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

Citation: *E. E. v. Minister of Employment and Social Development*, 2018 SST 243

Tribunal File Number: AD-16-708

BETWEEN:

E. E.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: November 21, 2017

DATE OF DECISION: March 16, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, E. E., applied for an Old Age Security pension and the Guaranteed Income Supplement in January 2011. He turned 65 in September 2011, making him eligible to receive an Old Age Security pension. He began receiving an Old Age Security pension in October 2011.

[3] The Respondent, the Minister of Employment and Social Development, determined that payment of an Old Age Security pension to the Appellant should have been suspended during his incarceration[1] between October 2011 and December 2011, pursuant to subsection 5(3) of the *Old Age Security Act* (OASA). Effectively, this resulted in an overpayment of a pension to the Appellant.

[4] The Appellant disputes that any overpayment is payable. He argues that the subsection is inapplicable in his circumstances because it does not have any retrospective application. He asserts that he was entitled to receive the pension throughout this period, as well as for any subsequent periods of incarceration for which he had already been sentenced prior to the subsection coming into force in January 2011.

[5] If the Appellant succeeds in this appeal, he will not owe any overpayment, and he will be entitled to an Old Age Security pension for any subsequent periods of incarceration after December 2011, for which he had already been sentenced prior to the subsection coming into force.

[1] The Appellant was convicted of fraud over $5,000 and began serving his sentence on October 2, 2008, and, after a period of day parole, was reincarcerated on January 14, 2010. He was statutorily released in February 2013 but his statutory release was revoked in July 2013. He remained incarcerated until October 1, 2014.

HISTORY OF PROCEEDINGS

[6] The General Division found that the Appellant had failed to establish that subsection 5(3) of the OASA violated his rights under section 7 and paragraph 11(*h*) of the *Canadian Charter of Rights and Freedoms*. It ordered the Appellant to repay the overpayment or, alternatively, allowed the Respondent to recover the overpayment by the means provided for under the OASA.

[7] The Appellant sought leave to appeal the General Division decision, on the ground that the General Division failed to address the issue of whether subsection 5(3) of the OASA has any retrospective applicability to those like him who were already sentenced to a term of two or more years, when the subsection came into operation. Otherwise, he did not challenge the constitutional basis upon which the General Division dismissed his appeal.

[8] I granted the Appellant's application for leave to appeal, as I was satisfied that the General Division may have failed to consider whether subsection 5(3) of the OASA applies retrospectively. I must now decide whether the General Division failed to consider this issue, and whether it erred in concluding that the subsection does not result in a punishment.

ISSUES

[9] The issues before me are as follows:

1. Did the General Division fail to consider the issue of whether subsection 5(3) of the OASA applies retrospectively?

2. Does subsection 5(3) of the OASA apply retrospectively?

3. Did the General Division err in determining that subsection 5(3) of the OASA does not amount to a punishment?

ANALYSIS

[10] Subsection 5(3) of the OASA provides that no pension may be paid in respect of a period of incarceration to a person who is subject to a sentence of imprisonment to be served in a penitentiary. The subsection states:

> **Incarcerated person**
>
> (3) No pension may be paid in respect of a period of incarceration – exclusive of the first month of that period – to a person who is subject to a sentence of imprisonment.
>
> (a) that is to be served in a penitentiary by virtue of any Act of Parliament; or
>
> (b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Employment and Social Development Act*.

[11] The subsection came into effect on January 1, 2011.

ISSUE 1: Did the General Division fail to consider the issue of whether subsection 5(3) of the OASA applies retrospectively?

[12] The Appellant argues that the General Division misapprehended the nature of his appeal and failed to address the central issue that he had raised, namely, whether subsection 5(3) of the OASA applies retrospectively. He maintains that the subsection did not apply in his circumstances in October 2011 (or in October 2013, when his statutory release was revoked), because the legislation came into effect after he had already been sentenced, otherwise it would amount to what he described as "double jeopardy," i.e. effectively being penalized twice in respect of the same offence.

[13] The Appellant refers to two authorities that succinctly describe the concept of retrospectivity. In *Matejka (Re)*,[2] MacFarlane J.A. referred to E.A. Driedger, Q.C.'s article, "Statutes: Retroactive Retrospective Reflections."[3]

[14] E.A. Driedger, Q.C. described the differences between retroactive and retrospective statutes as follows:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.
>
> . . .
>
> For retrospectivity the question is: Is there anything in the statute to indicate that the consequences of a prior event are changed, not for time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later.

[15] In *Thibault Estate (Re)*,[4] the Probate Court of Nova Scotia reproduced the British Columbia Court of Appeal's summary of the distinction between retroactive and retrospective operation of statutes in *Mackenzie v. British Columbia (Commissioner of Teachers' Pensions)*.[5] The summary was adopted from E.A. Driedger's analysis. The Court of Appeal wrote:

> 2.(1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
>
> (2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.

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[2] *Matejka (Re)*, 1984 CanLII 755 (BC CA), at paragraph 10.
[3] Statutes: Retroactive if Retrospective Reflections (1978), 56 Can. Bar Rev. 264, at pages 268 to 269.
[4] *Thibeault Estate (Re)*, 2009 NSSC 4.
[5] *Mackenzie v. British Columbia (Commissioner of Teachers' Pensions)* (1992), 15 B.C.A.C. 69.

> (3) A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.
>
> 3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.

[16] Initially, the Respondent argued that the General Division had in fact considered the retrospectivity issue, in the context of the Appellant's constitutional challenge. In the course of oral submissions, however, the Respondent argued that it was unnecessary after all to address the question of whether the General Division had failed to address this issue and that I should focus instead on whether subsection 5(3) of the OASA applies retrospectively.

[17] Notwithstanding the Respondent's position on this matter, I will examine whether the General Division considered the issue of whether the subsection applies retrospectively.

[18] As I noted in my leave to appeal decision, the General Division dealt with the Appellant's preliminary application for summary judgment. The General Division wrote that the Appellant argued that he should be granted summary judgment "on the basis that subsection 5(3) of the OASA does not apply retrospectively to him." The General Division then noted that the Appellant relied on several authorities, including *R. v. Clarke*,[6] in support of his argument "that sentencing legislation does not apply retrospectively therefore subsection 5(3) of the OASA does not apply in this case regardless of the alleged *Charter* violations."

[19] The General Division declined to grant summary judgment, finding that it lacked the jurisdiction to grant the remedy sought "without first applying the *Charter* tests." It found that it could adjudicate the applicability of the subsection, but only in the context of a properly presented constitutional issue. It found the Appellant's argument that the

[6] *R. v. Clarke*, 2014 SCC 28.

subsection has no retrospective application to be indivisible from the Appellant's *Charter* arguments.

[20] The General Division identified what it considered were the substantive issues on appeal. It sought to address whether subsection 5(3) of the OASA violated the Appellant's rights protected by either section 7 or paragraph 11(*h*) of the *Charter* and, if so, whether any breach was justified under section 1 of the *Charter*. It did not specifically identify the question of whether subsection 5(3) of the OASA has any retrospective effect as a separate issue.

[21] The General Division discussed the Appellant's basic needs and the effect that the subsection purportedly had on him and his estranged wife. The General Division also examined the Appellant's trust fund account activity during his incarceration between February 16, 2009 and October 2014. The General Division found that the Appellant's immediate basic needs were met while incarcerated, irrespective of the suspension of his Old Age Security pension. Or, in other words, the General Division found that the suspension of the Appellant's Old Age Security pension had no bearing on his access to these provisions and services. Consequently, it found that the Appellant had failed to establish that subsection 5(3) of the OASA had violated his rights under section 7 of the *Charter*.

[22] The General Division also examined whether the imposition of subsection 5(3) of the OASA constituted an additional punishment for which the Appellant had been convicted, contrary to paragraph 11(*h*) of the *Charter*. The Respondent argued that subsection 5(3) was not a punitive, but a financial measure, and that paragraph 11(*h*) applied only in the criminal context and when it involved true penal consequences. It argued that the suspension of benefits did not modify the Appellant's original punishment and merely represented an "additional effect of being incarcerated further to a social benefits scheme."

[23] The issue over whether subsection 5(3) of the OASA has any retrospective effect arose in the context of the General Division's examination over whether it breached the Appellant's rights under paragraph 11(*h*) of the *Charter*. At paragraph 70, the General

Division succinctly summarized the thrust of the Appellant's arguments on this issue. It wrote:

> Moreover, he submitted that subsection 5(3) should not apply to him based on the presumption against retrospective operation of legislation absent a clear legislative intent. He contended that subsection 5(3) does not comply with these principles because it does not expressly state it will apply retrospectively to periods before December 2010 (specifically: when his sentence was handed down in October 2008). … The punitive effect of subsection 5(3) in the Appellant's case was the loss of an estimated $42,000 worth of benefits, which became an added condition to his sentence after his sentence was handed to him.

[24] The General Division noted that, in *Canada (Attorney General) v. Whaling*,[7] the Supreme Court of Canada dealt with retrospective legislation that affected the incarcerated person's liberty. In the proceedings before it, the General Division found that there was no impact on the Appellant's individual's liberty under subsection 5(3) of the OASA. In other words, the General Division found that *Whaling* had little relevance to the issues under consideration.

[25] The General Division determined that, in *R. v. Rodgers*,[8] there was no infringement of an individual's rights under paragraph 11(*h*) of the *Charter* associated with the collection and analysis of DNA samples from previously convicted and sentenced offenders. This was so because the Court regarded the collection and analysis of DNA samples as "no more part of the arsenal of sanctions which an accused may be liable in respect of a particular offence than the taking of a photograph or fingerprints," rather than anything that attracted punishment or true penal consequences.

[26] Upon reviewing the line of authorities that examined a provision's purpose, the General Division rejected any notion that subsection 5(3) of the OASA has any penal consequences, because it found that it had not been designed to redress the wrong committed by the Appellant upon society.

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[7] *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 SCR 392.
[8] *R. v. Rodgers*, 2006 SCC 15.

[27] Ultimately, the General Division decided that subsection 5(3) of the OASA does not carry true penal consequences or amount to an additional punishment, contrary to paragraph 11(*h*) of the *Charter*, given that its purpose — saving taxpayers money — was financial in nature.

[28] The General Division also found that the suspension of an Old Age Security pension was akin to a condition of the Appellant's sentence and that this, unlike the duration of a sentence, therefore did not attract constitutionally protected expectations.

[29] In finding that subsection 5(3) of the OASA did not carry true penal consequences and that it was not punitive in nature, the General Division determined that the protections under paragraph 11(*h*) of the *Charter* were inapplicable and unavailable to the Appellant, irrespective of whether the subsection itself was retrospective.

[30] The General Division outlined the Appellant's arguments that subsection 5(3) is not retrospective. It then analyzed whether subsection 5(3) of the OASA infringed section 7 or paragraph 11(*h*) of the *Charter*. However, it did not thereby turn its attention to the Appellant's primary argument that, irrespective of any *Charter* considerations, the subsection has no retrospective application.

[31] The Appellant had relied on several authorities to support his arguments on the retrospectivity issue, but the General Division did not discuss any of them, other than *Whaling*, for other, unrelated reasons. The General Division did not make any determination regarding whether the subsection is retrospective in nature. Indeed, the General Division held that, because the Appellant had failed to establish any violation of his *Charter* rights, "the remaining issues [were] moot." This conclusion was, however, predicated on an erroneous assumption that any questions about the retrospectivity application of the subsection were intertwined with the *Charter* considerations.

[32] While subsection 5(3) of the OASA clearly raised constitutional questions, at the same time, the issue of whether it was retrospective in nature could also be considered independently of any *Charter* considerations. I find that the retrospectivity question was

discernible from any *Charter* considerations and that the General Division should have considered the issue.

[33] Both parties agree that it is appropriate for the Appeal Division to exercise its powers under subsection 59(1) of the *Department of Employment and Social Development Act* (DESDA) and render the decision that the General Division should have made, rather than return the matter to the General Division, and that I should determine whether subsection 5(3) of the OASA applies retrospectively.

ISSUE 2: Does subsection 5(3) of the OASA apply retrospectively?

[34] I concur with the parties that the Appeal Division may properly determine whether subsection 5(3) of the OASA applies retrospectively. This is a legal determination within the jurisdiction afforded to me under subsections 58(1) and 59(1) of the DESDA.

[35] The suspension of the Old Age Security pension applies to those who become incarcerated after the subsection came into force, but the Appellant submits that it should not apply to those who were already incarcerated before the subsection came into force, as otherwise it would necessarily require that the subjection be applied retrospectively.

[36] The Respondent denies that subsection 5(3) of the OASA has retrospective application, but says that nevertheless the subsection impacted the Appellant in that it suspended his Old Age Security pension during periods of incarceration after January 2011. The Respondent explains that the subsection is not retrospective because it does not attach new consequences to past actions, i.e. to prior incarceration(s), and that the only element necessary for a suspension of benefits is that the individual is "ongoing incarcerated" in a penitentiary at any point after January 2011, when the subsection came into force.

[37] The Respondent submits that the operative period is the *current incarceration*, and not the sentence *per se*. After all, past criminal convictions do not affect an individual's eligibility for an Old Age Security pension. The Respondent argues that there are no retrospective changes to any matters related to sentencing, such as the length,

quality or severity of the sentence. The Respondent maintains that the subsection does not provide for new legal consequences to a discrete prior event, which it argues in this case is the conviction or imprisonment for a crime.

[38] The Respondent asserts that the Old Age Security pension is intended to provide for a pensioner's immediate needs, such as food and shelter, and, as those immediate needs are provided for incarcerated individuals, the suspension of benefits under subsection 5(3) of the OASA does not make the incarceration more severe or change its quality.

[39] The Appellant agrees with the Respondent's position that subsection 5(3) of the OASA is not retrospective, although he disagrees that the subsection applies to him at all, for any periods of incarceration for which he had already been sentenced prior to the subsection coming into force.

[40] The subsection does not indicate that it applies to only those whose incarceration commenced after it came into force. At the same time, the subsection also does not indicate that it includes or extends to those who were already incarcerated before the subsection came into force.

[41] Although the Respondent argues that there are no new consequences to a discrete prior event or past action and that the only element is an ongoing incarceration, any ongoing incarceration is predicated on a "past action" whereby the individual had committed an offence for which he had been incarcerated. The ongoing incarceration is not based on a current or future action occurring; rather, it relies on a past event or action that leads to the ongoing incarceration. The Appellant does not suggest that the subsection affects the length or quality of his sentence; rather, he claims that the subsection affects his financial security and well-being. Therefore, the new consequence must necessarily be the suspension of the Old Age Security pension and the impact it has on his financial security and well-being.

[42] In my view, the subsection resulted in new consequences for any existing incarceration. The law changed from what it had otherwise been with respect to those

who were already incarcerated. By way of illustration, an individual may have been incarcerated and receiving an Old Age Security pension until subsection 5(3) of the OASA came into force, but once the subsection came into operation, that individual — through no action on his part — saw the pension suspended for the duration of his incarceration. He would have experienced a change in his circumstances once the subsection came into force.

[43] If the subsection is to apply in the Appellant's case, surely it can apply only if it has retrospective application.

[44] The Appellant argues that subsection 5(3) of the OASA should not have any retrospective effect, otherwise Parliament would have expressly set out its intention in this regard. Furthermore, he argues that there is a general presumption against retrospectivity and finally, he argues that there is no basis for rebutting the general presumption. Counsel for the Respondent denies that the subsection is *de facto* retrospective, as it applies to an ongoing incarceration, rather than a past incarceration. The Respondent submits alternatively that the presumption against retrospectivity is rebuttable where there is clear legislative intent, as he claims exists here. Finally, the Respondent claims that the Appellant did not have any vested rights when subsection 5(3) of the OASA came into force.

Express intention

[45] The Appellant argues that if Parliament had intended that subsection 5(3) of the OASA apply retrospectively, it would have expressly stated this in the subsection, much like it had in subsection 10(1) of the *Abolition of Early Parole Act* (AEPA), S.C. 2011, c. 11. Subsection 10(1) of the AEPA reads as follows:

> Application
>
> 10.(1) Subject to subsection (2), the accelerated parole review process set out in sections 125 to 126.1 of the *Corrections and Conditional Release Act*, as those sections read on the day before the day on which section 5 comes into force, does not apply, as of that day, to offenders who were sentenced, committed or transferred to

> penitentiary, whether the sentencing, committal or transfer occurs before, on or after the day of that coming into force.
>
> Restriction
>
> (2) For greater certainty, the repeal of sections 125 to 126.1 of the *Corrections and Conditional Release Act* does not affect the validity of a direction made under those sections before the day on which section 5 comes into force.
>
> (My emphasis)

[46] The Appellant argues that Parliament could have used similar wording in the OASA to expressly suspend payment of an Old Age Security pension to individuals who were already incarcerated when subsection 5(3) of the OASA came into force.

[47] Subsection 10(1) of the AEPA eliminated the accelerated parole review process for offenders, irrespective of whether they had been sentenced, committed or transferred to a penitentiary, before, on or after the subsection came into force. The repeal of the accelerated parole review process clearly applied retrospectively to those sentenced before the law was even passed.

[48] In *Whaling*, although Parliament expressed its intention that the repeal to the impugned legislation there would apply retrospectively, the Supreme Court of Canada nevertheless held that the retrospective changes to the conditions of a sentence in subsection 10(1) of the AEPA constituted "punishment," in violation of paragraph 11(*h*) of the *Charter* not to be punished twice for the same office. The Court held that the violation was not justified under section 1 of the *Charter*. In short, although Parliament had expressly provided for retrospective application, that did not immunize it from a *Charter* challenge.

[49] In response to the Court's determination that subsection 10(1) of the AEPA was unconstitutional, Parliament tabled *Bill C-56: An Act to amend the Corrections and Conditional Release Act* and the *Abolition of Early Parole Act*.[9] Clause 9 of the Bill

[9] Bill C-56 was introduced on June 19, 2017, and it was given first reading.

amends subsection 10(1) of the AEPA to provide for continuation of the accelerated parole review process to offenders in respect of an offence committed before the day on which the AEPA came into force.

[50] Although the Supreme Court of Canada struck down subsection 10(1) of the AEPA as an infringement of the right not to be tried or punished again for the same offence, it did not rule that retrospectivity could never be available to a legislator, if the appropriate conditions are met. The Appellant argues that *Whaling* remains relevant for its general principles against retrospectivity.

[51] The Appellant asserts that the following authorities also indicate that if legislation is to have retrospective effect, it must unequivocally state that it is to have retrospective effect:

i. *R. v. Clarke, supra* — This case involved an individual who argued that the caps on how much credit should be given for pre-sentence custody should not apply to him, because he had committed the offences before the *Truth in Sentencing Act* (TISA) came into force. Section 5 of the TISA applied "only to persons charged after" the Act came into force. Abella J. wrote, "Sentencing legislation will not be given retrospective application unless the legislation unequivocally states that it is to have retrospective effect." The Court agreed that section 5 of the TISA unambiguously applied only to those offenders charged after the amendments came into force, regardless of when the offences were committed. There was no retrospective applicability, given the clear language of the Act.

ii. *Matejka (Re), supra* — The executor of an estate applied for directions with respect to whether section 16 of the *Wills Act*, R.S.B.C. 1979, c. 434, applied retroactively. The B.C. Court of Appeal held that the section could not apply to revoke the bequest to the former spouse unless it was given a retroactive or retrospective effect. The Court of Appeal determined that if the section were to be given retrospective effect, it had to be clear from its terms or by necessary implication.

iii. In *R. v. P.L.E.*[10] — The Ontario Superior Court of Justice held that, "[i]n the absence of an explicit statement of retrospectivity, and the fact that the fact that the amendments substantially alter (or perhaps even eliminate) [a defence], it must be held that Bill C-2 is not retrospective and has prospective force only."

[52] The Appellant has satisfied me that, generally, if any legislation is retrospective, the legislation must be unequivocal that it is to have retrospective effect. In this case, it is not readily apparent whether the legislature intended subsection 5(3) of the OASA to have retrospective effect, given that it does not feature any of the language that one might ordinarily come to expect with retrospectivity, such as currently remains the case with subsection 10(1) of the AEPA. For instance, the language does not expressly stipulate that subsection 5(3) of the OASA extends to those who were incarcerated before the subsection came into force.

General presumption against retrospectivity

[53] The parties agree that there is a general presumption against retrospectivity. The Appellant relies on several authorities, which he asserts establish that the general presumption against retrospectivity applies in the circumstances of this case.

[54] In *Clarke, supra*, at para. 10, Abella J. agreed that sentencing legislation should be presumed not to apply retrospectively, but she noted that the presumption could be displaced by a clear legislation direction that a provision is to apply retrospectively. The impugned section read, in part, "apply only to persons charged after." The Court found that the language in the impugned legislation was sufficiently clear to rebut the presumption. The Respondent argues that this case is distinguishable as it deals with sentencing provisions, which could be construed as prejudicial, rather than beneficial. The Respondent agrees that if legislation has prejudicial consequences, then the general presumption against retrospectivity applies.

[55] In *Matejka, supra*, MacFarlane J.A. stated that a statute is presumed to be *prima facie* prospective unless the intent to give it a retrospective operation arises clearly in the

[10] *R. v. P.L.E.*, 2008 CanLII 67893 (ON SC), at paragraph 45.

terms or by necessary and distinct implication from a construction of the statute. He stated that if legislation is to be given retrospective effect

> it must be clear, from its terms or by necessary implication, that the enactment was intended as one that "creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed": see Sedgewick, The Construction of Statutory and Constitutional Law, 2nd ed. (1874), p. 160." E.A. Driedger, Q.C., postulates, at p. 272 of his article, that the presumption applies "if the statute would attach a new duty, penalty, or disability" - that is to say a prejudicial consequence - to a past event. There is a second, but separate, will of construction that statutes "should not be given a construction that would impair existing rights": see *Acme School Trustees v. Steele-Smith*, [1933] S.C.R. 47 at 50-51, [1933] 1 D.L.R. 545 (per Lamont J.). As no vested rights are affected here, that rule of construction is not applicable.

[56] In *R. v. Bengy*[11] the accused argued that he should be entitled to the retrospective benefit of the new self-defence provisions in the *Criminal Code*. The Ontario Court of Appeal determined that these provisions did not apply retrospectively to offences that pre-dated their coming into force. At paragraph 40, Hourigan J.A. referred to *R. v. Dineley*, 2012 SCC 58, [2012] 3 SCR 272. Hourigan J.A. noted that the majority in that case was unanimous on the governing principle, set out at para. 10 (and adopted by the dissent at paras. 45 to 47):

> There are a number of rules of interpretation that can be helpful in identifying the situations to which new legislation applies. Because of the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional. More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively…. However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases.

[11] *R. v. Bengy*, 2015 ONCA 397.

[57] The Ontario Court of Appeal found that the presumption against retrospectivity did not apply to statutes that were procedural in nature. It acknowledged that the distinction between substantive change and procedural change in legislation was sometimes difficult to ascertain, but that that would depend upon the circumstances of each case. If, for instance, in the case before it, the change was to impact the content and existence of the defence, as opposed to affecting only the manner in which it was presented, then it was more likely to represent a substantive change.

[58] The Court also examined whether the presumption against retrospectivity could be rebutted. The Court wrote:

> The presumption against retrospectivity must be rebutted by evidence of a "clear legislative intent that [the statute] is to apply retrospectively": *Dineley*, at para 10. There is nothing in the record that explicitly demonstrates such intent. At its highest, there is evidence that Parliament recognized the need to clarify the law of self-defence. From this, we are asked to draw an inference that Parliament must have intended that the change take effect retrospectively.

[59] In *R. v. P.L.E.*, *supra*, the Crown argued that legislative changes were simply procedural and therefore should apply retrospectively. The Ontario Court of Justice noted that there had been several decisions made across the country, almost exclusively at the provincial court level, that largely found that the legislation should apply retrospectively. The Court found those decisions compelling, but also found that they were merely instructive as opposed to binding. The Court determined that if an amendment were identified as merely procedural, then it would have retrospective application. However, if it was found to be substantive (which includes impinging upon the rights of an accused), it would be considered as having only prospective effect. The Court cited several examples where legislative changes elsewhere had been determined to have procedural effect only and therefore ought to be retrospectively applied. Ultimately, the Court determined that the legislation effectively abolished a defence that had been available to the applicant, or that had been substantially altered such that it was

insufficient to advance a defence of reasonable doubt on its own. The Court held that, for this reason, the legislation could not be retrospectively applied.

[60] The Supreme Court of the Northwest Territories revisited the debate in *R. v. Hunter*,[12] over whether legislation applied prospectively or retrospectively. The Court held that if new legislation affects substantive or vested rights, there is a presumption against retrospective application. The Court also held that the presumption against retrospective application of new legislation is very strong, but that it is rebuttable. The Court stated that the starting point would be to determine whether any new provisions were substantive and secondly, to determine whether circumstances exist that enable the Court to find that the presumption had been rebutted. There, the Court determined that the changes were substantive.

[61] The Court then turned to the analysis of whether the legislation had prospective or retrospective effect. This involved examining the purpose of the legislation, and the consequences of its retrospective application. In the case of beneficial legislation, the presumption against retrospectivity would be easier to rebut. In the circumstances of that case, the Court found that the "entire system" benefitted greatly from retrospective application. The Court concluded that the presumption against retrospective application was rebutted in that case.

[62] Following these examples, the Appellant urges me to apply the general presumption against retrospectivity and to resolve any ambiguities in his favour. The Respondent on the other hand argues that the presumption against retrospectivity is rebutted in the circumstances of this case, as it is clear that Parliament intended that subsection 5(3) of the OASA be given retrospective effect.

Circumstances when presumption against retrospectivity is rebuttable

[63] Laws are generally presumed not to be applied retrospectively unless expressly stated. The Appellant vigorously argues that there is no indication that Parliament ever

[12] *R. v. Hunter*, 2013 NWTSC 79 (CanLII).

intended that subsection 5(3) of the OASA would have retrospective effect, otherwise it would have expressly set out its intention in this regard.

[64] The Appellant acknowledges that the origins of the subsection trace their roots to public outrage over the fact that the serial killer Clifford Olson was receiving an Old Age Security pension. The Appellant questioned "how can someone like that get his pension?" but argues that the fact that the subsection initially may have been conceived to terminate Clifford Olson's pension is of no relevance in the interpretation of the subsection. The Appellant argues that the fact is relevant only when considering whether the statute has any penal consequences. The Appellant suggests that if the subsection was to have any retrospective application, it was intended as a punitive measure for only those who committed the most heinous of crimes, a category into which he does not fall.

[65] The Appellant has referred me to a series of authorities, which he argues establish that, ultimately, one is to be primarily guided by the language of the statute.

[66] In *Thibault Estate (Re), supra,* the Probate Court of Nova Scotia examined whether section 19A of the *Wills Act* operated retrospectively. It reviewed *Muise v. Nova Scotia (Workers' Compensation Board),*[13] which reviewed the principles of statutory interpretation relating to retrospective application of an amendment to legislation.

[67] The Probate Court cited Dickson, J. for the majority in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue.*[14] The Supreme Court of Canada noted the general rule that statutes are not be construed as having retrospective operation unless such construction is expressly or by necessary implication required by the language of the legislation. Secondly, a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction.

[68] The Probate Court then examined Driedger on the *Construction of Statutes,* Third Edition, 1994, noting that the author, Ruth Sullivan, had written that the

[13] *Muise v. Nova Scotia (Workers' Compensation Board),* [1998] NSJ No 182 (QL).
[14] *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,* [1997] 1 SCR 271, at page 279.

presumption against interfering with vested rights is rebutted by "any adequate indication that the legislature intended its legislation to have immediate and general application despite its prejudicial impact." Sometimes this intention could be found in the transitional provisions.

[69] The Probate Court also examined *Quebec (Attorney General) v. Healey*,[15] where the Supreme Court of Canada cited *Maxwell* on the *Interpretation of Statutes* (12th ed. 1969). The Supreme Court of Canada determined that the presumption against retrospectivity is not a rigid or inflexible rule, but one that is applied not only in light of the language of the statute and the subject matter with which the statute is dealing, but also with regard to legislative intent. This would also extend not only to the language of the statute or the subject matter of the legislation, but also to the circumstances in which it was passed.[16] These considerations could be sufficient to rebut the presumption that the legislative changes were intended to be prospective only in their operation. Applying these principles, the Probate Court of Nova Scotia determined that section 19A of the *Wills Act* was to be read prospectively. It found that the language of the Act was clear and unambiguous and it could find no external evidence to suggest that the legislature intended a contrary conclusion.

[70] The British Columbia Court of Appeal reiterated these principles in *Johnstone v. Wright*,[17] stating that a statute should not be given retrospective construction "if to do so would alter rights already crystallized before the statute was enacted, unless the legislative intention to do so is demonstrated expressly or by necessary implication." The Court concluded that section 120.1 of the *Family Relations Act* was not intended to be retrospective, principally because there was "no direct legislative statement in the new provision stating that the new provision was to be given a retrospective application, and that such a result [was] not required by necessary implication." One of the supporting reasons for coming to this conclusion was also that the word chosen by the legislature to express the terms of the condition bringing the legislation into effect was couched in the

[15] *Quebec (Attorney General) v. Healey*, [1987] 1 SCR 158 (SCC).
[16] *Upper Canada College v. Smith*, 61 SCR 413, 1920 CanLII 8 (SCC), at page 419.
[17] *Johnstone v. Wright*, 2002 BCCA 406.

present tense. From this, the Court inferred that the legislature contemplated events after the enactment.

[71] The Appellant also referred me to *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Castor (The)*,[18] as well as to *Hayward v. Hayward*.[19] In each of these cases, the courts reviewed the rules of statutory interpretation.

[72] The Respondent agrees with the general principles enunciated in the line of authorities upon which the Appellant relies, but argues that, in the circumstances of this case, they are irrelevant or in fact support the Respondent's position.

[73] As I have noted above, the Respondent argues that the presumption against retrospectivity applies only to prejudicial statutes, not to beneficial ones.[20] The Respondent claims that the purpose of subsection 5(3) of the OASA — the suspension of benefits — is not to punish, but rather, to preclude double coverage for an individual's needs, as an individual's needs are already met while incarcerated. The Respondent suggests that the "entire system" benefits from a retrospective application to subsection 5(3) of the OASA.

[74] The Respondent notes that the General Division considered whether the suspension of an Old Age Security pension could constitute a punishment in the context of paragraph 11(*h*) of the *Charter* and would thereby be considered prejudicial. The Respondent argues that the General Division was persuaded by the evidence before it that subsection 5(3) of the OASA is not punitive in nature. Given these findings, the Respondent argues that the presumption against retrospectivity does not arise.

[75] The Respondent argues that the evidence before the General Division was that the purpose of the OASA is to provide for the necessities of life, including food, clothing and shelter for pensioners. The Respondent claims that the evidence before the General Division was that all of these basics are provided while an individual is incarcerated.

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[18] *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c. v. Castor (The)*, [2003] 3 FCR 220, 2002 FCA 479.
[19] *Hayward v. Hayward*, 2011 NSCA 118.
[20] *R. v. Nova Scotia Pharmaceutical Society*, [1991] N.S.J. No. 169, citing E.A. Driedger, Q.C., *Construction of Statutes* (Second Edition, Butterworths 1983) at p. 197.

(The Appellant had argued before the General Division that he was required to pay for telephone calls, as well as room and board, but the General Division found that the evidence did not support his assertions, and that the Appellant's expenses were minimal.)

[76] In *R. v. K.R.J.*,[21] the Supreme Court of Canada examined the constitutionality of retrospective application of amendments to the *Criminal Code* that expanded the scope of community supervision measures. In particular, the Court determined whether the new measures constituted punishment such that they infringed the rights protected under paragraph 11(*i*) of the *Charter*. However, before the Court began its examination, it accepted that the presumption against retroactivity had been rebutted by a clear statement of Parliament. The Respondent argues that Parliament made a clear statement that subsection 5(3) of the OASA too was intended to have retrospective application.

[77] The Respondent notes that the General Division had before it the statement of the then Minister of Human Resources and Skills Development when she appeared before the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities on October 28, 2010. She discussed Bill C-31, *An Act to amend the Old Age Security Act* (short title: *Eliminating Entitlements for Prisoners Act*). Clause 3 of the bill added subsection 5(3) to the *Old Age Security Act.*

[78] I have reviewed the legislative history of Bill C-31, from its introduction in the House of Commons to when it received royal assent.

[79] It is instructive, in endeavouring to ascertain legislative intent, to reproduce portions of Minister Finley's statement. She stated:

> Canadians were shocked and outraged when it was discovered that mass murderers such as Clifford Olson, who admitted to brutally killing 18 children, are receiving old age security and guaranteed income supplement benefits. In a few short years, Paul Bernardo is supposed to receive these benefits, as are Robert Pickton and Russell Williams. This not only angers Canadians but is also outrageous and offensive to me, to the Prime Minister, and to our government, which is why, as soon as we discovered this practice, our Conservative government took immediate

[21] *R. v. K.R.J.*, 2016 SCC 31.

action and introduced Bill C-31, which puts a stop to incarcerated criminals receiving these benefits.

Madam Chair, the purpose of Old Age Security is to help seniors, especially those living on a fixed income, meet their immediate day-to-day basic needs and maintain a minimum standard of living in their retirement. This is in recognition of the contributions that seniors have made to Canadian society, to our economy, and to our communities.

An inmate's basic needs, such as food and shelter, are already met and paid for by tax dollars contributed by hard-working Canadians. Canadians accept these costs because they want to make sure that criminals stay off the streets, and stay in jail, where they belong. What Canadians and our government will not accept are benefits meant for law-abiding, hard-working seniors going to incarcerated criminals. The OAS program is not a savings plan for prisoners in which they accumulate tax dollars for their own personal use off the backs of hard-working taxpayers. Since an inmate's basic needs are already met by public funds, Canadian taxpayers should not also be paying for income support through OAS benefits. It's grossly unfair to make law-abiding Canadian taxpayers pay twice for incarcerated criminals. In short, Madam Chair, whether someone is in jail for three months or thirty years, the fact is, the taxpayers are already footing the bill for their room and board.

Convicted criminals should not be receiving old age security benefits that are intended to help seniors pay for their basic expenses. Accordingly, Bill C-31 puts an end to criminals receiving OAS and GIS benefits while in prison. It aims to do this in two steps. First, once the bill has passed, it would terminate OAS benefits for prisoners sentenced to more than two years in a federal penitentiary. This would affect approximately 400 inmates and would save Canadian taxpayers approximately $2 million.

The federal government would then work with provinces and territories to sign information-sharing agreements to proceed with the termination of these benefits for incarcerated criminals who are serving 90 days or more in a provincial or territorial prison. This would affect about 600 provincial and territorial inmates per year and would result in savings to taxpayers of an additional $8 million annually, for a total of $10 million per year, if all provinces and territories sign on.

[…]

At this point my primary concern is getting this bill passed to end the payments that currently exist. That is the number one priority.

> […]
>
> Until we sign work-sharing agreements with the provinces, we have no idea of knowing even exactly how many prisoners there are. We do have an estimate of about 600 who would be affected by this. We certainly don't know any of the details, and in drafting the bill from the federal perspective, we do not have that information at this point in time, no.
>
> […]
>
> This bill has a specific purpose, which is to change the system so that it is fair to the taxpayers of Canada. We want to ensure that people who committed crimes and were convicted of those crimes are not receiving taxpayers' money for the necessities of life when they don't actually have to pay for anything. That isn't fair to others.
>
> (My emphasis)

[80] Minister Finley explained that the sole purpose of the OASA was to support the needs of seniors, to ensure that they have an adequate standard of living. Another witness before the Committee explained that the OASA was never designed to support families, as there are other governmental programs to support them.

[81] Minister Finley also appeared before the Senate Standing Committee on Social Affairs, Science and Technology on December 9, 2010. She again confirmed that the purpose of Bill C-31 was "to put an end to incarcerated criminals' receiving these benefits." She testified that:

> The inequity right now is that prisoners are getting paid twice by taxpayers for their basic necessities of life. OAS and GIS are designed to ensure that Canadian seniors who helped build the country meet a minimum threshold of support to meet their basic daily needs, such as food, shelter and clothing. These are already being provided to persons who are incarcerated in prison. Therefore, it is unfair that taxpayers should be paying twice for these individuals. Whatever else they have, some prisoners do have other sources of funds. That is entirely their business. However, we believe that once they are in there, paying their debt to society, society should not be paying them twice.

[82] It is clear that Parliament intended for the subsection to "end the payments that currently exist" and to have a retrospective effect.

[83] For one, Bill C-31 and subsection 5(3) of the OASA were drafted in response to public outrage that Clifford Olson in particular was receiving an Old Age Security pension, and to the sentiment that there is little justification to pay an Old Age Security pension if an individual is in a federal institution and is already provided with accommodation and food.

[84] On third reading in the House of Commons, in urging passage of Bill C-31, Michael Savage, MP (Dartmouth-Cole Harbour) referred to a poll taken in April 2010, which showed that 59 percent of Canadians agreed with the statement that all federal prisoners should lose their benefits while in prison. The legislation was drafted in response to public concern.

[85] Two, the name of Bill C-31 was "Eliminating Entitlements for Prisoners." Given the backdrop of the origins of the bill, the subsection was clearly intended to apply to individuals who were already incarcerated. The word "eliminate" also indicates that the intention was to terminate or remove an existing entitlement, more so than precluding an individual from receiving one in future. I note that during third reading of the bill in the House of Commons, the Parliamentary Secretary to the Minister of Public Safety described the subject matter as the "ending of entitlements for prisoners," which also suggests that the legislation would end something that was already in existence.

[86] Three, Minister Finley confirmed this when she approximated the number of individuals who would be affected by the legislation. Parliament clearly contemplated retrospective application, in providing an estimate of the number of individuals who would be affected by passage of the legislation.

[87] Four, when Minister Finley described the purpose of Bill C-31, she referred to people who <u>were</u> convicted of crimes, rather than to people who were going to be convicted of crimes in future, and to criminals "receiving" the pension, suggesting that they were already receiving the pension.

[88] Five, the legislature also indicated that the OASA was intended to support the needs of seniors, and as inmates already receive the necessities of life, there was no need to continue providing what it considered amounted to double coverage.

[89] Significantly, Bill C-31 received widespread Parliamentary support. It received the unanimous consent of the House of Commons following third reading on November 18, 2010. It also passed without any debate in the Senate. Members supported the underlying intention of the Bill that prisoners should not be receiving payment of a pension for their basic needs, when these are provided in prison.

[90] As the Supreme Court of Canada indicated in *Rizzo & Rizzo Shoes Ltd. (Re),*[22] and in *Upper Canada College, supra,* considerations such as legislative intent and the subject matter with which the statute is dealing may be sufficient to rebut the general presumption against retrospectivity.

[91] In *Rizzo,* at para. 21, the Supreme Court of Canada wrote the following:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[92] As I noted above, generally, new legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively. Although subsection 5(3) of the

[22] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, 1988 CanLII 837.

OASA does not expressly state that it applies retrospectively, there is compelling external evidence, some of which I have listed above, that the legislature intended that subsection 5(3) of the OASA should have retrospective effect and affect those individuals who were already receiving an Old Age Security pension even before the subsection came into force. The Appellant has not referred me to any evidence otherwise.

[93] In the Appellant's case, of course, he had yet to be receiving an Old Age Security pension, but expected to receive one, until the subsection came into force. Thus, when the subsection is read in its grammatical and ordinary sense harmoniously with the scheme and the object of the OASA and the intention of Parliament, it is clear that the subsection applies retrospectively.

Did the Appellant have a vested right to an Old Age Security pension?

[94] The Appellant submits that he had a vested right to an Old Age Security pension and that it should not be interfered with. The Respondent counters that the Appellant did not have a vested right and, accordingly, the presumption against interference with vested rights does not come into play.

[95] In *Dikranian v. Quebec (Attorney General)*,[23] the Supreme Court of Canada set out the criteria for recognizing vested rights. At paragraph 39, Bastarache J., for the majority, wrote the following:

> A court cannot find that a vested right exists if the juridical situation under consideration "is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued […]

[96] Similarly, as the Nova Scotia Court of Appeal set out in *Hayward*, *supra*, the presumption against interference with vested rights is not applicable because, in order to

[23] *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73.

have a vested right, an individual's legal situation must be tangible and concrete and this legal situation must have been sufficiently constituted at the commencement of the new statute. In the *Hayward* case, the former spouse's entitlement under the will was no more than "expectancy"; her entitlement arose only after the testator passed away. The Court of Appeal determined that, accordingly, she did not have a vested right which would bring that presumption against interference with vested rights into play.

[97] Further, the Respondent argues that even if the Appellant had been eligible and applied for an Old Age Security pension before the subsection came into force, he could not have claimed a vested right. In *Canada (Attorney General) v. Kowalchak*,[24] the Federal Court of Appeal declared that, "[…] a claimant has no vested right that the rules under which benefits will be paid to him on a weekly basis will remain fixed and immutable after the moment he makes his claim; any change in those rules will be applicable to him." The Respondent asserts that, in the same vein, if the Appellant had in fact been receiving an Old Age Security pension before subsection 5(3) of the OASA came into force, he would have become disentitled for those months (and only those months) in which he remained incarcerated.

[98] The Respondent notes that the Appellant turned 65 years of age in September 2011. Although he had applied for an Old Age Security pension in January 2011, he could not qualify for the pension until he reached 65 years of age and resided in Canada for a requisite number of years. The Appellant became eligible for the Old Age Security pension well after subsection 5(3) came into effect. I concur with the Respondent's submissions that the Appellant did not enjoy a vested right in receiving an Old Age Security pension when Bill C-31, *Eliminating Entitlements for Prisoners Act*, came into force because he had merely an expectation to the pension, rather than a tangible entitlement. And, as the Federal Court of Appeal held, even if the Appellant had been receiving an Old Age Security pension when the subsection came into force, he did not enjoy a vested right to the rules, as any changes to those rules would apply to him.

[24] *Canada (Attorney General) v. Kowalchak*, [1990] F.C.J. No. 447.

ISSUE 3: Did the General Division err in determining that subsection 5(3) of the OASA does not amount to punishment?

[99] Finally, the Appellant submits that, notwithstanding its purported intention to eliminate entitlements to prisoners, subsection 5(3) of the OASA is punitive in nature and therefore should not be upheld.

[100] The Appellant urges me to find that subsection 5(3) of the OASA constitutes a form of penalty or punishment that did not apply at the time of sentencing. Simply put, he claims that suspending payment of the pension is essentially taking money from him, no different from imposing a fine, as both measures involve taking money from him and restricting his financial freedoms. He argues that, as his expectations about the original punishment changed, this amounts to additional punishment. He argues that the General Division failed to appreciate the financial impact the subsection would have on him.

[101] The General Division concluded that subsection 5(3) of the OASA does not carry "true penal consequences" nor does it constitute an additional punishment, contrary to paragraph 11(*h*) of the *Charter*. However, the Appellant suggests that the General Division's analysis and findings on this point are of limited value, as they were against the backdrop of the *Charter* and were made without any material consideration for the financial impact the subsection would have on him.

[102] The Appellant also cites the example of those in halfway houses. He notes that this group of individuals receives accommodations, clothing and other basics, as well as an Old Age Security pension. Although the Appellant had confirmed that he would not be challenging the constitutional basis upon which the General Division dismissed his appeal, the Appellant claims that applying subsection 5(3) of the OASA — whether retrospectively or prospectively — results in having different classes of prisoners and thereby constitutes a form of discrimination. I do not see that this issue had been before the General Division and it has not been properly raised before me.

[103] The Appellant submits that if subsection 5(3) of the OASA is punitive in nature, then the authorities upon which he relies are entirely applicable. He argues that those

authorities establish that statutory provisions of a punitive nature do not attract retrospective application, absent a clear legislative intent. (This is distinct from his argument summarized at paragraph 91 of the General Division's decision. He had previously argued that subsection 5(3) was punitive in nature because it applied retrospectively to him, adding a new condition to his October 2008 sentence, contrary to paragraph 11(*h*) of the *Charter*.)

[104] As I have determined above, even if I should accept that subsection 5(3) of the OASA is prejudicial or punitive, rather than beneficial, legislative intent — as largely corroborated by external evidence in this case — defeats the general presumptions against retrospectivity and interference with vested rights.

[105] The Appellant suggests that he enjoys a right not to be deprived of his financial security, but he has failed to cite any supporting authorities for such a proposition. Indeed, the Federal Court of Appeal in *Kowalchuk, supra*, indicates that it is well within a legislature's jurisdiction to amend the rules governing benefits to individuals. Overall, the Appellant has not convinced me why Parliament is precluded from enacting any legislation, including that of a seemingly punitive financial nature, provided that it can withstand constitutional scrutiny.

CONCLUSION

[106] For the foregoing reasons, the appeal is dismissed.

Janet Lew
Member, Appeal Division

APPEARANCES (via videoconference)

Appellant	E. E.
Representative for the Respondent	Michael Stevenson (counsel)