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

Citation: *B. R. v Minister of Employment and Social Development*, 2018 SST 844

Tribunal File Number: AD-18-24

BETWEEN:

B. R.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: August 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, B. R., was born in India and arrived in Canada in August 1992. In 2002, he applied for an Old Age Security (OAS) pension, on the basis that he had accumulated 10 years of residence in Canada. Shortly afterwards, he also applied for the Guaranteed Income Supplement (GIS), an additional benefit paid to OAS pension recipients who have a low income and are living in Canada.

[3] As part of his OAS pension application, the Appellant declared having returned to India several times, his longest trip being from November 30, 1993, to May 29, 1995 (1993 to 1995 absence). In turn, the Respondent, the Minister of Employment and Social Development (Minister), asked questions to determine whether the 1993 to 1995 absence might have interrupted the Appellant's residence in Canada. In December 2002, however, the Minister approved the Appellant's OAS benefits as though the Appellant's residence in Canada had never been interrupted.

[4] In October 2010, the Appellant's file was chosen for review. Among other things, the Minister changed the initial eligibility decision that it had made in December 2002 and concluded that the Appellant's residence in Canada had, in fact, been interrupted by the 1993 to 1995 absence. As a result, the start date of the Appellant's OAS benefits was postponed by a corresponding period and the Minister demanded that the Appellant repay all of the benefits that he had received between September 2002 and February 2004, an amount totalling roughly $17,000.

[5] The Appellant appealed the Minister's decision to the Tribunal's General Division, but he was unsuccessful. He then applied for leave to appeal the General Division decision to the Tribunal's Appeal Division, an application that I granted some months ago.

[6] I have now concluded that the General Division committed an error of jurisdiction by failing to consider the Minister's power to change its initial eligibility decision. Alternatively, the General Division committed an error of law by misinterpreting the relevant statutory provisions. In my view, the Minister did not have the legal authority to change its initial eligibility decision, and the appeal must therefore be allowed.

PRELIMINARY MATTERS

[7] I concluded that an oral hearing was unnecessary in this case and that the appeal could be decided based on the documents and submissions on file. I chose this form of hearing because:

a) both parties indicated that it was an appropriate or preferred form of hearing;[1]

b) the relevant underlying facts are not in dispute; and

c) the *Social Security Tribunal Regulations* direct me to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[8] To ensure the fairness of the proceedings, I gave each party an opportunity to respond to the submissions of the other party.

[9] In the course of drafting these reasons, I also came to the view that the Federal Court of Appeal's decision in *Kinney v Canada (Attorney General)* could be relevant to the outcome of this appeal.[2] As a result, I invited the parties to provide submissions on the possible application of the *Kinney* decision, but only the Minister replied.[3]

ISSUE

[10] Did the General Division commit an error of jurisdiction or law when it accepted that the Minister had the authority to change its initial eligibility decision?

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[1] Submissions of the Respondent (AD8) at para 41. As part of a telephone conversation with Tribunal staff, the Appellant expressed a preference that the appeal proceed without a hearing.
[2] *Kinney v Canada (Attorney General)*, 2009 FCA 158.
[3] AD11 to AD13.

ANALYSIS

The Appeal Division's Legal Framework

[11] For the Appellant to succeed, he must show that the General Division committed at least one of the three errors (or grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). These errors concern whether the General Division:

a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) erred in law in making its decision, whether or not the error appears on the face of the record; or

c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[12] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.[4] As a result, any error of jurisdiction or law could justify my intervention.

Did the General Division Commit an Error of Jurisdiction or Law?

I. Background Facts

[13] As mentioned above, the Appellant applied for his OAS benefits roughly 10 years after arriving in Canada.[5] Among the eligibility criteria for establishing his entitlement to a partial OAS pension, the Appellant had to show that he had accumulated at least 10 years of residence in Canada.[6] In addition, the Appellant had to be awarded an OAS pension before becoming eligible to receive the GIS.[7]

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[4] *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.
[5] GD2-414.
[6] *Old Age Security Act* (OAS Act), s 3(2).
[7] OAS Act, s 11(7)(*b*).

[14] Under the *Old Age Security Act* (OAS Act), a key distinction is made between people who **reside** in Canada and those who are merely **present** in Canada. The two terms are defined under section 21 of the *Old Age Security Regulations* (OAS Regulations). According to that definition, a person is present in Canada if they are physically within the country's borders. A person resides in Canada, however, only if they make their home and ordinarily live in this country. Assessing a person's residence can be a difficult task. It requires an examination of the whole context of the person whose residence is being assessed, though there is a non-exhaustive list of factors that can guide those who are called on to make these decisions.[8]

[15] In order for the Minister to assess a person's residence, the claimant must provide details on when they resided in Canada and on any relevant absences from Canada.[9] In response to a question on the OAS application form, the Appellant therefore indicated that he started residing in Canada on August 21, 1992. Prior to that date, he had resided in India. However, he also disclosed having returned to India several times after that date, including during the 1993 to 1995 absence.[10]

[16] As part of its 2002 assessment of the Appellant's residence, the Minister wrote to the Appellant, noting the following: "The information we have in your file shows that you arrived in Canada in August 1992 and left in December, 1992. You returned in April of 1993, stayed for 7 months and 3 days, and left for 1 ½ years. In 2 years and 9 months, only 11 months and 13 days were spent in Canada."[11] The Minister was obviously questioning whether the Appellant had, in fact, established his residence in Canada in August 1992 or at some later date. As a result, the Minister sent the Appellant a questionnaire to gather more information on the Appellant's absences from Canada before May 1995.[12]

[17] In his answers to the questionnaire, the Appellant explained that he had intended to start living permanently in Canada on August 21, 1992, and that he obtained provincial health insurance coverage at that time.[13] He said that he went to India in December 1992 to try and find

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[8] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76; *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277; *De Bustamante v Canada (Attorney General)*, 2008 FC 1111.
[9] OAS Regulations, s 20(1).
[10] GD2-416.
[11] GD2-423.
[12] GD2-425 to 428.
[13] GD2-429 to 432.

suitable spouses for his unmarried children. He returned to India in November 1993 to attend their marriages. He acknowledged that he stayed in India for an extended period of time but highlighted that he had obtained a returning resident permit, which he argued—and continues to argue—should be conclusive proof of his continued residence in Canada.[14]

[18] During the 1993 to 1995 absence, the Appellant also explained that he was a visitor in India, did not own a home or business there, did not work there, did not file taxes there, and did not have a driver's licence or health insurance plan there.[15]

[19] The Minister obviously accepted the Appellant's explanations and concluded that his residence in Canada had been uninterrupted since his arrival in August 1992. As a result, the Minister granted the Appellant a partial OAS pension, with GIS benefits, all of which was paid from September 2002.[16]

[20] Later, as part of the Minister's investigation launched in 2010, the Minister gathered more precise information regarding the Appellant's absences from Canada. The Minister also learned that the Appellant had pension income from his previous employment in India and that he had inherited, with his two sons, part ownership in an agricultural property in India. The Appellant initially said that he did not receive any rent from this property, since his sons were the ones cultivating the land, but later declared earning income from the property that ranged from approximately $320 to $435 per year.[17] The Appellant's GIS benefits were recalculated based on his worldwide income, something that is not in issue before me.[18]

[21] In addition, however, the Minister says that the information that was obtained as part of the investigation launched in 2010, when considered alongside the information that it already had on file, clearly demonstrated that the Appellant had not resided in Canada during the 1993 to 1995 absence.[19] As a result, the Minister reversed its 2002 decision on this issue, which meant

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[14] GD2-436.
[15] GD2-431.
[16] GD2-418 to 421.
[17] GD2-37 to 38; GD2-40 to 41.
[18] Indeed, the General Division referred the matter to the Tax Court of Canada under section 28(2) of the OAS Act, something the Minister later said was unnecessary. Ultimately, the appeal was dismissed for want of prosecution. See GD11 and GD12.
[19] Submissions of the Respondent (AD8) at para 33.

that the Appellant only became eligible for his OAS pension and GIS benefits from a later date, thus creating the alleged overpayment on his account.

[22] The Appellant asked the Minister to reconsider its decision concerning his residence in Canada during the 1993 to 1995 absence, but the Minister maintained its new position.

II. General Division Proceeding

[23] The Appellant appealed the Minister's reconsideration decision to the Tribunal's General Division. The General Division decided to hear the appeal by teleconference, but the Appellant did not participate.

[24] The General Division defined the issue that it needed to decide in paragraphs 14, 15, and 43 of its decision: Did the 1993 to 1995 absence interrupt the Appellant's residence in Canada such that the date on which he became eligible for his OAS benefits should be adjusted?

[25] As part of its decision, the General Division noted:

a) section 23(1) of the OAS Regulations, which gives the Minister broad powers to obtain further information or evidence regarding a person's eligibility for a benefit; and

b) section 37(2) of the OAS Act, which states that people must repay any OAS benefits that they might have received in error.

[26] The General Division then embarked on an assessment of the Appellant's residence during the 1993 to 1995 absence. According to the General Division, the Appellant was obligated to prove his residence in Canada on a balance of probabilities, but he failed to do so.

III. The Parties' Submissions

[27] It is worth mentioning that the Appellant has had no legal representation throughout these proceedings and that his English-language abilities are limited. Nevertheless, I understand that these are the two main points that he has tried to raise, both at the General and Appeal Divisions:

a) In 2002, the Minister decided that the 1993 to 1995 absence had not interrupted the Appellant's residence in Canada and the Minister should not be allowed to change that decision at a later date; and

b) The Appellant's residency in Canada was extended during the 1993 to 1995 absence through the issuance of a returning resident permit by Employment and Immigration Canada (and his immigration status remains valid even today).[20]

[28] I will quickly deal with the Appellant's second argument at this time. With respect, the Appellant's immigration status in Canada is only one of many factors that can be taken into account when assessing his residence in Canada under the terms of the OAS Act. Permanent residence for immigration purposes is not the same as residence in Canada for the purpose of establishing one's eligibility for benefits under the OAS Act. As a result, the fact that the Appellant obtained a returning resident permit during the 1993 to 1995 absence is not determinative in the way that he hoped it would be.

[29] For its part, the Minister argues that it faced no legal barriers to its reassessment of the Appellant's residence during the 1993 to 1995 absence. The Minister relies on section 23 of the OAS Regulations and section 37 of the OAS Act to argue that it has an explicit, open-ended, regulatory authority to require, at any time, that OAS pension recipients provide evidence of their eligibility to receive that pension. In addition, if the Minister determines that a person has received a pension to which they were not entitled, those payments become a debt to Her Majesty and are recoverable.

[30] In the Minister's submission, common law principles such as *functus officio* or *res judicata* cannot displace the authority explicitly granted to it by legislation. And for the Tribunal to hold otherwise would be to directly contradict and defeat the clearly expressed will of Parliament.

[31] The Minister also denies that the General Division failed to exercise jurisdiction over an issue raised by the Appellant. Rather, the Minister highlights the General Division's reference to section 23(1) of the OAS Regulations, which is a complete answer to the question of the

[20] AD6 and AD7.

Minister's ability to change its initial eligibility decision. Though the Minister acknowledges that the General Division did not address this issue directly, such an oversight is not an error that warrants the Appeal Division's intervention.

[32] In addition, the Minister underscores that, when it reversed its 2002 decision regarding the Appellant's residence in Canada during the 1993 to 1995 absence, it did not simply look at the same information that had been gathered in 2002. Rather, it was that information, combined with the information that was gathered as part of the investigation launched in 2010, which led it to conclude that the 1993 to 1995 absence had interrupted the Appellant's residence in Canada. Finally, the Minister submits that the General Division applied the facts and the law correctly when it concluded that the Appellant had failed to prove his residence in Canada during the 1993 to 1995 absence.

IV. The General Division Committed Errors of Jurisdiction and Law

[33] In the Appellant's letter to the General Division dated June 10, 2015, he highlighted that his applications for an OAS pension and for GIS benefits had been approved by the Minister in December 2002 and asked that monies withheld be released to him as quickly as possible.[21]

[34] Then, attached to the Appellant's letter dated September 17, 2015, were letters from the Minister showing that the Minister was aware of and questioned him regarding the 1993 to 1995 absence, but then went on to approve his OAS pension and GIS benefit applications from the earliest possible date.[22] The Appellant questioned how his benefits could be terminated 10 years after the Minister had approved them.[23]

[35] In my view, it is sufficiently clear from these documents that the Appellant was challenging the Minister's ability to change its initial eligibility decision. Nevertheless, the General Division indicated in its decision that it had just one issue to decide, namely, the Appellant's residence in Canada during the 1993 to 1995 absence. In the circumstances, I have concluded that the General Division committed an error by failing to exercise jurisdiction over an issue raised by the Appellant.

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[21] GD1A.
[22] GD3-3 to 6.
[23] GD3.

[36] I cannot agree with the Minister's argument that the General Division's reference to section 23(1) of the OAS Regulations means that this error is inconsequential. The General Division's various statements regarding the relevant issue indicate that it never turned its mind to whether the Minister had the statutory power to change its initial eligibility decision. In my view, it cannot be said that the General Division dealt with this issue merely by quoting section 23(1) of the OAS Regulations, especially when:

a) as part of its decision, the General Division clearly articulated the relevant issue a number of times, but the Minister's power to change its initial eligibility decision was not part of that issue;

b) section 23(1) of the OAS Regulations was quoted among a number of other statutory provisions, though its relevance to the decision was never explained; and

c) section 23(1) of the OAS Regulations was not analyzed or interpreted in any way.

[37] Alternatively, the General Division committed an error of law by misinterpreting section 23 of the OAS Regulations. If the General Division did indeed conclude that the Minister had the power to change its initial eligibility decision based on that provision, then it did so without applying any of the relevant principles of statutory interpretation, as I have set out below.

[38] Among the powers available to me under section 59(1) of the DESD Act, I have decided that this is an appropriate case in which to give the decision that the General Division should have given because:

a) the factual record is complete and there is little or no dispute as to the relevant facts;

b) I have the power to decide any question of law or fact that is necessary for the disposition of this appeal;[24]

c) there is little or no reason to return the matter to the General Division; and

[24] DESD Act, s 64.

d) the Tribunal is required to conduct its proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[25]

[39] I have concluded that, when properly interpreted, section 23 of the OAS Regulations did not authorize the Minister to change its initial eligibility decision. Given this limitation on the Minister's statutory powers, there was no need for the General Division to assess the Appellant's residence during the 1993 to 1995 absence. Rather, the General Division should have confirmed the Appellant's entitlement to receive his partial OAS pension and GIS benefits starting in September 2002.

[40] How, then, do I interpret section 23 of the OAS Regulations?

V. Relevant Principles of Statutory Interpretation

[41] The accepted approach to statutory interpretation states that "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."[26] Section 12 of the *Interpretation Act* also states that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[42] The objects of the OAS Act, including its altruistic purpose, have been highlighted by the Federal Court as follows:[27]

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

[43] The Federal Court of Appeal has described the OAS Act as providing income support to elderly persons, which is a pressing and substantial public policy objective.[28] The Tax Court of

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[25] *Social Security Tribunal Regulations*, s 3(1)(*a*).
[26] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21.
[27] *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466 at para 28.

Canada characterized the OAS Act as "social welfare legislation which must be construed liberally to favour those who might reasonably be expected to benefit from it."[29]

[44] Importantly, the main provision on which the Minister relies in this case, section 23, is part of the OAS Regulations and not part of the OAS Act. In situations where a decision maker must reconcile an act and its regulations, the Federal Court of Appeal has directed that the act is the starting point and that the two should be interpreted as harmoniously as possible but that, in the end, regulations are bound by the scope of their enabling statutes:[30]

> Normally, in cases such as this one, the Court will examine the provisions of the enabling statute first in order to ascertain precisely what it is that Parliament has allowed to be regulated. It will then turn to the regulation. There being a presumption that the regulation has been passed in accordance with the provisions of the enabling statute and that there is coherence between the terms used in the statute and those used in the regulation, the Court will endeavour to interpret the regulation in such a way as to keep it within the confines permitted by the enabling statute. Should that prove impossible, the regulation or part of it will be declared *ultra vires*. Reconciliation is therefore the rule, and it will be achieved in most cases.

[45] This approach has previously been applied in the context of the OAS Act and OAS Regulations.[31]

VI. Section 23 of the OAS Regulations

[46] As mentioned above, the Minister argues that section 23 of the OAS Regulations provides it with broad powers to investigate and reassesses a person's eligibility for an OAS benefit. In essence, the Minister submits that a person's eligibility for an OAS benefit can be reassessed at any time and for any reason. In addition, the Minister contends that, whenever it conducts such a reassessment, the beneficiary is obliged to prove their entitlement to the benefit that they are receiving.[32]

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[28] *Collins v Canada*, [2000] 2 FC 3 (TD), aff'd 2002 FCA 82 at para 40.
[29] *Ward v Canada (Human Resources and Social Development)*, 2008 TCC 25 at para 8.
[30] *Ontario Hydro v Canada*, [1997] 3 FC 565, 1997 CanLII 5299 (FCA).
[31] *Stachowski v Canada (Attorney General)*, 2005 FC 1435 at paras 32–33.
[32] *De Carolis v Canada (Attorney General)*, 2013 FC 366 at para 32.

[47] The Minister's powers under section 23 of the OAS Regulations are expressed as follows:

> **Further Information and Investigation Before or After the Approval of an Application or Before or After the Requirement of an Application Is Waived**
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> **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.
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> **(2)** The Minister may at any time make an investigation into the eligibility of a person to receive a benefit including the capacity of a beneficiary to manage his own affairs.

[48] In support of its position, the Minister also relies on section 37 of the OAS Act, which states that people must repay any amounts that they might have received but to which they were not entitled:

> **Return of benefit where recipient not entitled**
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> **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**
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> **(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.

[49] In my view, the powers that the Minister claims to have been given by section 23 of the OAS Regulations are extraordinary, and the Minister's interpretation cannot be supported on a proper reading of the relevant provisions.

[50] In keeping with the directions of the Federal Court of Appeal set out above, I have started my analysis with a review of the OAS Act.

[51] Under the OAS Act, the eligibility requirements that a claimant must meet in order to be entitled to a full or partial OAS pension are set out in section 3. Once the Minister is satisfied that those requirements have been met, the Minister approves the application, but the effective date of the Minister's approval varies according to section 5 of the OAS Regulations. This is, essentially, the Minister's initial eligibility decision.

[52] Payment of an OAS pension begins the month after its approval and continues, by statute, throughout the lifetime of the pensioner.[33] Importantly, the OAS Act provides only two circumstances in which an OAS pension ceases to be payable:[34]

a) on written request from the pensioner, or

b) on the pensioner's death.

[53] However, the OAS Act does provide several circumstances in which an OAS pension can be suspended, such as when the pensioner has less than 20 years of residence in Canada and leaves Canada for a prolonged period or ceases to reside in Canada.[35] An OAS pension can also be suspended if the pensioner is incarcerated or if the pensioner fails to comply with any statutory obligations.[36] In the case of a suspension, however, the OAS Act always provides for the pension to be reinstated once the pensioner's status is "normalized".

[54] In my view, the OAS Act creates an important distinction, therefore, between the cessation of a pension on the one hand and the suspension of a pension on the other. Critically,

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[33] OAS Act, s 8(1).
[34] OAS Act, s 8(3).
[35] OAS Act, s 9(1)–(4).
[36] OAS Act, ss 5(3), 8(2.1), and 9(5).

there are very few circumstances in which a pensioner's OAS pension can be ceased, and these circumstances are so straightforward that they are unlikely to be the subject of an investigation.

[55] I acknowledge, of course, that sections 37(1) and (2) of the OAS Act reflect the possibility that a pensioner's eligibility for OAS benefits, or the amount of their OAS benefits, might change over time. Indeed, I have just highlighted situations in which a pensioner's OAS pension should be suspended, and the amount of a pensioner's GIS benefit, for example, can change depending on their marital status. As a result, there are a number of circumstances that the Minister might want to investigate, even after making its initial eligibility decision, to determine whether pensioners are still entitled to their OAS benefits or are receiving those benefits in the correct amount.

[56] In my review of the OAS Act, however, I have not been able to find any statutory basis supporting the Minister's ability to change its previous decisions, such as its initial eligibility decisions. The law favours finality, and pensioners legitimately expect that they can rely on the Minister's eligibility decisions. As a result, one would expect to find clear statutory language if the Minister had the power to revisit these decisions. In the absence of such a provision, I do not consider this situation as being among those that could lead to a change in a pensioner's entitlement, as contemplated by section 37 of the OAS Act.

[57] Significantly, provisions permitting the Minister to change its earlier decisions exist elsewhere in the OAS Act and in other statutes administered by the Minister, which makes their absence in relation to eligibility decisions under the OAS Act all the more striking.

[58] For example, section 44.1(4) of the OAS Act authorizes the Minister to rescind or amend previous decisions relating to the imposition of a penalty. This power can only be exercised in certain situations, however, such as on the presentation of new facts.[37] A similar provision can be found in section 90.1(4) of the *Canada Pension Plan* (CPP).

[59] Significantly, in the context of determinations made under the CPP, the Minister also has the authority to rescind or amend other decisions based on new facts.[38] The Minister seems to

[37] OAS Act, s 44.1(4)(*a*)–(*d*).
[38] CPP, s 81(3).

argue that it is exercising just such a power in this case, yet the OAS Act contains no equivalent provision.

[60] In addition, it is worth noting the *Employment Insurance Act*, which is also administered by the Minister, though most powers are exercised by the Canada Employment Insurance Commission (Commission). That statute gives the Commission the power to rescind or amend previous decisions in relation to a claim for benefits.[39] It also gives the Commission broad powers to reconsider previous decisions more generally, though these powers can only be exercised within specific time frames.[40]

[61] Indeed, the power that the Minister claims to have—to change previous decisions at any time and for any reason—is extraordinary. Not even the Minister of National Revenue has been given such powers under the *Income Tax Act*.[41]

[62] Given that Parliament gave the express power to rescind, amend, and reconsider previous decisions in other benefits-conferring contexts, one would have expected Parliament to use similar language in the OAS Act if it had intended to give the Minister the power to change its initial eligibility decisions.

[63] In this case, the Minister's investigation led to a change in the Appellant's eligibility date for receiving his OAS pension and GIS benefits. However, it is important to recognize that changing an initial eligibility decision could (and sometimes does, in my experience) lead to the complete cessation of OAS benefits. As I highlighted above, however, the OAS Act only permits the cessation of OAS benefits in two circumstances: on the pensioner's death or on written request from the pensioner. Investigations and the changing of eligibility decisions are not among the situations in which the Minister is authorized to cease a pensioner's OAS benefits. Rather, an investigation could lead the Minister to conclude that a pensioner's benefits should be suspended, so long as it is for a reason set out in the OAS Act.

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[39] *Employment Insurance Act*, s 111.
[40] *Ibid*, s 52.
[41] See, for example, *Income Tax Act*, s 152(4).

[64] My interpretation of the OAS Act is also reinforced by the scope of the regulation-making authority granted to the Governor in Council. In this respect, section 34(*j*) of the OAS Act limits the Governor in Council's authority as follows:

> **Regulations**
>
> **34** The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect and, without restricting the generality of the foregoing, may make regulations
>
> […]
>
> ***(j)*** providing for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary and the reinstatement or resumption of the payment thereof;

[65] Again, there is no indication that Parliament intended to give the Governor in Council the authority to create regulations that would allow the Minister to change previous eligibility decisions, potentially leading to the retroactive cessation of OAS benefits and the very significant repayment obligations that such decisions might entail.

[66] I acknowledge that the words used in section 23 of the OAS Regulations give broad powers to the Minister; however, the interpretation of this subordinate legislation cannot be divorced entirely from its enabling statute. Rather, I must try to interpret section 23 of the OAS Regulations in such a way as to keep it within the confines permitted by the OAS Act. In other words, section 23 of the OAS Regulations must be interpreted harmoniously with the OAS Act and in a way that respects its confines.

[67] In this context, I have concluded that the interpretation that the Minister is urging me to adopt goes beyond the scope of the enabling statute and cannot be accepted. In my view, the Minister's interpretation also runs contrary to the liberal construction of the OAS Act and Regulations, which the courts have directed me to adopt, and to their objects, which are altruistic in nature. Given that the Appellant's application for OAS benefits was approved while the Minister was aware of the 1993 to 1995 absence, it also strikes me that the Appellant is a person who could reasonably expect to benefit from the OAS Act and Regulations and that the relevant provisions should be liberally construed in his favour.

[68] I agree, therefore, that the Minister has broad powers to insist that claimants provide documents proving their eligibility for an OAS pension before its approval. Once an OAS pension has been approved, however, I do not interpret section 23 of the OAS Regulations as authorizing the Minister to go back and change its initial eligibility decision. Rather, once a pensioner's OAS pension has been approved, section 23 of the OAS Regulations only authorizes the Minister to investigate that person's ongoing entitlement to benefits, including the amount of their benefits.

[69] In my view, this limitation on the Minister's powers is further reinforced by the Federal Court of Appeal's decision in *Kinney*. The Minister had determined that Mr. Kinney was eligible for a CPP disability pension, though his eligibility for that pension could change if his condition improved. Indeed, the *Kinney* decision arose from the Minister's attempt to cancel Mr. Kinney's disability pension on the grounds that he had regained the capacity to work.

[70] This case and the *Kinney* case arise from different regulatory schemes, though there are many similarities between the two. In particular, the Minister is responsible for administering both the CPP and the OAS Act. In addition, both regulatory schemes give the Minister broad powers to investigate a recipient's potentially changing eligibility for a benefit and to recover any amounts that were paid in error.[42]

[71] In *Kinney*, the Minister's reconsideration decision was made in May 2004, though it sought to cancel his disability pension from December 1992. Among Mr. Kinney's many arguments, the one the Federal Court of Appeal focused on was whether the Minister had the statutory authority to apply its disqualification decision all the way back to December 1992. Significantly, the Court noted that the Minister had made a decision on April 2, 1998, confirming Mr. Kinney's eligibility for a disability pension up to that date.

[72] The Court's decision was delivered from the bench, so it is quite short and does not contain as much detail as one might like. Nevertheless, while the Court confirmed the Minister's ability to cancel Mr. Kinney's disability pension, it concluded that the Minister did not have the statutory power to change its earlier decision of April 2, 1998. As a result, the Minister could not cancel Mr. Kinney's disability pension for the period before that date.

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[42] See, for example, CPP, ss 66 and 70(1)(*a*); *Canada Pension Plan Regulations*, ss 68(2) and 69–70.

[73] The Minister argues that *Kinney* has no application to this case given the factual differences between the two. I disagree. Instead, I am convinced that the Federal Court of Appeal's reasoning in *Kinney* should apply to this case too. Under both statutory schemes, the Minister has broad powers to investigate a beneficiary's entitlement to a benefit, but the Federal Court of Appeal concluded that such powers do not include the power to change a previous eligibility decision.

[74] According to the Minister, the *Kinney* case should be distinguished because at least two eligibility decisions were made in that case: an initial one (the date of which is unknown), followed by the one dated April 2, 1998, which confirmed Mr. Kinney's entitlement to a disability pension up to that date. The Minister highlights that, in this case, there is only an initial eligibility decision and no subsequent decision. In my view, the key to the *Kinney* decision is not the number of eligibility decisions, but that the last eligibility decision made by the Minister should be treated as having been correct.

[75] In this case, the Minister decided, in December 2002, that the Appellant was eligible for an OAS pension and for GIS benefits because, in August of that year, he had accumulated 10 years of residence in Canada. If that decision is treated as being correct, the Minister could not later go back and say that, by August 2002, the Appellant had accumulated any less than 10 years of residence in Canada.

[76] Significantly, I previously noted the Minister's authority under section 81(3) of the CPP to rescind or amend one of its previous decisions; however, that power did not exist at the time of the Federal Court of Appeal's decision in *Kinney*. As a result, the two statutory schemes were even more similar then than they are now.

[77] I hasten to add that my conclusion in this case should not be interpreted as suggesting that OAS pension applications cannot be scrutinized or investigated. To the contrary, the OAS Act gives the Minister the power to carefully assess the residence of claimants before approving their applications. And once applications are approved, the Minister can continue to assess a pensioner's ongoing eligibility for benefits (or their amount). By way of illustration only, the Minister could have decided, even in 2010, that the Appellant's residence in Canada had been

interrupted the day after the initial eligibility decision and demanded that the Appellant repay most of the OAS benefits that he had received.[43]

[78] However, the OAS Act and Regulations do not allow the Minister to approve an application and then wait years—years during which memories fade, illness might set in, and documents are likely to be lost or destroyed—and then insist that pensioners re-prove their residence in Canada during a period that can stretch back over decades. Indeed, I have personally ruled on a number of cases in which the Minister has insisted that pensioners do just that or risk being liable for overpayments that can reach $100,000 or even $200,000.

[79] In *M. E. v Minister of Employment and Social Development*,[44] a decision relied on by the Minister, the Minister insisted that the pensioner re-prove his residence in Canada starting from 1972, the year when he first arrived in this country. The Minister's investigation and reassessment imposed significant stress on the pensioner who had to seek financial assistance during the six or seven years while his OAS pension and GIS benefits were suspended.

[80] In my view, these cases illustrate the significant unfairness and tremendous stress that can be caused to pensioners by adopting the Minister's interpretation of section 23 of the OAS Regulations. Indeed, if the Minister's position were accepted, the Minister could repeatedly reassess a pensioner's case to the point of harassment. Rather, I have concluded that such an interpretation should be rejected as being at odds with the objects and purpose of the OAS Act.

[81] I recognize that there are compelling situations in which the Minister might well want to cancel an OAS benefit and demand that monies already paid out be reimbursed, such as on the basis of new facts or in cases of fraud. However, the Minister only has the powers given to it by legislation, and I am unable to give the Minister any additional powers that it might need or want. Rather, I can interpret the scope of the Minister's existing powers and set aside any decisions that it might make without the necessary legislative authority.

[82] Importantly, it is not as though the Minister is powerless in cases where a person has obtained OAS benefits using fraudulent means. In such cases, the options available to the

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[43] OAS Act, s 9(3).
[44] *M. E. v Minister of Employment and Social Development*, 2017 SSTGDIS 6, 2017 CanLII 33760.

Minister can be found in sections 44 and 44.1 of the OAS Act: these provisions provide that people who knowingly make false or misleading statements on their application forms risk being prosecuted for a summary conviction offence or having an administrative penalty levied against them.[45]

[83] I also leave open the possibility that the Minister could, as a consequence of finding that a pensioner had obtained a benefit using fraudulent means, exercise its powers under sections 9(5) and 37 of the OAS Act to suspend the payment of a pension and recover any amounts paid in error on the basis that the pensioner had failed to comply with their statutory obligations. In any event, if Parliament intends for the Minister to have the power to cancel and demand the repayment of an OAS benefit, then it should consider expressing its intent more clearly by amending the OAS Act and Regulations to insert plain statutory language similar to what has been used elsewhere.

[84] Critically, however, this is not a case in which the Minister alleges that the Appellant obtained his OAS benefits by fraudulent means. Nor is it a case in which the Minister claims to have changed its initial eligibility decision based on “new facts” (namely, facts that could not have been discovered at the time the Minister made its initial eligibility decision).

[85] More specifically, the Minister has not attempted to use any of its powers under section 44 or 44.1 of the OAS Act against the Appellant, and there are no allegations that the Appellant provided any false or misleading statements before the 2002 approval of his OAS benefits. And while the Minister underscores the fact that its reassessment was based on additional evidence that only came to light in the course of the investigation that it launched in 2010, there is no reason to believe that that information could not have been discovered in 2002, had the Minister conducted a more thorough investigation at that time (which is to say, asked just a few more questions).

[86] Before ending this analysis, it is worth recognizing that there is at least one case in which the Federal Court upheld a finding that a pensioner was liable to pay back benefits that he had received following a reassessment that led the Minister to conclude that, contrary to its initial

[45] OAS Act, ss 44 and 44.1.

eligibility decision, the pensioner had, in fact, never established his residence in Canada.[46] In that case, however, the Federal Court never turned its mind to the Minister's statutory authority to conduct such a reassessment. Indeed, this may be the first time that this question is tackled directly.

[87] For all of these reasons, I have concluded that the OAS Act and Regulations did not give the Minister the power to change its initial eligibility decision in the way that it did.

CONCLUSION

[88] In my view, the Minister overstepped its powers under the OAS Act and Regulations when it tried to change the initial eligibility decision that it had made in December 2002. Exercising my authority under sections 59 and 64 of the DESD Act, I find that the Appellant was entitled to receive his partial OAS pension and GIS benefits starting in September 2002.

[89] The appeal is allowed.

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	B. R., self-represented Michael Stevenson, Representative for the Respondent

[46] *De Carolis*, *supra* note 32.

Appendix

***Old Age Security Act,* RSC 1985, c O-9.**

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.

Exception

(2) Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of

(*a*) a day one year before the day on which the application was received, and

(*b*) the day on which the applicant attained the age of sixty-five years,

as may be prescribed by regulation.

[…]

Duration

(3) Subject to this Act, the pension shall continue to be paid during the lifetime of the pensioner and shall cease with the payment for the month in which the pensioner dies.

Suspension of pension where pensioner leaves Canada

9 (1) Where a pensioner, having left Canada either before or after becoming a pensioner, has remained outside Canada after becoming a pensioner for six consecutive months, exclusive of the month in which the pensioner left Canada, payment of the pension for any period the pensioner continues to be absent from Canada after those six months shall be suspended, but payment may be resumed with the month in which the pensioner returns to Canada.

No suspension after 20 years residence

(2) In the circumstances described in subsection (1), payment of the pension may be continued without suspension for any period the pensioner remains outside Canada if the pensioner establishes that at the time the pensioner left Canada the pensioner had resided in Canada for at least twenty years after attaining the age of eighteen years.

Suspension of pension where pensioner ceases to reside in Canada

(3) Where a pensioner ceases to reside in Canada, whether before or after becoming a pensioner, payment of the pension shall be suspended six months after the end of the month in which the pensioner ceased to reside in Canada, but payment may be resumed with the month in which the pensioner resumes residence in Canada.

No suspension where pensioner had 20 years residence in Canada

(4) In the circumstances described in subsection (3), payment of the pension may be continued without suspension if the pensioner establishes that at the time the pensioner ceased to reside in Canada the pensioner had resided in Canada for at least twenty years after attaining the age of eighteen years.

Failure to comply with Act

(5) Where a pensioner fails to comply with any of the provisions of this Act or the regulations, payment of the pension may be suspended, and where a pension is so suspended, payment may be resumed when the pensioner has complied with those provisions.

Request that pension cease to be payable

9.1 (1) Any pensioner may make a request to the Minister in writing that their pension cease to be payable.

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Regulations

34 The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect and, without restricting the generality of the foregoing, may make regulations

[…]

(j) providing for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary and the reinstatement or resumption of the payment thereof;

• • •

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.

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Offences

44 (1) Every person who

> **(a)** knowingly makes a false or misleading statement in any application or statement required or permitted by this Act or makes any such application or statement that by reason of any non-disclosure of facts is false or misleading or obtains any benefit payment by false pretences, or
>
> […]

is guilty of an offence punishable on summary conviction.

• • •

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

> **(*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*).

[…]

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…

***Old Age Security Regulations*, CRC, c 1246.**

Further Information and Investigation Before or After the Approval of an Application or Before or After the Requirement of an Application Is Waived

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.

(2) The Minister may at any time make an investigation into the eligibility of a person to receive a benefit including the capacity of a beneficiary to manage his own affairs.

***Canada Pension Plan*, RSC 1985, c C-8.**

Return of benefit where recipient not entitled

66 (1) A person or estate that has received or obtained by cheque or otherwise a benefit payment to which the person or estate is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person or estate 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.

• • •

When pension ceases to be payable

70 (1) A disability pension ceases to be payable with the payment

(*a*) for the month in which the beneficiary ceases to be disabled;

[…]

• • •

Rescission or amendment of decision

81 (3) The Minister may, on new facts, rescind or amend a decision made by him or her under this Act.

***Canada Pension Plan Regulations*, CRC, c 385.**

Withholding of Benefits

59 (1) Where evidence is required under the Act or these Regulations to determine the eligibility or continuing eligibility of any beneficiary to receive any amount payable as a benefit and where the Minister has requested such evidence and the beneficiary has not complied with the request or the Minister is not satisfied with the evidence furnished by that beneficiary, the Minister may, on 30 days written notice, withhold payment of the benefit until such time as the beneficiary has furnished the evidence and the Minister is satisfied as to the eligibility of that beneficiary to receive benefits.

(2) Where payment of a benefit that has been withheld under subsection (1) is resumed, the benefit shall be paid for any portion of the period of withholding during which the beneficiary was entitled to receive benefits.

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Determination of Disability

68 (2) In addition to the requirements of subsection (1), a person whose disability is to be or has been determined pursuant to the Act may be required from time to time by the Minister

(*a*) to supply a statement of his occupation and earnings for any period; and

(*b*) to undergo such special examinations and to supply such reports as the Minister deems necessary for the purpose of determining the disability of that person.

• • •

69 (1) For the purpose of determining whether any amount shall be paid or shall continue to be paid as a benefit in respect of a person who has been determined to be disabled within the meaning of the Act, the Minister may require that person from time to time

(*a*) to undergo such special examinations,

(*b*) to supply such reports, and

(*c*) to supply such statements of his occupation and earnings for any period,

as the Minister may specify.

[…]

70 (1) Where a person who has been determined to be disabled within the meaning of the Act fails without good cause to comply with any requirement of the Minister made under section 69, he may be determined to have ceased to be disabled at such time as the Minister may specify except that such time shall not be earlier than the day of failure to comply.

(2) For the purpose of subsection (1), ***good cause*** means a significant risk to a person's life or health.

***Employment Insurance Act*, SC 1996, c 23.**

Reconsideration of claim

52 (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

Decision

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

Amount repayable

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(*a*) the amount calculated is repayable under section 43; and

(*b*) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

Amount payable

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

Extended time to reconsider claim

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

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Rescission or amendment of decision

111 The Commission may rescind or amend a decision given in any particular claim for benefits if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

***Interpretation Act*, RSC 1985, c I-21.**

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.