Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: ***A. J. v. Minister of Employment and Social Development,*** **2016 SSTGDIS 14**

Date: January 28, 2016

File number: GP-13-1898

GENERAL DIVISION - Income Security Section

Between:

A. J.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Shane Parker, Member, General Division - Income Security Section

Heard by Teleconference on November 6, 2015

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. J., the Appellant's representative

BACKGROUND

[1] The Appellant applied for an Old Age Security (OAS) pension on March 2, 1989 (GD8-1 to 2). In July 1989 the Respondent informed that the Appellant was awarded a full pension of 40/40ths effective November 1989. The Respondent advised on April 11, 2012 that it was adjusting the pension to 25/40ths from 40/40ths, and claimed an overpayment in the amount of $44,192.70 for the period of November 1989 to March 2012 (GD3-15 to 17). As of August 2012 the Respondent began deducting a percentage of the Appellant's OAS pension in order to recover the alleged overpayment. The Appellant asked that the Respondent reconsider this decision. On June 17, 2013 the Respondent provided its reconsideration decision, which maintained the original decision to claim an alleged overpayment; however, it adjusted the amount by 50%, from $44,192.70 to $22,096.35. The Respondent stated it would resume recovery of the alleged overpayment by deducting an amount from the Appellant's OAS pension starting October 2013.

[2] On September 4, 2013 the Appellant appealed this decision to the Tribunal's General Division.

[3] The appeal was heard by teleconference for the following reasons:

- the method of proceeding is most appropriate to allow for multiple participants;
- there are gaps in the information in the file and/or a need for clarification; and
- this method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The Appellant's representative confirmed at the hearing that he was authorized to attend the hearing and make submissions in the Appellant's absence. During the hearing the Appellant's representative reviewed and explained the Appellant's written submissions on file, as well as articulate additional submissions orally.

APPEAL

ISSUES

[5] The first issue is whether the Appellant is entitled to a full OAS pension.

[6] If the Appellant is not entitled to a full OAS pension, and given that he was paid at the full pension rate, the second issue in this appeal is whether, in the circumstances, the Respondent can recover an overpayment of the Appellant's OAS pension.

LAW

[7] As far as eligibility for an OAS pension is concerned, the most relevant legislative provisions from the OAS Act are as follows.

> **Payment of full pension**
>
> 3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to
>
> (a) every person who was a pensioner on July 1, 1977;
>
> (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,
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> (ii) has attained sixty-five years of age, and
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> (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

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.

[8] Section 8 of the OASA deals with payment of the pension. It reads:

Payment of Pension Commencement of pension

8. (1) Payment of pension to any person shall commence in the first month after the application therefor has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.

[9] According to subsection 3(4) of the OAS Act the amount of the partial pension shall be rounded to the lower multiple of a year when it is not a multiple of a year.

[10] Section 5 of the OAS Regulations deals with approval of an OAS application:

Approval of an Application for a Pension

5. (1) Subject to subsection (2), where the Minister

(a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and

(b) approves the application after the last day of the month in which it was received, the Minister's approval shall be effective on the latest of

(c) the day on which the application was received,

(d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and

(e) the date specified in writing by the applicant.

[11] Section 20 of the OAS Regulations deals with the determination of residence:

Residence

20. (1) To enable the Minister to determine a person's eligibility in respect of residence in Canada, the person or someone acting on the person's behalf shall provide a statement giving full particulars of all periods of residence in Canada and of all absences from Canada that are relevant to that eligibility.

[12] Section 21 of the OAS Regulations distinguishes between being resident and present in Canada:

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.

[13] Paragraph 21(4)(a) of the OAS Regulations states that any interval of absence from Canada of a person resident in Canada that is of a temporary nature and does not exceed one year shall be deemed not to have interrupted that person's residence or presence in Canada.

[14] Section 23 of the OAS Regulations enables the Respondent to require an applicant for the OAS to make available further information or evidence at any time:

> 23. (1) The Minister, **at any time** before **or after approval of an application** or after the requirement for an application is waived, may require the applicant, the person who applied on the applicant's behalf, the beneficiary or the person who receives payment on the applicant's behalf, as the case may be, to make available or allow to be made available further information or evidence regarding the eligibility of the applicant or the beneficiary for a benefit.
>
> [emphasis added here]

[15] Section 37 of the OAS Act deals with the repayment of benefits to which individuals are not entitled, or an overpayment:

> **Return of benefit where recipient not entitled**
>
> 37. (1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.
>
> **Recovery of amount of payment**
>
> (2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable **at any time** in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act. [emphasis added here]

[16] Section 222 of the *Income Tax Act* (ITA) provides:

> All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

[17] Subsection 37(4) of the OAS Act outlines the circumstances in which the Respondent has the discretion to remit all or a portion of benefits to which an individual is not entitled (or an overpayment):

> **Remission of amount owing**
>
> (4) Notwithstanding subsections (1), (2) and (3), where a person has received or obtained a benefit payment to which that person is not entitled or a benefit payment in excess of the amount of the benefit payment to which that person is entitled and the Minister is satisfied that
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> (a) the amount or excess of the benefit payment cannot be collected within the reasonably foreseeable future,
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> (b) the administrative costs of collecting the amount or excess of the benefit payment are likely to equal or exceed the amount to be collected,
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> (c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or
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> (d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error in the administration of this Act, the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the Criminal Code in connection with the obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.

[18] Section 32 of the *Crown Liability and Proceedings Act* (the CLPA) states:

> 32. **Except as otherwise provided** in this Act **or in any other Act of Parliament**, the laws relating to prescription and the limitation of actions in force in a province between subject and subject **apply to any proceedings by or against the Crown in respect of any cause of action** arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken **within six years after the cause of action arose.** [emphasis added here]

[19] Section 44.1 of the OAS Act is the provision dealing with administrative monetary penalties. It contains, amongst other things, a 5-year limitation period. Section 44.1 is reproduced in its entirety here:

> **Penalties**
>
> 44.1 (1) The Minister may impose on a person a penalty for each of the following acts or omissions if the Minister becomes aware of facts that in the Minister's opinion establish that the person has
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> (a) made a statement or declaration in an application or otherwise that the person knew was false or misleading;
>
> (a.1) knowingly failed to correct any inaccuracies in the information provided by the Minister as required by subsection 5(6), 11(3.3), 15(2.4), 19(4.05) or 21(4.3);
>
> (b) made a statement or declaration in an application or otherwise that the person knew was false or misleading because of the non-disclosure of facts;
>
> (c) knowingly failed to declare to the Minister all or some of the person's income;
>
> (d) received or obtained by cheque or otherwise a benefit payment to which the person knew that they were not entitled, or a benefit payment that the person knew was in excess of the amount of the benefit payment to which they were entitled, and

did not return the cheque or the amount of the benefit payment, or the excess amount, as the case may be, without delay; or

(e) participated in, assented to or acquiesced in an act or omission mentioned in any of paragraphs (a) to (d).

Purpose of penalty

(1.1) The purpose of the penalty is to promote compliance with this Act and not to punish.

Maximum penalty

(2) The Minister may set the amount of the penalty for each act or omission at not more than $10,000.

Limitation on imposition of penalties

(3) A penalty shall not be imposed on a person under subsection (1) if

(a) a prosecution for the act or omission has been initiated against the person; or

(b) five years have passed since the day on which the Minister became aware of the act or omission.

Rescission, etc., of penalty

(4) The Minister may rescind the imposition of a penalty under subsection (1), or reduce the penalty,

(a) on the presentation of new facts;

(b) on being satisfied that the penalty was imposed without knowledge of, or on the basis of a mistake as to, some material fact;

(c) on being satisfied that the penalty cannot be collected within the reasonably foreseeable future; or

(d) on being satisfied that payment of the penalty would cause undue hardship to the debtor.

SUBMISSIONS

[20] The Appellant's representative submitted that:

a) The Appellant met the criteria for a full OAS pension when he applied for the pension in 1989.

b) In the alternative, if the Appellant did not qualify for a full OAS pension, it is unreasonable to demand repayment for an alleged overpayment that dates back over 22 years. The Respondent's July 1989 letter did not state he was ineligible for the full OAS pension, which left the Appellant to reasonably conclude that he remained entitled to a full OAS pension. Once again, in December 1989 the Appellant queried the Respondent as to whether he was entitled to a full OAS pension, and the Respondent did not act to the contrary, which reaffirmed the Appellant's presumption that he remained entitled to a full OAS pension. As such, and in the circumstances, the Respondent's demand for overpayment after more than 22 years of inaction contravenes the *Crown Liability and Proceedings Act* (section 32 thereof). In addition to the CLPA, the *Ontario Limitations Act* and *Income Tax Act* suggest that there be a reasonable limitation period for the Respondent to claim an overpayment once that cause of action arises, pursuant to section 37 of the OAS Act. In summary, the Respondent knew in July 1989 that the Appellant was not entitled to a full OAS pension (if that is found to be the case) but continued to be paid as though he was so entitled. The cause of action to recover the overpayment (if that is found to be the case), and limitation period for this cause of action, should therefore have begun as of July 1989. However, the Respondent did not take action to recover the overpayment (if that is found to be the case) until April 2012.

c) An overpayment made before 1995 is statute barred. As such, the Respondent cannot recover the alleged overpayment made from November 1989 until December 1994 inclusive.

d) There should be a reverse onus in this case such that the Respondent must prove on balance that it can recover an alleged overpayment. The Respondent has failed to adequately prove that the Appellant is not eligible for a full OAS pension. Rather, it has merely submitted a short explanation claiming an overpayment.

e) The Respondent uses language similar to that found in section 44.1 of the OAS Act to suggest it is imposing a penalty on the Appellant by reclaiming an alleged overpayment. The Respondent does not, however, explicitly cite this provision apparently because it would then be limited to claiming a $10,000 maximum penalty and subject to a 5-year limitation period. In any event, and whether the Respondent is relying upon section 44.1 directly or indirectly, the Appellant did not contravene this provision, and paragraph 44.1(1)(d) specifically. At no time did he know that he was not entitled to a full pension (if that is found to be the case). Such disentitlement is denied.

[21] The Respondent submitted that the Appellant did not meet the 40-year residence requirement under subsection 3(1) of the OAS Act to qualify for a full OAS pension. Since he was wrongly paid the full pension amount from November 1989 to March 2012, an overpayment resulted which the Respondent can recover at any time pursuant to subsection 37(2) of the OAS Act, which is the only legislation (in addition to the OAS Regulations) that governs the Respondent. The Respondent concedes that it knew the Appellant took up residence in Australia, and was therefore not entitled to receive a full pension, thanks to the Appellant's two letters in 1989; however, the Appellant should bear some responsibility for the overpayment because he allowed the full benefits to continue to be paid, which is why the initial overpayment amount was reduced by half.

EVIDENCE

[22] The salient evidence in this appeal is largely undisputed. The Appellant was born in Australia on October 3, 1924; he turned 65 on October 3, 1989. He resided in Canada for 25 years, from July 1953 to August 1956; and August 1966 to "present" (the date he applied for an OAS pension in March 1989). The Appellant was in Australia on a visitor's Visa and as a Canadian resident from March 1989 to July 1989.

[23] From March 1989 to July 1989 the Appellant had numerous and stronger ties to Canada, as compared to Australia. He "*maintained continuous* [Ontario Health Insurance Plan] *coverage; he remained a member of numerous professional organizations* […]*; he had numerous social ties in X* […] *and he maintained economic ties through a geological and mining consulting business, based in X, of which he was principal and owner* […] *Moreover, he held and travelled on a Canadian passport* […] *his Australian passport and citizenship had been revoked in the early 1970s* […] *To enter Australia, he, like all other non-resident visitors to that country, required an entry visa.* […] [The Appellant] *did not have any significant residential ties in Australia. He stayed at a temporary address at a rental property, and owned there no property, house, furniture, car, or business; nor did he have an Australian drivers' licence, or an Australian pension, or Australian health and dental insurance coverage, or membership in any Australian professional organizations* […]" (GD3-6 to 7).

[24] On June 11, 1989 the Appellant wrote to the Respondent, advising he would be residing in Australia on a permanent basis, and that he knew by doing so he may have to forfeit the full OAS pension in favour of a partial pension. The Respondent received this letter and on July 5, 1989 advised the Appellant to contact the Respondent should he decide to return to Canada. The Appellant was awarded a full pension effective November 1989. On December 9, 1989 the Appellant requested that his pension be directly deposited into his bank account, and again acknowledged that he may not qualify for the full pension amount given that he was residing in Australia.

[25] Between January 1992 and January 2012 the Respondent received nine (9) completed OAS Foreign Beneficiaries Pension Declaration forms from the Appellant confirming his name and Australian address to be correct. The Respondent sends these forms to pensioners to ensure continued entitlement of the pension at the contact information on file.

[26] Further to a review of the most recent Pension Declaration form of January 31, 2012, the Respondent informed the Appellant on April 11, 2012 that he was paid a full OAS pension instead of a partial OAS pension (25/40ths), resulting in an overpayment. On June 17, 2013 the Respondent provided its reconsideration of this decision (the

reconsideration decision), justifying why it was claiming an overpayment; however it reduced the amount of the overpayment from the amount originally claimed on April 11, 2012, as a concession for not taking action earlier to recover the overpayment.

ANALYSIS

[27] The Tribunal recognizes the Appellant's argument that there be a reverse onus in cases of reclaiming alleged overpayments of benefits, when claimants are already in receipt of benefits. However, the Appellant bases this argument on another Review Tribunal decision which is not binding on the present Tribunal. The Tribunal is bound by decisions of higher courts such as the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada (the Supreme Court). The Federal Court has held that the burden of proof rests on the Appellant to establish entitlement to an OAS pension (*De Carolis v. Canada (Attorney General)*, 2013 FC 366).

[28] Similarly, the Appellant relies upon a Review Tribunal finding in arguing that any alleged overpayment made before 1995 is statute barred. The Tribunal is not bound by Review Tribunal findings. However, the Tribunal will address the statute-bar argument which the Appellant claims is supported by the Supreme Court, below.

Issue #1: Was the Appellant entitled to a full OAS pension?

[29] The Appellant argues that he was entitled to a full pension when he applied for it in 1989. He relies upon paragraph 3(1)(b) of the OAS Act which, again, states:

> 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
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> (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

[30] In the present case, the Appellant was not a pensioner on July 1, 1977 but had attained 25 years of age and was residing in Canada at that time. On these bases he met the requirements of subparagraph 3(1)(b)(i) of the OAS Act. The Appellant attained 65 years of age, in accordance with subparagraph 3(1)(b)(ii) of the OAS Act. Where things get contentious is the third hurdle, or requirement, under paragraph 3(1)(b): whether he resided in Canada for the ten years immediately preceding the day on which his application is approved (pursuant to subparagraph 3(1)(b)(iii)).

[31] With respect to the within appeal, the Tribunal finds that the Appellant's application was approved effective October 1989, when he attained age 65, pursuant to paragraph 5(1)(d) of the OAS Regulations. This is supported by the fact that payment became effective November 1989, or the month after approval, pursuant to subsection 8(1) of the OAS Act.

[32] Returning to the requirement in subparagraph 3(1)(b)(iii) of the OAS Act, the Appellant submitted that he "resided in Canada" for ten years immediately preceding the day his application was approved (in October 1989, as determined above). In support of this submission the Appellant refers to his stronger ties to Canada than to Australia from March 1989 to October 1989. The Appellant also relies upon paragraph 21(4)(a) of the OAS Regulations which states that any interval of absence from Canada of a person resident in Canada that is of a temporary nature and does not exceed one year shall be deemed not to have interrupted that person's residence or presence in Canada.

[33] The Appellant admittedly was in Australia, not on a temporary basis, but a permanent one, according to his June 1989 letter (GD3-20). On that basis, paragraph 21(4)(a) of the OAS Regulations does not assist him in extending his Canadian residence period, because that provision deals with absences of a "temporary nature." This said, the residence analysis is

broader than the single factor of absences from Canada. A person's intention to reside somewhere is also irrelevant to the residence analysis. In this broader respect, the Appellant has a strong argument that he was resident in Canada despite his physical presence in Australia from March 1989 to the approval of his application in October 1989.

[34] Paragraph 21(1)(a) of the OAS Regulations provides that a person resides in Canada if he makes his home and ordinarily lives in any part of Canada.

[35] In *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Federal Court set out factors to be taken in account in determining whether a person makes his or her home in and ordinarily lives in Canada. They are as follows:

a) ties in the form of personal property (bank accounts, business, furniture, automobile, credit card);
b) social ties (membership with organizations or associations, professional membership);
c) other ties to Canada (hospital and medical insurance coverage, driver's license, property tax statements, public records, immigration and passport records, federal and provincial income tax records);
d) ties in another country;
e) regularity and length of stay in Canada and the frequency and length of absences from Canada; and
f) the lifestyle of the person or his establishment in Canada.

[36] The Appellant's ties to Canada and Australia between March 1989 and July 1989 are described this way:

> During the first 4 months when he was abroad, and at least up to the day the OAS application was approved (at some point between March 2 and July 5, 1989), he remained a permanent resident of Canada. This is because during these first 4 months abroad- indeed, even longer than these 4 months - he continued to maintain a very significant number of residential ties in Canada; and, correspondingly, he had very few significant residential ties during this time while in Australia. Examples of the residential ties in Canada include the following: he maintained a residential address at X X Ave, X, Ontario; he possessed and used an Ontario drivers' licence; he maintained and used a chequing, savings and credit card account at the Bank of

> Montreal (at X X St X, in X); he maintained and used continuous health and dental insurance through his employer (the University of X); he maintained continuous OHIP coverage; he remained a member of numerous professional organizations (e.g. University of X Faculty Association, Geological Society of America); he had numerous social ties in X (friends, colleagues, neighbours, former students); and he maintained economic ties through a geological and mining consulting business, based in X, of which he was principal and owner.
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> Moreover, he held and travelled on a Canadian passport during the first 4 months of this period abroad, as his Australian passport and citizenship had been revoked in the early 1970s when he was granted Canadian citizenship. To enter Australia, he, like all other non-resident visitors to that country, required an entry visa. The entry visa that he received on March 7, 1989 from the Australian Consulate states that he is permitted multiple return visits to Australia clearly indicating that they recognized that his permanent residence was not in Australia. […]
>
> In addition, during the first 4 months when he was abroad, and at least up to the day the OAS application was approved (sometime between March 2 and July 5, 1989), he did not have any significant residential ties in Australia. He stayed at a temporary address at a rental property, and owned there no property, house, furniture, car, or business; nor did he have an Australian drivers' licence, or an Australian pension, or Australian health and dental insurance coverage, or membership in any Australian professional organizations, or any Australian-based loans or mortgages; and he had very few social ties. He was not at that time substantially deep rooted and settled there. His statement in the letter of June 11, 1989 to HWC-ISP that he has decided to take up permanent residence in Australia is a forward-looking statement of intention and a plan, not a statement describing an existing fact at that time. [underlining added here]
>
> (GD3-6 to 8)

[37] At the hearing, the Appellant's representative argued that these ties remained as described above into the fall of 1989, or around the time the application was approved in October 1989.

[38] There was no evidence or submission before the Tribunal to counter the Appellant's account of his stronger ties to Canada than to Australia between March 1989 and October 1989. As such, and for these and the above reasons, the Tribunal finds that the Appellant's Canadian residence was not interrupted between March 1989 and October 1989, when he was present in Australia. Therefore he was resident in Canada for the ten years immediately preceding the day his application was approved in October 1989 pursuant to subparagraph 3(1)(b)(iii) of the OAS Act.

[39] The Tribunal concludes that the first issue is answered in the affirmative. The Appellant met the requirements for a full OAS pension pursuant to paragraph 3(1)(b) of the OAS Act. Since the Appellant was entitled to a full pension, and received payment at the full 40/40 amount from November 1989 to March 2012, no overpayment was owing to the Respondent. Any amount of the Appellant's pension that was withheld or not paid to the Appellant on the basis of an alleged overpayment was therefore improper.

[40] There appears to be no authority in section 37 or elsewhere in the OAS Act to direct the Respondent to repay such amounts in the circumstances. Subsection 37(4) of the OAS Act provides the Respondent the discretion to remit benefits to individuals in certain cases where an overpayment resulted; however, for the reasons above, there is no overpayment here, so this provision is not applicable or otherwise constitute authority to order the Respondent to forthwith remit any and all benefits to the Appellant which it withheld or refused to pay based on the alleged overpayment. The Tribunal queries whether the Respondent will defer to internal policy or the within decision, to do this.

Issue #2: If the first issue is answered in the negative, is the Respondent entitled to recover an overpayment in the circumstances?

[41] In the event the conclusion to the first issue is found to be incorrect, the Tribunal will hereby address the second issue before it.

[42] The Tribunal found the Appellant's arguments in relation to this issue to be well articulated. The Appellant cited Supreme Court precedent which turned its mind to the injustice that could result from legislation permitting the Crown to collect debts from individuals "at any time." Further details of this argument are found below.

[43] The Appellant's arguments are confronted by the Respondent's argument that it is only bound by the OAS Act and therefore can recover an overpayment "at any time" pursuant to subsection 37(2) of the OAS Act.

[44] Before evaluating these competing arguments, the Tribunal will address the Respondent's argument that the Appellant should bear some blame for the delayed recovery of the overpayment because he allowed payment to continue when he knew he was not entitled to

the full amount. This argument was without merit. By seeking a reconsideration and ultimately appealing to the Tribunal the Appellant demonstrated that he did not accept the allegation that he was overpaid (see: the Appellant's reconsideration request at GD3-36 and Notice of Appeal at GD3-4 to 9)). With respect to the 1989 letters, it is a stretch to conclude that the Appellant "knew" he was not entitled to a full OAS pension. When he raised this notion in his letters that he "will have to forfeit the full pension" (GD3-33) and later that he "may" not be entitled to the full OAS pension (GD3- 26), the response received from the Respondent by letter dated July 5, 1989 made no mention of disentitlement to a full OAS pension (GD3-22), and otherwise payment was made at the full rate for over two decades. The full OAS pension was paid despite the Appellant regularly informing the Respondent of his residence in Australia during this time period. In summary, after reviewing this activity, it was far from clear that the Appellant knowingly received the full pension when he was not so entitled. To the contrary, when he put the issue directly to the Respondent, and after transparently and regularly providing the Respondent confirmation of his Australian residence, the Respondent's response and activity that followed reasonably suggested that he was entitled to continue receiving the full OAS pension.

[45] Now turning to the arguments relating to this issue, the Tribunal further outlines the Appellant's arguments:

a) The OAS Act, like other Crown proceedings involving debt recovery, is subject to the 6-year limitation period set out in section 32 of the CLPA. The CLPA is a law of general application: it applies presumptively to the OAS Act, by setting limitations on the collection of (in this case alleged) overpayments.

b) The cause of action in this case began no later than July 5, 1989, when the Respondent acknowledged receipt of the Appellant's June 11, 1989 letter. According to that June 1989 letter, the Appellant informed the Respondent of his travel plans and the circumstances pertaining to his residence that might potentially cause a change in his eligibility from full to partial pension. The Respondent acknowledged receipt of this letter, and acknowledged his change of residence, in its letter to him of July 5, 1989. Moreover, the Appellant informed the Respondent for a second time by letter on December 9, 1989 of his change of residence, and of his inability to return to Canada; and he informed them again of the potential change in eligibility from full to partial pension. Furthermore, on numerous occasions thereafter, the Appellant provided witnessed declarations to the Respondent of his overseas residence.

c) Despite knowing about the Appellant's change of residence, and despite being informed by him that this might potentially cause a change in his eligibility for the

full pension, the Respondent did not take any action or concrete steps to revise and recalculate the pension payment, or take action to recover the alleged debt, or even communicate with him about the matter, for over two decades. It is clear that the Respondent did not take any action to revise and recalculate the OAS pension, or contact the Appellant about it, to reclaim the alleged overpayment, during the six years from the start date of July 5, 1989, which is the time allowed by statute law to take proceedings against a subject in respect of any cause of action, according to Section 32 of the CLPA. Thus the action initiated in April 2012 by the Respondent to recover the alleged overpayment is extinguished by the expiration of the limitation period of 6 years following the date upon which the Respondent became aware of the changes in the Appellant's travel plans and the potential changes these plans might cause to his eligibility for the full OAS pension.

d) The above findings and analysis are supported by the Supreme Court's decision in *Markevich v. Canada* [2003] 1 S.C.R. 94 (*Markevich*). The *Markevich* case involved a taxpayer who failed to pay federal and provincial taxes for the 1980 to 1985 taxation years, as assessed by Revenue Canada (now the Canada Revenue Agency, or CRA) in 1986. The CRA took no collection action until 1998. The Supreme Court judgement in *Markevich* states that as a law of general application, section 32 of the CLPA presumptively applies on a residual basis to all Crown proceedings (*Markevich*, paragraph 11). The CLPA applies to proceedings against subjects involved in all Crown debts, not just to income tax debts. This includes Crown proceedings, such as statutory collection procedures that would enable the Crown to achieve the same result that it could through court action. Section 32 of the CLPA, in other words, does not apply exclusively to court matters: the legislative history of Section 32 of the CLPA supports the inference that Parliament intended for its application to extend beyond proceedings in court (*Markevich*, paragraphs 28, 35).

e) The Supreme Court judgement in *Markevich* also states that the breadth of the limitations provisions contained in Section 32 of CLPA can only be narrowed by an enactment that specifically excludes it from application (paragraph 11). Section 37 of the OAS Act (the provision expressly relied upon by the Respondent in recovering the alleged overpayment in this appeal) does not explicitly exclude the application of limitation periods set forth in the CLPA. The Supreme Court's judgement also rejects the "complete code" interpretation of the Income Tax Act- that is, the interpretation according to which the Income Tax Act (ITA) is a complete code that excludes the application of Section 32 of the CLPA. The ITA does not operate in a legislative vacuum (*Markevich*, paragraph 14). The OAS Act also does not operate in a legislative vacuum. The Supreme Court's analysis of the failure of the arguments that support the complete code interpretation of the ITA also applies to the interpretation of the OAS Act: like the ITA, the OAS Act (section 37 in particular) is informed by laws of general application, including the CLPA.

f) In paragraph 20 of *Markevich*, the Supreme Court states: "If the Minister makes no effort to collect a tax debt for an extended period, at a certain point a taxpayer may reasonably come to expect that he or she will not be called to account for the liability, and may conduct his or her affairs in reliance on that expectation .... ". It is

therefore reasonable to infer in the within appeal that pensioners, like taxpayers, both of whom have an interest in their financial security, may likewise reasonably come to expect that after an extended period of non-communication and inaction from the Respondent (despite knowing of a possible overpayment), they will not be called to account for liabilities pertaining to (alleged) overpayments of pensions; and, likewise, that they may conduct their affairs in reliance on that expectation.

g) In the circumstances, it is unreasonable for the Respondent to demand repayment from a pensioner (the Appellant) for an alleged overpayment dating back approximately 23 years, particularly when the Appellant has been bona fide, transparent, and diligent in communicating with the Respondent, and informing it of his residence and his intentions; and in the present case informing it - twice - of the possibility of a change in his eligibility for the OAS pension. The demand is unreasonable in three ways:

> i) First, it is unreasonable to subject individuals to legal or administrative actions involving alleged overpayments or alleged debts for events that transpired in the long distant past. As the Supreme Court judgement states in *Markevich*, limitation provisions rest, among other things, on the certainty rationale, which recognizes that with the passage of time, an individual "should be secure in his reasonable expectation that he will not be held to account for ancient obligations." (*Markevich*, paragraph 19) This rationale is offended by the Respondent's 22-year failure to initiate repayment recovery for a known alleged pension overpayment. This is nearly double the delay by the claimant CRA in *Markevich*.
>
> ii) Second, it is unreasonable to expect individuals to be able to assemble the evidence required to mount a credible defense against claims for events alleged to have occurred in the long distant past. The Supreme Court also notes this in *Markevich*: limitation provisions rest on the evidentiary rationale, namely, the desire to preclude claims where the evidence used to support that claim, or to defend against it, has grown stale (paragraph 19). The evidentiary rationale is clearly violated by the Respondent in this case.
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> iii) Third, it is unreasonable that a claimant, in this case the Respondent, should pursue a claim against an individual after the claimant has failed over 22 years to exercise reasonable diligence in the matter. The Supreme Court in *Markevich* also notes the importance of the diligence rationale to limitation provisions. It states that limitation provisions encourage claimants to act diligently and not "sleep on their rights .." (paragraph 19). Like the CRA in *Markevich*, it is "contrary to the public interest" for the Respondent here to "sleep on its rights in enforcing collection" (*Markevich*, paragraph 20). With over 22 years of inaction on the alleged overpayment recovery process, the Respondent has not exercised reasonable diligence.

[46] From an equitable standpoint, the Appellant's arguments are strong in that it would be unjust to repay a debt upon which the Respondent failed to act for over 22 years.

[47] That said, the Tribunal does not have equitable powers and must interpret and apply its governing legislation as it is written.

[48] The present appeal is distinguishable from *Markevich* in that here, subsection 37(2) of the OAS Act provides for prescription while the collection provisions at issue in *Markevich* (section 222 of the ITA or its accompanying provisions) were silent. As such, section 32 of the CLPA does not apply to subsection 37(2) of the OAS Act. In *Markevich*, the Supreme Court wrote that the breadth of section 32 of the CLPA can only be narrowed by an Act of Parliamant (such as the OAS Act) "either expressly or impliedly, for limitation periods." Again, the Supreme Court said that the ITA did not provide for limitation periods within its collection provisions. The Court distinguished such provisions from the ITA's assessment provisions which did provide for limitation periods by including the language "at any time" (ie. sections 152(4), 152(4.2)). Unlike the collection provisions of the ITA considered in *Markevich*, Parliament turned its mind to the limitation period in its drafting of subsection 37(2) of the OAS Act. In other words, Parliament has (expressly) "otherwise provided" for a limitation period in subsection 37(2) with the language "at any time", based on a plain language reading of this provision. This interpretation is supported by Rothstein J.A. (as he then was), who said this in reference to the ITA's assessment provisions containing the language "at any time": "Parliament has put its mind to the limitation question in the [ITA] and when it intends there to be no limitation period, it has so stated." (*Markevich* at paras. 11, 13 and 16)

CONCLUSION

[49] The appeal is allowed.

[50] With respect to issue #1: The Appellant was entitled to the full OAS pension.

[51] Since issue #1 has been decided positively, issue #2 is no longer a live issue.

Shane Parker
Member, General Division - Income Security