Citation: *Minister of Employment and Social Development v AL*, 2021 SST 573

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Minister of Employment and Social Development
Representatives:	Samaneh Frounchi and Ian McRobbie
Respondent:	A. L.
Representative:	Asaf Rashid

Decision under appeal:	General Division decision dated November 24, 2020 (GP-18-2602)

Tribunal member:	Shirley Netten
Type of hearing:	Videoconference
Hearing date:	June 28, 2021
Hearing participants:	Appellant's representatives Respondent by her Power of Attorney Respondent's representative
Decision date:	October 8, 2021
File number:	AD-21-60

Decision

[1] The appeal is allowed in part. The General Division made an error of law. The Minister of Employment and Social Development Canada (Minister) has an implied discretionary power to reopen her[1] initial Old Age Security (OAS) decisions.[2]

[2] The Minister properly exercised her discretion when revisiting previous approvals of the Respondent A. L.'s Guaranteed Income Supplement (GIS). However, the Respondent was not in a common-law relationship until November 2015. She was overpaid the GIS for only seven months and not for 16 years.

Overview

[3] The Respondent received the GIS for many years, at the rate for a single person. It turns out that she had a common-law partner (CH). After CH died in 2016, the Respondent applied for a Canada Pension Plan survivor's pension, as CH's common-law spouse.

[4] Based on information from the Respondent, the Minister[3] concluded that she and CH had been common-law partners from 1996 to 2016. The Minister determined that the Respondent had been overpaid a total of $121,855.53 in GIS payments, from July 2000 to June 2016. The Respondent asked for reconsideration, and then appealed to the Social Security Tribunal's General Division. She said that she and CH began living together in November 2014.

[5] The General Division found in favour of the Respondent, but it did not decide when she and CH became common-law partners. Rather, the General Division found that the Minister did not have the authority to change her previous approvals of the

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[1] I heard this appeal when the Minister of Employment and Social Development Canada was the Honourable Carla Qualtrough.
[2] By OAS decisions, I mean decisions about all benefits available under the *Old Age Security Act*, and not just the OAS pension.
[3] For simplicity, this decision refers to the Minister's authority and decisions. In practice, Service Canada acts on behalf of the Minister, conducting investigations and making decisions under the OASA.

Respondent's GIS. This meant that the Respondent could keep the GIS that she had received.

[6] The Minister appealed to the Appeal Division. I have now found that the Minister has an implied discretionary power to reopen initial OAS decisions. I have also found that the Minister exercised her discretion in a judicial manner in this case, but the revised decision was wrong. The Respondent was in a common-law relationship from November 2015 until CH's death in June 2016. Based on the couple's combined income, the Respondent was not entitled to the GIS for the period December 2015 to June 2016 inclusive. Her overpayment is limited to this seven-month period.

Issues

[7] In this appeal, I will answer the following questions:

a) Did the General Division make an error of law when it decided that the Minister does not have the power to change her initial decisions under the *Old Age Security Act* (OASA)?

b) If so, how should I fix that error?

- Should I give the decision the General Division should have given?
- Is the Minister's power discretionary?
- Does the Tribunal have jurisdiction to consider the Minister's exercise of her discretion?
- Did the Minister exercise her discretion in a judicial manner?
- When was the Respondent in a common-law relationship?
- What is the revised GIS decision?

The General Division made an error of law: the Minister has an implied authority to reopen her initial decisions

[8] This appeal was heard alongside two other appeals raising a common legal issue: did the General Division err in law when it decided that the Minister could not change initial decisions made under the OASA?

[9] These reasons talk about the Minister's "initial" decisions. "Initial" refers to the fact that the Minister makes this decision at the first level, after a claimant applies for benefits (or their application is waived). An "initial" decision is contrasted with a "reconsideration" decision made at the second level, in response to a claimant's request for reconsideration. An initial decision may be a one-time decision or an annual decision. It is not preliminary, tentative or interim. Unless a claimant requests a reconsideration within 90 days, the decision is implemented by Service Canada.

I am deciding whether the General Division's interpretation was right or wrong

[10] One of the grounds of appeal to the Appeal Division is that the General Division "erred in law in making its decision."[4] Based on this unqualified language, I agree with the Minister's representatives that I don't owe the General Division any deference on questions of law. This means that I am deciding whether the General Division's interpretation of the law is correct, and not whether it is reasonable.[5] Because of this, I can turn directly to the question of whether the Minister does or does not have the power to reopen her initial OAS decisions.

The General Division applied the doctrine of *functus officio*

[11] When courts and tribunals ask whether a decision-maker has the power to reopen or change a decision, they often talk about the doctrine of *functus officio*.

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[4] See section 58(1)(b) of the *Department of Employment and Social Development Act.*
[5] For the purpose of judicial review, the federal courts review the reasonableness of the Tribunal's interpretations of the law (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). This is a deferential approach, and leaves open the possibility that more than one interpretation can be reasonable. An appeal to the Appeal Division is not a judicial review of a General Division decision. The Appeal Division is guided by the grounds of appeal set out in the *Department of Employment and Social Development Act*.

Functus officio is a Latin term for the principle that a decision-maker, having made their decision, has no further power in the matter. As a general rule, judges, adjudicators and administrative officials can't reopen their decisions; they "must get it right the first time, for that will be their only time."[6] The principle of *functus officio* favours finality. It lets people rely on the decisions they receive.

[12] Sometimes, a law says that an administrative body can reopen its decisions. This overrides the doctrine of *functus officio.* For example, the *Canada Pension Plan* and the *Employment Insurance Act* both include specific provisions allowing the Minister or the Canada Employment Insurance Commission (Commission) to change an initial decision.[7] In contrast, the OASA says that the Minister must reconsider her initial decision if a claimant asks, but it doesn't say whether the Minister can revisit an initial decision **on her own initiative**. I agree with the General Division that the OASA does not expressly give this power to the Minister.

[13] The General Division decided that this silence, especially compared to the explicit authority in other laws, means that the Minister has no power to reopen her initial OAS decisions (at least not in the absence of fraud or misrepresentation).[8] Without specifically saying so, the General Division effectively applied the doctrine of *functus officio*.

Functus officio doesn't always apply

[14] Initially, *functus officio* prohibited the reopening of final decisions — those where the decision-maker had completed their task and the decision was ready for

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[6] Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020.
[7] Section 81(3) of the *Canada Pension Plan* allows the Minister to change a decision if there are new facts. Section 111 of the *Employment Insurance Act* allows the Commission to change a decision if there are new facts, or if important facts weren't known or were mistaken, and section 52 allows the Commission to reconsider its benefits decisions within certain timeframes.
[8] The General Division followed the lead of the Appeal Division in *BR v Minister of Employment and Social Development*, 2018 SST. *BR* also relied on *Kinney v Canada (Attorney General)*, 2009 FCA 158. I have not addressed *Kinney* because the parties did not rely on it, and I find it to be of little assistance. *Kinney* said that the Minister's decision to stop paying a disability pension (under section 70 of the *Canada Pension Plan*) could not take effect prior to a decision confirming entitlement. *Kinney* did not directly address the Minister's power to reopen a previous decision.

implementation — with limited exceptions.[9] But in 1989, in a case called *Chandler*, the Supreme Court of Canada called for greater flexibility in the administrative context. Among other things, the Court said that the principle of *functus officio* "should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."[10] Courts have since found that some administrative decision-makers have an implied statutory power to reconsider.[11]

[15] Consistent with this approach, the Supreme Court of Canada has separately explained that the powers in a law include "not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."[12]

[16] So, even though the power to reopen a decision may be unusual (or, as the General Division said, extraordinary), the absence of an explicit authority is not conclusive. Figuring out whether an administrative decision-maker has an implied power to reopen a decision is a matter of statutory interpretation.[13] Statutory interpretation (deciding what a law means) involves looking at the text, context and purpose of the statute: "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."[14] Laws that grant benefits should be interpreted in a broad and generous manner, with any ambiguity resolved in favour of the claimant.[15]

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[9] Such as clerical errors, or an error in expressing the court's clear intention: *Paper Machinery Ltd v JO Ross Engineering Corp*, [1934] SCR 186.
[10] *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC).
[11] This has happened in cases such as: *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, 1997 CanLII 399 (SCC); *Kleysen Transport Ltd v Hunter*, 2004 FC 1413; *Merham v Royal Bank of Canada,* 2009 FC 1127; *GFL Environmental Inc v Wheatland (County of),* 2019 ABQB 976.
[12] This is called the doctrine of necessary implication: *ATCO Gas & Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, at paragraph 51.
[13] The Federal Court of Appeal said this in *Ramos v Canada (Attorney General)*, 2019 FCA 205.
[14] This quote is from the Supreme Court of Canada decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at paragraph 21, citing Driedger in *Construction of Statutes*. This approach to statutory interpretation was recently confirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
[15] The Supreme Court of Canada also said this in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at paragraph 21.

[17] Since the OASA is silent about a power to reopen initial decisions, there is no single provision for me to interpret. I must consider the text, context and purpose of the OASA more broadly. Are there indications that the Minister can reopen her initial entitlement decisions? Is it sometimes a practical necessity to reopen such decisions?

[18] In my view, the answer to both these questions is "yes." Consequently, I agree with the Minister's representatives that there is implied authority to revisit entitlement decisions.[16]

There are several indicators that the Minister can reopen initial OAS decision

– Purpose and structure of the legislation

[19] The purpose of the OASA is to provide financial assistance to seniors who are, or were, Canadian residents for a period of time. Each of its benefits (the OAS pension, the GIS, the Allowance for spouses of GIS recipients, and the Allowance for the Survivor) has a direct or indirect residency requirement. Benefits vary depending on the length of Canadian residence, income and marital status. There is an emphasis on the alleviation of poverty: the OAS pension is universal but clawed back above a certain income level, and the GIS and Allowances are only available to low-income seniors and their spouses. As noted by the Federal Court, the OASA fulfills a social goal; it "should therefore be construed liberally, and persons should not be lightly disentitled to OAS benefits."[17]

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[16] Because the Minister succeeded on this point, my decision doesn't address the Minister's alternative argument that *functus officio* doesn't apply to administrative, as opposed to adjudicative, decisions. *Chandler* does not make this distinction and I would not in any case characterize all OAS decisions as purely administrative. Indeed, the Federal Court has described the Minister's OAS entitlement decisions as adjudication: *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at paragraph 22. See also the discussion about the administrative/adjudicative distinction in Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020.

[17] *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466.

[20] At the same time, the OASA strives to give benefits only to those who qualify, and to recover any overpayment of benefits. These objectives are seen in the legislation, as described below.

[21] In order to receive benefits, a claimant must meet certain eligibility criteria and the Minister must approve the benefits.[18] An application is not always required; in some circumstances, the Minister will proceed based on information it already has about the claimant's eligibility.[19]

[22] There are limitations on payment. For example, the OAS pension can't be paid during certain prison terms;[20] the GIS and Allowances can't be paid to those who have not been present or resident in Canada for six months, or to certain sponsored immigrants;[21] and the amount of the GIS varies (potentially to nil) depending on marital status and income.[22]

[23] The Minister undertakes the approval process once for the OAS pension, and annually for all other benefits. After an initial decision, the following provisions in the OASA and the *Old Age Security Regulations* (OASR) could come into play:

- Reconsiderations and appeals: a claimant can ask the Minister to reconsider her decision, and can appeal the reconsideration decision to the Tribunal;[23]
- Investigation: the Minister can "at any time before or after approval" obtain further information about, or make an investigation into, a claimant's eligibility for a benefit;[24]
- Suspension of benefits related to eligibility: the Minister has to suspend benefits if it believes that the claimant is ineligible. The Minister may suspend benefits during an investigation;[25]

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[18] OASA, sections 3-5 for the OAS pension; sections 11-16 for the GIS; section 19 for the Allowance; sections 21-24 for the Allowance for the Survivor.
[19] OASA, section 5(4) for the OAS pension; sections 11(3), (3.1), (4) for the GIS; section 19(4.1) for the Allowance; section 21(5.1) for the Allowance for the Survivor.
[20] OASA, section 5
[21] OASA sections 11(7), 19(6), 21(9)
[22] OASA section 12
[23] OASA, sections 27.1, 29
[24] OASR, section 23
[25] OASR, section 26

- Suspension of benefits for other reasons: the OAS pension is suspended when a claimant has not been present or resident in Canada for six months, unless the claimant had over 20 years' residence in Canada; the OAS pension and Allowances may be suspended for failure to comply with a provision in the OASA or the OASR.[26]

- Adjustment of GIS payments: GIS payments are adjusted when actual income is different from estimated income;[27]

- Return and recovery: a claimant must return benefits they received but were "not entitled" to. The debt is recoverable in court or by set-off against other benefits;[28]

- Write-off of overpayment: Unless there has been a related conviction, the Minister can write off some or all of an overpayment for financial reasons or because of "erroneous advice or administrative error in the administration of this Act."[29]

- Offences and penalties: certain wrongdoing may lead to a summary conviction or monetary penalty, if initiated within five years of the Minister becoming aware of the situation.[30]

[24] I recognize that the investigation and suspension provisions relating to eligibility are in the regulations rather than the statute. The OASA permits regulations for putting "the purposes and provisions of this Act into effect," and specifically permits regulations "for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary." As such, the OASA (and not just the OASR) contemplates the possibility of investigating eligibility and suspending payments after benefits have been approved.

[25] The Minister previously focused on the investigation power as the source of her authority to reopen initial decisions. I agree with the General Division that a power to investigate does not necessarily include a power to reopen a previous entitlement decision. But the power to investigate is not the focus in these appeals; it is just one piece of a larger puzzle.

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[26] OASA, sections 9, 20
[27] OASA, section 18
[28] OASA, section 37 and OASR, section 27
[29] OASA, section 37(4)
[30] OASA, sections 44, 44.1

[26] Collectively, the above provisions reflect a legislative intent to pay benefits only to individuals who qualify for them, and to recoup benefits that were paid to those who shouldn't have received them. The latter objective is seen in section 37(1) of the OASA — which requires recipients to pay back benefits to which they were not entitled — and that objective is supported by the investigation, suspension, recovery and write-off procedures.

[27] Parliament chose not to simply suspend payments prospectively when entitlement is in doubt, but also to reach back and recover benefits wrongly paid. In my view, as described below, this necessarily implies that the Minister has the authority to go back and change her initial entitlement decisions in appropriate cases.

– **Primary indicator: The OASA requires the return of benefits if ineligible**

[28] Section 37 of the OASA says that if you receive benefits that you aren't entitled to, you have to return them, and the debt is recoverable:

> 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.
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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 … [Emphasis added.]

[29] The Respondent's representative argued that approval in and of itself amounts to entitlement: once approved, you are entitled, and so section 37 would only require the return of benefits paid without approval. This argument relies on an Appeal Division decision that discusses the difference between eligibility and entitlement.[31] I agree that eligibility relates to the criteria needed to qualify for benefits (such as residency), and

[31] *Minister of Employment and Social Development v MB*, 2021 SST 8.

that entitlement is about the right to receive a benefit. But I can't agree that entitlement "is the Minister approving the application and paying."[32] As outlined previously, you have the right to receive OAS benefits if you apply (or your application is waived), you are eligible, **and** the Minister approves. These elements together amount to entitlement. Consequently, I don't agree that section 37 only requires the return of benefits paid without approval.

[30] The General Division similarly suggests (without focusing on the meaning of entitlement) that section 37 could be limited to payment errors such as miscalculation of benefits or continued payment of benefits when entitlement ceases — in other words, errors that do not raise questions of eligibility (and so would not require a previous decision to be reopened). But section 37 does not limit the return of benefits to such payment errors. A plain reading of section 37 is that you must return benefits if it turns out that you weren't supposed to get them, **whether that is because of a payment error or because you weren't actually eligible for them**.

[31] There is historical and contextual support for this plain reading of section 37:

- A claimant's obligation to return benefits is linked, in the same section, to the Minister's power to recover or forgive the overpayment. For many years, the Minister could recover an overpayment due to wilful misrepresentation or fraud at any time, but could only recover other overpayments within the year following the year the benefits were received.[33] Then and now, the Minister cannot write off an overpayment if the person has committed an offence "in connection with the obtaining of the benefit payment."[34] Offences such as making a false or misleading statement, and obtaining benefits by false pretences,[35] go to benefit eligibility. By prohibiting a write-off of the associated

[32] *Minister of Employment and Social Development v MB*, 2021 SST 8, at paragraph 115.
[33] OASA, section 37(2), until amended by S.C.1995, c. 33: "… may be recovered as a debt due to Her Majesty in proceedings commenced (a) at any time, where that person made a wilful misrepresentation or committed fraud for the purpose of receiving or obtaining that amount or excess amount; and (b) in any case where paragraph (a) does not apply, at any time before the end of the fiscal year immediately following the fiscal year in which that amount or excess amount was received or obtained."
[34] OASA, section 37(4)
[35] OASA, section 44

overpayments, Parliament must have intended the Minister to recover this type of overpayment under section 37.

- Since 1995, the Minister has had the power to forgive overpayments resulting from "administrative error in the administration of this Act."[36] Administrative errors are not limited to payment errors; they could include, for example, mistakenly granting approval to an ineligible claimant. By allowing the Minister to write off the associated overpayments, Parliament must have intended such overpayments to be created in the first place. The fact that section 37 addresses the return of overpayments associated with administrative errors also refutes the argument made by the Respondent's representative that section 37 only requires the return of benefits received as a result of fraud or misrepresentation.

- Elsewhere in the OASA, the possible consequences of wrongdoing are summary conviction or a monetary penalty of up to $10,000 "to promote compliance with this Act."[37] The offence and penalty provisions of the OASA do not include recovery of the benefits to which the offender was not entitled. If ineligibility could not lead to an overpayment under section 37, there would be no mechanism to recover benefits obtained, for example, through wilful misrepresentation or fraud.[38] The General Division[39] offers as a possible solution the suspension of payments followed by recovery under section 37 — yet that recovery would itself require a change to the initial entitlement decision.

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[36] The possibility of forgiving debts due to erroneous advice or administrative error was added when the time limit on recovery was removed. OASA, section 37(4)(d).
[37] OASA, sections 44, 44.1
[38] In *BR v Minister of Employment and Social Development*, 2018 SST 844, the Appeal Division stressed that the Minister is not powerless in cases of fraud, because of the risk of summary conviction or administrative penalty. While these may be deterrents, they do not allow for the recovery of benefits after the fact. In *Minister of Employment and Social Development v MB*, 2021 SST 8, the Appeal Division suggested that a fraudulent application nullifies the approval. This seems to confirm that the Minister needs to be able to revise her initial decisions in such cases.
[39] In one of the three cases I heard together: *SF and CF v Minister of Employment and Social Development*, 2021 SST 23.

[32] The requirement for people to return benefits that they weren't entitled to, including benefits that they weren't eligible for, is a strong indicator that Parliament intended the Minister to be able to reopen her initial entitlement decisions. How can you be asked to return benefits that were previously granted, without first receiving a revised decision from the Minister that you weren't actually entitled to those benefits?

– **Other indicators: The options of suspending or resuming payment aren't enough**

[33] The suspension provisions are another indicator that Parliament intended the Minister to have the power to reopen initial decisions. Section 34(j) of the OASA permits regulations "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." Section 26 of the OASR states that a suspension continues until there is satisfactory evidence of eligibility, and allows for retroactive payment for periods of eligibility.

[34] If, following a suspension and investigation, it turns out that you were not entitled to benefits, the initial decision may have to be revised in order for the overpayment to be recovered. This point was made above. But what if it turns out that you were not fully disentitled but instead entitled to a different period or level of benefits? This would happen if, for example, the Minister investigated and found that your years of residency permitted only a partial rather than full OAS pension.

[35] Without the ability to change the initial entitlement decision, there would be no way to pay the correct benefits. The options would be all or nothing: resumption of the full pension previously approved (paying more than entitled to), or continued suspension of benefits (paying less than entitled to). In this situation, the power to amend an initial decision may be necessary, to achieve the purpose of providing financial assistance to those seniors who qualify.

– **Other indicators: The Minister must respond to changes in status**

[36] The income threshold for the GIS varies with marital status. A single person receiving the GIS may no longer be eligible once married or in a common-law

relationship, or they may qualify for a lower payment. Conversely, a recently separated person may become eligible for the GIS, or for a higher payment.

[37] The Minister has to "approve payment of a supplement and fix its amount" annually.[40] If a claimant doesn't report a change in marital status promptly, and the Minister can't reopen the previous entitlement decisions, that claimant could potentially receive the wrong level of benefits (higher or lower) for years. The Minister needs the power to revisit her initial decisions in these circumstances, to ensure that the correct level of income assistance is provided to those who qualify.

Summary

[38] As outlined above, there are strong indications in the OASA that Parliament intended the Minister to be able to revisit her initial entitlement decisions. After benefits are in pay, the Minister can investigate eligibility, suspend benefits, and reach back to recover benefit payments for which there was no entitlement. Within this structure, the Minister may need to reopen her initial entitlement decision when it turns out that a claimant wasn't eligible for benefits, or was eligible for different benefits. This power is "practically necessary," so that seniors receive the benefits they are entitled to, and return benefits that they received but were not entitled to. Accordingly, the Minister has an implied power to reopen her initial decisions under the OASA. It was an error of law for the General Division to conclude otherwise.

[39] I recognize that my conclusion is different from that of other Appeal Division decisions, including those that the General Division relied upon.[41] I have had the benefit of new arguments and evidence; ultimately, a focus on whether the OASA indicates an implied power to reconsider led me to a different result. While consistency at the Appeal Division is important, the question of the Minister's power to revisit initial decisions is still relatively novel. Precedent develops over time, and "the tribunal hearing a new question

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[40] OASA, section 16(1)
[41] *BR v Minister of Employment and Social Development*, 2018 SST 844, *MA v Minister of Employment and Social Development*, 2020 SST 269, *Minister of Employment and Social Development v MB*, 2021 SST 8, and others.

may thus render a number of contradictory judgments before a consensus naturally emerges."[42]

[40] By finding an implied power to reopen initial decisions, I am not endorsing hasty OAS approvals with verification to follow — after all, the Minister is not supposed to approve anyone's benefits unless they qualify. Rather, having the option of reopening initial decisions reflects the reality that Service Canada will occasionally make mistakes, and some claimants will misrepresent the facts or fail to meet their reporting obligations. I understand my colleagues' concern that the Minister could in theory repeatedly or unfairly reassess eligibility. In my view, that concern is largely addressed through limits on the Minister's discretion, which I address below.

Remedy: I will replace the General Division's decision with my own

[41] After finding an error of law, the Appeal Division can make the decision that the General Division should have made.[43] I will do so in this appeal because both parties had a full and fair opportunity to present their evidence to the General Division.

[42] I can decide any question of law or fact necessary to dispose of an appeal.[44] I have already found that the Minister has an implied power to change her initial decisions under the OASA. But that is not the end of the story. How is that implied power to be exercised?

The Minister's authority is discretionary and must be exercised "in a judicial manner"

[43] I am not persuaded by the Minister's argument that, having investigated a claimant's eligibility, the authority to revisit the initial decision is not discretionary.[45] As the Minister's representative said, an investigation includes a recommendation, but it is

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[42] The Supreme Court of Canada said this in *Tremblay v Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC).
[43] This is set out in section 59(1) of the *Department of Employment and Social Development Act*.
[44] These powers are found in section 64(1) of the *Department of Employment and Social Development Act*.
[45] A discretionary power is one that you can choose to use, or not.

not a decision. In other words, investigating eligibility and deciding to change a previous decision are separate tasks. The law does not oblige the Minister to reopen an initial decision, on her own initiative (even following an investigation).

[44] Elsewhere, even explicit authority to reopen decisions is typically discretionary.[46] And, when recognizing an implicit power to reopen for other administrative bodies, the courts have described a discretionary power. For example, in permitting an immigration officer to reconsider a decision, the Federal Court of Appeal noted the officer's obligation "to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider."[47] Similarly, the Federal Court decided that the Canadian Human Rights Commission could reconsider its decisions even though no specific statutory provision provided for this, "but this is a discretionary power which must be used sparingly in exceptional and rare circumstances."[48]

[45] The Minister's representatives have separately acknowledged that the Minister's discretion is not unrestricted, and that there are checks on the exercise of the power to revisit initial decisions. I agree that these checks exist: a discretionary power must be exercised "judicially." This means that a discretionary decision will be set aside if the decision-maker "acted in bad faith or for an improper purpose or motive, took into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner."[49]

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[46] Some examples of this are found in section 81(3) of the *Canada Pension Plan*; sections 52, 111 of the *Employment Insurance Act;* section 25 of the *Employment Equity Act;* section 32(3) of the *Royal Canadian Mounted Police Act.* See also the Federal Court of Appeal decision in *Gareau v Canada (Employment and Immigration Commission)* [1986] F.C.J. No. 746.
[47] *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230
[48] *Merham v Royal Bank of Canada,* 2009 FC 1127
[49] This summary is found in *Canada (Attorney General) v Purcell*, 1995 CanLII 3558 (FCA). The Tribunal takes a similar approach to other discretionary decisions by the Minister or Commission, including the Commission's discretion to change its initial decisions (for example, *JP v Canada Employment Insurance Commission*, 2021 SST 109).

– **Discretion to fix incorrect decisions, while considering finality**

[46] What is a proper purpose, for the exercise of the Minister's discretion to reopen a previous decision? The obvious answer is to fix incorrect entitlement decisions[50] — so that benefits are paid correctly going forward and overpayments are recovered.

[47] What else must the Minister consider when deciding whether to reopen an entitlement decision? In my view, the policy of finality that underlies the doctrine of *functus officio* is a relevant and important factor in the exercise of the Minister's discretion, and must be considered. This approach was endorsed by the British Columbia Court of Appeal (and cited by the Federal Court), when it found that applying the doctrine of *functus officio* wasn't the only way to give effect to the "sound policy" of finality: "That policy [of finality] will **necessarily govern the manner in which the jurisdiction to reconsider is exercised**…"[51] [Emphasis added.]

[48] The OAS pension provides basic financial assistance to seniors, and the GIS and Allowances provide a modest income to those with limited means. In this context, it is especially important for claimants to be able to rely on their entitlement decisions, without fear that they will have to return money already spent. Because of the importance of finality, and because seniors "should not be lightly disentitled to OAS benefits,"[52] the discretionary power should be used sparingly. Yet the Minister does not seem to have a policy or guidelines outlining when decision-makers should exercise the discretion to reopen initial decisions.[53] And, the Minister's Expert Report describes a routine, risk-based approach in which applications are approved on a presumption of eligibility, followed by a post-decision audit process.[54]

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[50] While the Minister's representatives preferred the term "accurate," I find it difficult to describe an initial decision as "accurate" or "inaccurate," as opposed to "correct" or "incorrect."
[51] *Zutter v. British Columbia (Council of Human Rights)*, 1995 CanLII 1234 (BCCA), cited by the Federal Court in *Merham v Royal Bank of Canada,* 2009 FC 1127 at paragraph 23.
[52] *Canada (Minister of Human Resources Development) v. Stiel*, 2006 FC 466, previously cited in this decision.
[53] The Minister's policy on overpayments skips over this exercise entirely, indicating simply that overpayments are "discovered" or "identified" and then entered into the system for recovery. See the Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report.
[54] It is unclear how this approach fits with the Minister's obligation under the OASA to be satisfied that a claimant is qualified before approving or paying their benefits.

[49] The fact situations in the three appeals that I heard together suggest two ways in which the policy of finality limits the exercise of the Minister's discretion. These overlap with factors that are sometimes considered when deciding whether to apply the doctrine of *functus officio*: the nature of the error, the circumstances giving rise to the possible reopening, and the passage of time and delay.[55] There may be others that I haven't considered here.

– **Is this repeat assessment, without new material information?**

[50] First, to respect the importance of finality, the purpose of reopening initial decisions (fixing incorrect decisions) should be interpreted narrowly. An initial entitlement decision might be incorrect because of a failure on the part of the claimant (such as non-disclosure, late reporting, contradictory information or misrepresentation of important information) or because of an error in the administration of the OASA (such as clerical or system errors, not collecting the right information, or overlooking conclusive information).[56] But an initial decision is not incorrect (or "inaccurate") simply because a second decision-maker took a different view of the same or similar facts. The purpose of the power to reopen decisions cannot be simply to repeat, for no compelling reason, the adjudicative task of applying the law to the facts to determine eligibility.

[51] In other words, in the absence of new information likely to change the original result, reopening a decision that turned on the judgment of the decision-maker would be an improper exercise of the Minister's discretionary power. This is similar to the approach the representative in one of the companion cases recommended, that new and contradictory evidence should be required for reopening, to guard against repeated reassessment of claims. In this way, the discretionary power to fix incorrect entitlement

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[55] Wong, A., "Doctrine of *Functus Officio:* The Changing Face of Finality's Old Guard," Canadian Bar Review, Dec 2020, at pages 577-8.

[56] This overlaps with the Minister's list of reasons for overpayments. That list covers both payment errors (which would not involve fixing an incorrect entitlement decision) and eligibility errors: "original and duplicate cheques negotiated, amendments to periods of residence, a calculation error, income declared incorrectly, incorrect information provided, duplicate benefits paid to the same person, revision of estimated income, change of rate table for OAS benefits, or events such as death, marriage, separation." See section 2 of the Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report.

decisions can be balanced against the importance of people being able to rely upon decisions made about their benefits.

– **Has there been excessive delay?**

[52] Second, because the importance of finality increases with the passage of time, timeliness is also a relevant factor in the exercise of the discretion to reopen an initial decision. Over time, a claimant becomes more reliant on their existing entitlement, and it becomes more difficult for them to challenge a revised decision with historical evidence.

[53] The Respondent's representative suggested that the five-year limitation period for commencing a proceeding for an offence under the OASA must, by implication, apply to the recovery of overpayments. I disagree: Parliament chose to establish a limitation period for offences but not for the recovery of overpayments.[57] Nevertheless, when deciding whether to exercise her discretion to reopen an initial decision, the Minister should consider the question of excessive delay.

[54] The Minister has the power to investigate a claimant's eligibility "at any time."[58] This makes sense, because new material information could come to the Minister's attention long after an initial decision was made. But to the extent that the timelines are within the Minister's control (particularly after initiating an investigation), it is the Minister's responsibility to decide promptly whether to reopen a previous entitlement decision and, if so, to inform the claimant of the revised decision.[59] Excessive delay could possibly amount to an abuse of process,[60] such that the Minister should not exercise her discretion to revisit the initial decision.

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[57] OASA, sections 44 and 37. As previously mentioned, an earlier limitation period for recovery of some overpayments was repealed in 1995.
[58] OASR, section 23
[59] The Minister appears to recognize this principle. The Functional Guidance and Procedures document titled Overpayments, at Tab 33 of the Expert Report, encourages staff to act "in a timely manner." It permits the write-off of overpayments where Service Canada fails to correct an error within "one year of discovery," even though this reason is not found in the OASA.
[60] For example, where there is significant prejudice or the delay "would offend the community's sense of decency and fairness": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44. See also

– **Summary**

[55] To summarize, the Minister does not have an unrestricted discretion to reopen initial entitlement decisions. Her authority must be exercised for the purpose of fixing incorrect decisions, and that purpose must be narrowly construed. She should consider the nature and timeliness of the proposed revised decision — Is this repeat assessment without important new information? Has there been excessive delay? In every case, the Minister should ensure that the benefit of reopening the original decision outweighs the importance of that decision being final.

The Tribunal has jurisdiction over the intertwined decision

[56] The Minister argues that, if the power to revisit decisions is discretionary, these discretionary decisions are not subject to appeal to the Tribunal. Any objection to the exercise of discretion would only be subject to review by the Federal Court. I disagree.

[57] The Tribunal has jurisdiction to hear an appeal of a reconsideration decision, and claimants have the right to request reconsideration of a decision about entitlement to, or the amount of, an OAS benefit.[61]

[58] A revised entitlement decision has two components. The Minister has to decide: Should I exercise my discretion to reopen the previous decision? And if I do, what is the new decision? These two components are intertwined and cannot reasonably be disentangled for recourse purposes. Under the Minister's preferred approach, a claimant whose OAS entitlement was reopened would have to challenge the Minister's discretion to do so at the Federal Court, while at the same time pursuing the reconsideration and appeal processes for the new substantive decision. That would make no sense.[62]

Abrametz v Law Society of Saskatchewan, 2020 SKCA 81 (leave to appeal granted by the Supreme Court of Canada, February 2021).

[61] Reconsideration rights are described in section 27.1 of the OASA, and appeal rights are found in section 28.

[62] If there is an overpayment, the Minister should go on to decide whether to forgive the overpayment. The Minister's decision about writing off a debt is not subject to reconsideration or appeal to the Tribunal but, as the last stage in the decision-making process, it is easily separable from the entitlement decisions.

[59] The Tribunal should take a broad approach to its jurisdiction, within the limits of the law, to manage appeals efficiently and to allow for meaningful recourse. I am satisfied that both aspects of the revised decision — the exercise of discretion and the new decision — are ultimately about OAS benefit entitlement. Both aspects are subject to reconsideration by the Minister and appeal to the Tribunal.[63]

The Minister properly exercised her discretion to reconsider the GIS entitlement decisions

[60] In this case, the Minister decided to revisit her previous GIS entitlement decisions because the Respondent provided new and different information about her relationship status.[64] Did the Minister exercise her discretionary power in a judicial manner?

[61] The Respondent had an obligation to notify Service Canada that she had established a common-law relationship, and to do so promptly.[65] The Respondent did not tell Service Canada about her common-law status until August 2016. The change in status had clear implications for her GIS eligibility: this was substantial new information, previously unavailable to the Minister, that would certainly have led to different GIS decisions. While there was some delay between receiving the new information and issuing the revised decision, it was not excessive.[66] In this case, the benefit of reopening the previous decisions — to ensure that the Respondent received only the benefits for which she qualified upon her change in status — outweighed the importance of the previous decisions being final. For these reasons, the Minister exercised her discretion to revisit the previous GIS decisions in a judicial manner.

[62] The next question is whether the revised decision itself was correct. That turns on when the Respondent was in a common-law relationship.

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[63] The Tribunal has similarly held that the Commission's exercise of its discretionary power to reopen its decisions is subject to appeal, such that the Tribunal can step in if the discretion is not properly exercised. See for example *FB v Canada Employment Insurance Commission*, 2016 CanLII 102760 (SST).
[64] See the letters from Service Canada to the Respondent at GD2-3, GD2-12.
[65] This obligation is found in section 15(1.1) of the OASA.
[66] The investigation and revised decision were complete approximately 18 months after the new information came to light. Some of the delay appears to be due to the Respondent's lack of response to requests for documents.

The Respondent was in a common-law relationship from November 2015

[63] The OASA defines a common-law partner as "a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited with the individual for a continuous period of at least one year."[67] Factors to consider when deciding whether a couple is cohabiting in a conjugal relationship include shared shelter, sexual and personal behaviour, domestic services, social activities, economic support, children, and societal perception.[68] A couple can cohabit without sharing a residence, but their mutual intention is important.[69]

[64] There is no dispute that the Respondent and CH had a close relationship for many years, with the Respondent described as CH's loving soulmate in his obituary. There is also no dispute that the Respondent and CH were common-law partners when CH died in June 2016. The parties agree that the Respondent and CH cohabited for some period of time preceding CH's death, but they disagree about when the common-law relationship began. The parties agree that the date the couple began living together is determinative in this case.

- **The common-law relationship did not begin in 1996**

[65] The Respondent applied for survivor's benefits at a Service Canada Centre on August 8, 2016, on her own. She signed a Statutory Declaration of Common-law Union that said she and CH lived together for 20 continuous years from August 9, 1996 to June 15, 2016 (CH's date of death).

[66] The Respondent later refuted the Declaration, stating that she "was under a lot of stress at the time and did not understand the question."[70] She wrote in an affidavit that the written start date was meaningless to her, and that she told the clerk "that we were

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[67] OASA, section 2
[68] These factors were set out in *Molodowich v Penttinen* (1980), 1980 CanLII 1537 (ON SC) and cited with approval by the Supreme Court of Canada in *M. v H.* 1999 CanLII 686 (SCC).
[69] The Supreme Court of Canada says this in *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65.
[70] See GD2-15.

together for 20 years, but this was not intended to mean 'living together'."[71] This statement is consistent with the use of August 9, 1996 as the start date, precisely 20 years earlier.

[67] There is other evidence that contradicts a 1996 start to the couple's common-law relationship:

- the Respondent's GIS renewal application in 2000 states that she was single;
- affidavits from the Respondent and family members state that the Respondent lived in her house ("address A") with her sister until her sister's death in 1999, that her great-nephew (JS) lived there from 1989 to 2003, and that CH did not live with them;
- CH had a different home address ("address B") on file with the federal government; and
- in her 2004 will, CH's sister gave him the right to continue living at address B for the rest of his life.

[68] Indeed, the Minister no longer relies upon the Respondent's Declaration. Instead, the Minister's representative asserts that the couple must have been living together from June 2005 because of documentation signed in June 2006.

– **The 2006 house transfer does not prove a common-law relationship**

[69] In June 2006, the Respondent transferred the ownership of address A from herself to herself and CH as joint owners. The transfer document says that the Respondent "hereby consents to this disposition, pursuant to the *Matrimonial Property Act* of Nova Scotia."[72] The Minister's representative says that this consent would only be required if the Respondent was already a spouse, and so she must have already been living with CH for a year. I disagree.

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[71] See GD5-5.
[72] See GD2-38.

[70] First, the *Matrimonial Property Act* applies only to those who are married or registered domestic partners.[73] There is no evidence that the Respondent and CH ever married or registered their domestic partnership. Second, the *Matrimonial Property Act* prohibits the transfer of a matrimonial home unless the **other** spouse consents.[74] If the Respondent and CH were spouses, it is CH who would have to consent to the Respondent's disposition of that property.

[71] I don't know why the June 2006 transfer document mentions the *Matrimonial Property Act*, but I don't find this reference to be evidence of a common-law relationship between the Respondent and CH.

[72] It is clear that the Respondent and CH became co-owners of address A in 2006. Affidavits sworn by the Respondent and JS explain that CH became a co-owner so that the Respondent could qualify for a traditional mortgage. The Respondent and CH mortgaged address A in October 2007. At that time, the Respondent and CH confirmed that they were not spouses of each other or registered domestic partners, but this does not tell us whether they were living together.

– **The evidence supports cohabitation beginning in November 2014**

[73] The Respondent's close family members are JS (who lived with her from age 5 to 18, after the death of his mother, the Respondent's niece) and JS's father SS. JS and SS have had frequent contact with the Respondent, and with CH, over the years.

[74] The Respondent, JS, and SS all provided sworn evidence that CH did not move to address A until late 2014, when he needed care due to illness. Prior to that, the couple spent time together, and helped each other out, but maintained separate households. The Respondent said that she and CH were in a relationship, and were soulmates, but "we never held ourselves out to be a common law couple as we did not live together for most of our relationship." She pointed out that CH took care of the small farm and livestock at address B. SS described the Respondent and CH as "boyfriend

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[73] *Matrimonial Property Act*, Statutes of Nova Scotia, section 2(g); *Vital Statistics Act,* Statutes of Nova Scotia, section 54(2).
[74] *Matrimonial Property Act*, Statutes of Nova Scotia, section 8

and girlfriend", whereas JS did not see them as a romantic couple until the relationship "blossomed" in 2014.

[75] A number of documents indicate that CH continued to use address B after 2006. The federal government sent multiple pension statements and tax slips to address B, between 2006 and 2015. Print-outs of CH's tax returns from 1997 to 2015 make it look like his address was address A for all these years, but there is evidence on file that this was based on the printing date in 2017, rather than the actual tax returns.[75] Moreover, CH's copy of his 2012 tax return, and the tax preparation receipt, indicate that CH used address B at that time. The Respondent and CH continued to file their tax returns as single persons, after 2006.

[76] I recognize that address A was on CH's last driver's license, with an issue date of November 7, 2011 and an expiry date exactly five years later. In his affidavit, JS recalled taking CH to the Department of Motor Vehicles to update his address after he moved in with the Respondent, around November 2014. There is no evidence addressing the question of whether an address update results in a different issue date on a driver's license. Nevertheless, the precise five-year validity period of the license suggests that the issue and expiry dates would remain the same. As such, I can't assume from the driver's license that CH lived at address A from the issue date (2011) onwards.

[77] Co-ownership of a house is not the same as co-residence in that house, and the Respondent has provided a reasonable explanation for CH's joint ownership of address A from 2006 onwards. I do not infer from this ownership interest that CH lived at address A; after all, CH also had the right to live at address B during the same period. The Respondent's explanation for the timing of CH's move, in relation to his illness, is plausible. In the absence of persuasive evidence that CH lived at address A before November 2014, I place significant weight upon the sworn affidavits and the evidence that CH continued to receive important mail at address B. I find it more likely than not

[75] See the affidavit of DM at GD16-7.

that CH lived at address B until November 2014 and then moved to address A, where he lived with the Respondent until his death in June 2016.

[78] After CH moved in, the Respondent regularly provided domestic services and care for him, the couple spent much of their time together, and they held themselves out as a couple living together. There was no mutual intention to cohabit, or to be in a common-law relationship, before then. I find, on a balance of probabilities, that the Respondent and CH cohabited in a conjugal relationship from November 2014 to June 2016.

– **Common-law status begins one year later**

[79] As noted above, common-law status is reached after one year of continuous cohabitation. So, the Respondent was in a common-law relationship as of November 2015.

New decision about the Respondent's GIS

[80] Since the Respondent's marital status did not change until November 2015, it is only the Minister's 2015 entitlement decision that needs to be reopened.

[81] The Respondent was no longer eligible for the GIS once she was in a common-law relationship, because the couple's combined income was too high.[76] A change in status affects the GIS from the following payment month.[77] So, the new initial decision for 2015 is the following:

> The Respondent was entitled to the GIS as a single person up to and including November 2015. The Respondent was not entitled to the GIS from December 2015 to June 2016, inclusive.

[76] The Respondent and CH's 2014 income is found in the reconsideration file at GD2-111 and -132.
[77] See section 15(6.1) of the OASA.

Conclusion

[82] The appeal is allowed in part.

[83] The Minister has an implied discretionary power to reopen her initial OAS decisions. The Tribunal has jurisdiction over the Minister's exercise of this discretion as well as the revised decision. The Minister properly exercised her discretion to revisit the previous entitlement decisions about the Respondent's GIS, based on new information about her status. However, the Respondent was not in a common-law relationship until November 2015.

[84] The Respondent was entitled to the GIS as a single person until November 2015. She was not entitled to the GIS from December 2015 to June 2016, inclusive.

Shirley Netten
Member, Appeal Division