53] It has been decided on several occasions that the issue of residence is a question of mixed fact and law that is more factually than legally driven. (see Canada (Minister of Human Resources Development) v Ding, 2005 FC 76 (CanLII) [Ding] at paras 58-60; Canada (Minister of Human Resources Development) v Chhabu, 2005 FC 1277 (CanLII) at paras 23-24).

[54] "The legal test of residence has a substantial factual component": per Sharlow J.A. in Laurin v. R., 2008 FCA 58 (CanLII), 2008 D.T.C. 6175 (Eng.) (F.C.A.). "It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case": per Cartwright J. in Beament v. Minister of National Revenue, 1952 CanLII 56 (SCC), [1952] 2 S.C.R. 486, 52 D.T.C. 1183(S.C.C.), and quoted by Bowman C.J. in Laurin v. R., 2006 TCC 634 (CanLII), 2007 D.T.C. 236 (Eng.) (T.C.C. [General Procedure]).

[55] The granting of a full or partial OAS pension to the Appellant depends on a determination of her continuing residency, if any, in Canada, between 2001 and 2010. Set out above, the OASA definition of residence is "a person resides in Canada if he makes his home and ordinarily lives in any part of Canada" (paragraph 21(1)(a))

[56] The Appellant's testimony provided a mosaic of a life lived with one foot in each of two countries. There is no doubt that she made a choice in 1968 to come to Canada, learn its language, raise a family, contribute to its economy and eventually acquire Canadian citizenship. Following her retirement, there is no doubt that she was sharing time with family and friends and activities in both and in later years more time in Portugal as retirement years and resources permitted.

[57] There is no dispute that the Appellant qualifies for at least a partial OAS pension, whether or not she was residing in Canada at the time of the application, as it was agreed that she had at least 20 years of residency in Canada after age 18. The Tribunal is satisfied that the Appellant resided in Canada for at least 33 years (i.e., 1967-August 30, 2001). A question for this Tribunal is whether or not she gave up her residency in Canada.

[58] The Appellant applied for OAS in January 2010 using her son's address in X. As the evidence reveals and as accepted by this Tribunal, the duplex on X was purchased, mostly, with proceeds from the sale of the S. residence. While it was in the name of the son at one time, it is no longer. From the very beginning both the Appellant and her husband paid for a number of expenses that would conventionally be regarded as costs for maintaining a residence. Hydro bills, electrical bill, taxes, all paid in the name of the son (initially) demonstrate a tangible nexus with the property and a life style. This included continuing relationships with friends, a church, the Portuguese Club and family.

[59] These many facts contribute to a finding of residency in Canada leading up to her 65th birthday.

[60] The Tribunal is aware of the argument of the Appellant who relates her recent annual visits to Portugal as one would regard the annual migration of "snowbirds" from X to Florida. Thousands of Canadians do just that and are careful to avoid the 6 month absence limitation.

[61] Justice Russell in the case of Canada (Minister of Human Resources Development) v Ding, 2005 FC 76 (CanLII) [Ding] at paras 58-60; concludes that residency is a factual issue that requires an examination of the whole context of the individual and that it constitutes a reviewable error to focus on a claimant's "obvious intentions" to the exclusion of other factors in a case that could lead to a contrary conclusion. In arriving at this conclusion, he cites paragraph 8 of Schujahn v Canada (Minister of National Revenue), [1962] Ex CR 328 (QL):

> "It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words "ordinarily resident" or "resident". It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return. The change of domicile depends upon the will of the individual. A change of residence depends on facts external to his will or desires. The length of stay or the time present within the jurisdiction, although an element, is not always conclusive.

> Personal presence at some time during the year, either by the husband or by the wife and family, may be essential to establish residence within it. A residence [page 332] elsewhere may be of no importance as a man may have several residences from a taxation point of view and the mode of life, the length of stay and the reason for being in the jurisdiction might counteract his residence outside the jurisdiction. Even permanency of abode is not essential since a person may be a resident though travelling continuously and in such a case the status may be acquired by a consideration of the connection by reason of birth, marriage or previous long association with one place. Even enforced coerced residence might create residential status".

[62] The Tribunal found that the Appellant gave her evidence in a forthright and believable fashion. It was done in the absence of her husband (who was excluded from the hearing room during the time she testified). She appeared not in the least evasive and answered direct questions in a spontaneous manner so as provide a full picture and context of her lifestyle and activities, her connections to Canada and her family and explanations for her visits to the country of her birth. Her credibility is not at issue with this Tribunal.

[63] Looking at the whole of her testimony and the corroborative facts (later provided in the hearing by her husband) including voluminous evidence submitted in support of her residency in Canada, the Tribunal regards the foot in Canada to be, by far, supporting a finding of uninterrupted residency in Canada. After reviewing all of the written and oral evidence, the Tribunal is satisfied, on a balance of probabilities, that the Appellant resided in Canada between August 2001 and March 2010 (when the Appellant turned 65). The Tribunal considered all of the written and oral evidence, and is convinced, on a balance of probabilities, that the Appellant was a continuing resident of Canada and residing in Canada during the year preceding her 65th birthday.

[64] 3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to:

> (b) every person who

> (i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,
>
> (ii) has attained sixty-five years of age, and
>
> (iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved;

[65] Since she has continued residency in Canada, she will be entitled to receive 40/40 (full) OAS pension under OAS paragraph 3(1)(b).

CONCLUSION

[66] The Appellant qualifies for a full OAS pension under paragraph 3(1)(b).

The appeal is allowed.

John Eberhand
Member, General Division