Citation: *PM v Minister of Employment and Social Development*, 2022 SST 1167

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	P. M.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 11, 2020 (issued by Service Canada)
Tribunal member:	Pierre Vanderhout
Decision date:	October 4, 2022
File number:	GP-21-583

Decision

[1] The appeal is allowed in part.

[2] The Appellant, P. M., isn't eligible for a full Old Age Security ("OAS") pension. But he is eligible for a partial OAS pension of 7/40. This is more than what the Minister of Employment and Social Development ("Minister") granted in the reconsideration decision of December 11, 2020.

[3] Payments start as of July 2018.

[4] This decision explains why I am allowing the appeal in part.

Overview

[5] The Appellant was born in South Africa on April 20, 1941. He is now 81 years old. He came to Canada as an immigrant on May 7, 1975, and became a Canadian citizen in 1978. He moved to the United States ("US") around December 11, 1979. He later lived for a time in the United Kingdom ("UK"). He owns what he describes as a small "pied-à-terre" in France. He has had it for about 30 years.[1] But he has also spent an exceptional amount of time pursuing personal interests in other countries. He might spend time in as many as 15 different countries in a calendar year. His passports are filled with various stamps and visas.

[6] While the Appellant visited Canada from time to time after 1979, he began spending more time here again in June 2012. In August 2015, he rented an apartment, and has been a tenant in Canada since then. However, at least until the COVID-19 pandemic started in early 2020, he continued to travel the world extensively.

[7] The Appellant applied for an OAS pension on September 17, 2018.[2] He said he wanted his pension to start in July 2018.

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[1] GD19-26
[2] The Appellant previously applied for an OAS pension in late 2015, but later withdrew that application.

[8] The Minister granted the Appellant a partial pension. This partial pension was 4/40 of a full pension.[3] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

[9] The Appellant says he should get a full OAS pension. He says he meets the "10-year-rule" (or the related "3-for-1 rule"). In addition to residing in Canada from May 7, 1975, to December 11, 1979, he suggests that he may have legally resided in Canada until December 31, 1979.[4] He also says he has resided in Canada since 2012. He further points to his extended residence in the US, with which Canada has a social security treaty. He raises many concerns about how the Minister has handled his application. As a result, he has requested many remedies besides a full OAS pension.

[10] The Minister admits that the Appellant resided in Canada from May 7, 1975, to December 11, 1979. The Minister also admits that the Appellant has resided in Canada since April 6, 2019. However, the Minister denies that the Appellant resided in Canada for the last 20 days of 1979. The Minister also denies that the Appellant resided in Canada at any time from January 1, 2012, to April 5, 2019. The Minister points to the Appellant's house in France, his family members in France and South Africa, his other connections to South Africa, and his nomadic lifestyle. The Minister also disagrees with the Appellant's interpretation of the *Old Age Security Act* (the "Act").

[11] This decision was made "on the record," for the reasons set in the Tribunal's letter dated April 20, 2022.[5]

What the Appellant must prove

[12] To receive a **full** OAS pension, a person usually has to prove he resided in Canada for at least 40 years after he turned 18.[6]

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[3] The Minister of Employment and Social Development ("Minister") manages the Old Age Security programs for the Government of Canada. See the reconsideration decision at GD2-3.
[4] See GD2-684 and GD2-717
[5] See GD27-1 to GD27-2.
[6] See section 3(1)(c) of the *Old Age Security Act* ("OAS Act"). The Appellant also has to be at least 65 years old and a Canadian citizen or legal resident of Canada. And he must have applied for the pension. The Appellant has met these requirements.

[13] The Appellant doesn't claim he resided in Canada for 40 years after turning 18. He says he doesn't need to, as he met other requirements to get a full OAS pension.

[14] If the Appellant doesn't qualify for a full OAS pension, he might qualify for a **partial** pension. A partial pension is based on the number of years (out of 40) that a person resided in Canada after they turned 18. For example, a person with 12 years of residence receives a partial pension equal to 12/40 of the full amount.

[15] To receive a partial OAS pension, the Appellant must prove he resided in Canada for at least 10 years after he turned 18. But, if he didn't reside in Canada the day before his application was approved, he must prove he already has 20 years of residence.[7]

[16] The Appellant must prove he resided in Canada. He must prove this on a balance of probabilities. This means that he must show it is more likely than not that he resided in Canada during the relevant periods.[8]

Reasons for my decision

[17] I find that the Appellant isn't eligible for a full OAS pension. But he is eligible for a partial pension of 7/40. This is more than his current partial pension of 4/40.

[18] The Minister concedes that the Appellant resided in Canada from May 7, 1975, to December 11, 1979, and again starting on April 6, 2019. The Appellant submits that his latest Canadian residency actually started in 2012. He also suggests that he may have "legally" resided in Canada for the last 20 days of 1979.

[19] As a result, I considered the Appellant's potential residency in Canada from January 1, 2012, up to and including April 5, 2019. I have also considered his potential residency in Canada from December 12, 1979, to December 31, 1979. These are the only periods of residency that the Appellant and the Minister dispute.

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[7] See section 3(2) of the OAS Act.
[8] See *De Carolis v Canada (Attorney General)*, 2013 FC 366.

[20] Here are the reasons for my decision.

The test for residence

[21] The law says that being present in Canada isn't the same as residing in Canada. "Residence" and "presence" each have their own definition. I must use these definitions in making my decision.

[22] A person **resides** in Canada if he makes his home and ordinarily lives in any part of Canada.[9]

[23] A person is **present** in Canada when he is physically present in any part of Canada.[10]

[24] When I am deciding whether the Appellant resided in Canada, I must look at the overall picture and other factors (the "Ding Factors"). The Ding Factors include:[11]

- where he had property, like furniture, bank accounts, and business interests
- where he had social ties, like friends, relatives, and membership in religious groups, clubs, or professional organizations
- where he had other ties, like medical coverage, rental agreements, mortgages, or loans
- where he filed income tax returns
- what ties he had to another country
- how much time he spent in Canada
- how often he was outside Canada, where he went, and how much time he spent there
- his lifestyle in Canada
- his intentions.

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[9] See section 21(1)(a) of the *Old Age Security Regulations* ("OAS Regulations").
[10] See section 21(1)(b) of the OAS Regulations.
[11] See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. See also *Valdivia De Bustamante v Canada (Attorney General)*, 2008 FC 1111; *Duncan v Canada (Attorney General)*, 2013 FC 319; and *De Carolis v Canada (Attorney General)*, 2013 FC 366.

[25] This isn't a complete list. Other factors may be important to consider. I have to look at **all** the Appellant's circumstances.[12]

When the Appellant resided in Canada

[26] As noted above, the Appellant resided in Canada from May 7, 1975, up to and including December 11, 1979. He has also resided in Canada since April 6, 2019.

[27] I find that the Appellant also **resided in Canada** in the following periods:

- May 26, 2015, up to and including August 13, 2015 (80 days)
- November 1, 2015, up to and including January 30, 2016 (91 days)
- April 10, 2016, up to and including April 5, 2019 (1091 days)

[28] The Appellant **didn't reside in Canada** in the following periods:

- December 12, 1979, up to and including December 31, 1979
- January 1, 2012, up to and including May 25, 2015
- August 14, 2015, up to and including October 31, 2015
- January 31, 2016, up to and including April 9, 2016.

[29] The periods of Canadian residence total 2,942 days (just over 8 years) up to April 5, 2019. I will now discuss each period, starting with the earliest one. For each period, I will explain why I have decided that the Appellant did or didn't reside in Canada.

– The Appellant didn't reside in Canada from December 12, 1979, to December 31, 1979

[30] The Appellant said his Canadian employer transferred him to Seattle (US) in late 1979.[13] When he applied for the OAS pension, he said he resided in Canada until November 1979, and started residing in Seattle in December 1979.[14] He later said he

[12] See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.
[13] GD2-684
[14] GD2-376

immigrated to the US on December 11, 1979, to open a new office in Seattle.[15] This is supported by a US visa document showing his entry date as December 11, 1979.[16]

[31] The Appellant had significant Canadian earnings in 1979, although they do not specifically refer to the last 20 days of the year.[17] At the same time, he also had significant 1979 earnings in the US that specifically refer to each quarter of the year (including the last quarter). He had significant US earnings until the end of 1985.[18]

[32] The Canada Revenue Agency ("CRA") said the Appellant became a non-resident of Canada as of January 1, 1980.[19] This is really the only evidence that he might still have resided in Canada after December 11, 1979. However, a CRA determination of residency is not binding on the Tribunal or the Minister. The Old Age Security Act contains a very specific definition of "residence". In contrast, the Income Tax Act does not define it, leaving the exact meaning to the common law. The factors used to assess residency under each act may be similar, but context and a claimant's specific factual circumstances must always be kept in mind.[20]

[33] Ultimately, I return to the definition of residence in the Old Age Security Act.[21] I cannot say that the Appellant made his home and ordinarily lived in Canada for the last 20 days of 1979, just because the CRA considered him to be a Canadian resident for tax purposes. His own actions and words mandate that he ceased to be a Canadian resident for OAS purposes when he immigrated to the US on December 11, 1979.

– **The Appellant didn't reside in Canada from January 1, 2012, to May 25, 2015**

[34] The Appellant is also a South African citizen. He appears to have made South Africa his base for many years. However, he said the unstable situation there in 2011 led him to revisit Canada as a potential base.[22]

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[15] GD2-429
[16] GD2-397
[17] GD2-730
[18] GD2-649 and GD2-799
[19] GD2-401
[20] *Duncan v. Canada (Attorney General)*, 2013 FC 319.
[21] See s. 21(1)(a) of the OAS Regulations.
[22] GD2-430

[35] The Appellant re-entered Canada on June 4, 2012.[23] He soon took several steps that were consistent with residing in Canada. He got a Nova Scotia driver's licence on July 24, 2012.[24] He set up a bank account with HSBC in Halifax in August 2012.[25] He appears to have acquired a Canadian SIM card for his mobile phone on a 2011 visit.[26] He appears to have investigated the purchase of land in 2012. However, he said the bank's letter never arrived and he didn't follow up the land matter until April 2015.[27]

[36] The Appellant executed his Last Will and Testament on February 22, 2013. In that Will, he said that he re-immigrated to Canada in June 2012 and intended to take up permanent residence in Nova Scotia. He also wanted his estate matters settled as a Canadian citizen and under the applicable provincial laws.[28]

[37] The Appellant produced a list of prescriptions, showing that he was prescribed Micardis in Canada on June 24, 2013. The other prescriptions were from after May 25, 2015.[29]

[38] As with the period in late 1979, the Appellant points out that he was considered a Canadian resident for tax purposes starting on January 1, 2012. He filed tax returns here from that year forward as a resident of Nova Scotia.[30]

[39] The Appellant provided the following summary of the time he spent in Canada from January 1, 2012, to May 25, 2015[31]:

Entered Canada	Left Canada	[# days]
June 4, 2012	June 13, 2012	10
July 12, 2012	August 5, 2012	25
May 4, 2013	July 3, 2013	61
August 23, 2013	August 27, 2013	5
July 29, 2014	August 3, 2014	6

[23] GD2-588, for example.
[24] GD2-576
[25] GD2-421
[26] GD2-227
[27] GD2-230
[28] GD2-222 to GD2-223
[29] GD2-586 to GD2-587
[30] GD2-401 and GD2-430
[31] GD2-556

[40] This shows that the Appellant was present in Canada for 107 days over a period lasting 1241 days. He was therefore present in Canada approximately 8.7% of the time. He spent most of those 107 days as a guest at Cape View Motel and Cottages in Nova Scotia. He had a private post office box at the Salmon River (Nova Scotia) post office.[32]

[41] I have considered whether the Ding Factors lead to a finding that the Appellant resided in Canada during this period. However, I find his presence in Canada during this period to be very intermittent and unsettled. His accommodations were very temporary. He did not have medical coverage in Canada until sometime in 2015.[33] At one point, he declared that he did not resume permanent residence in Canada until August 2015.[34] At other times, he has said that such residence resumed in 2012. He says the later date was based on incorrect advice from the Minister.

[42] The Appellant did take some steps toward a more rooted existence in Canada, such as getting a driver's licence and opening a bank account. He also prepared a will and thought about buying land. While he often spoke of his intention to make Nova Scotia his home in 2012[35], the fact is that he spent very little time there. I acknowledge that his extensive travels would necessarily reduce his presence in Nova Scotia. But he still managed to retain a significant presence in South Africa and France, besides having strong ties to those countries. These ties include a daughter and granddaughter in France, as well as a daughter and grandson in South Africa.[36] He has no family in Canada, although he says he has "some good friends".[37]

[43] In South Africa, the Appellant spent significant time between January 1, 2012, and May 25, 2015. His South African passport suggests he was present in South Africa for the following periods[38]:

Start Date	End Date	Page	Duration
August 26, 2012	January 25, 2013	GD2-235, -244	153 days
September 25, 2013	November 25, 2013	GD2-234, -236	62 days

[32] GD2-681
[33] GD2-204
[34] GD2-537
[35] See, for example, GD2-430.
[36] GD2-302
[37] GD2-205
[38] This passport begins at GD2-233.

April 22, 2014	June 23, 2014	GD2-234, -236	63 days
September 6, 2014	December 8 (?), 2014	GD2-243	94 days

[44] The Appellant therefore appears to have been present in South Africa for 372 days from January 1, 2012, to May 25, 2015. This is roughly 30.0% of the period in question, compared to 8.7% in Canada.

[45] In France, he continued to own his "pied-à-terre". He has had it since about 1990. He had a phone, utilities (including electricity and water), a debit card, insurance, a television licence, and a bank account there in his name.[39] He also had access to a car there.[40] He argues that he cannot be considered a resident of France because he is not allowed to stay for more than three months at a time without a special visa. He said France considers him a "*visiteur*", and he cannot come and go as he pleases.[41]

[46] From January 1, 2015, to May 20, 2015, the Appellant spent 91 days at his home in St.-Guilhem, France.[42]

[47] It is more difficult to assess how much time the Appellant spent in France from 2012 to 2014. This is partly because of the European Union's "no internal borders" approach. This means that we can only say where he entered the European Union, not when he entered France. Another complication is that his home in France is near Spain. Many of his passport stamps are from Barcelona, which is in Spain, rather than the closer but much smaller city of Montpellier, France.

[48] Many passport stamps are also unreadable. Nonetheless, it appears that the Appellant arrived in Spain (or France) on many occasions from 2012 to 2014. Such occasions include[43]:

2012 - (prior to) January 20, March 5,
2013 - January 26, March 14, April 16, July 9, December 3, December 21,
2014 – January 8, (prior to) July 22, August 7, December 10

[39] GD2-203, GD2-204, GD2-300, GD2-301, and GD2-303
[40] GD2-299
[41] GD2-437
[42] GD2-206 to GD2-207
[43] These are based on passport stamps from GD2-749 to GD2-765

[49] By emphasizing his legal status as a "*visiteur*" in France, the Appellant is trying to use French law to determine an issue of Canadian law. The name used by French officials to describe him cannot determine his residency for OAS purposes. I place very little weight on his legal status in France. I also note that he has regarded his residence in France as his "home" in the past, even when he was considered a "*visiteur*".[44]

[50] I conclude that the Appellant was not resident in Canada from January 1, 2012, to May 25, 2015. Compared to his connections to both South Africa and France, his connection to Canada was very unsettled. He may well have been planning Canadian residency, but he had not yet achieved it.

– **The Appellant resided in Canada from May 26, 2015, to August 13, 2015**

[51] The Appellant resided in Canada from May 26, 2015, to August 13, 2015.

[52] Starting on May 26, 2015, the Appellant's residency situation changed significantly. He started taking steps in Canada that were more consistent with a settled existence here, even if he did not abandon his strong connections to South Africa and especially France.

[53] Most notably, in July 2015, the Appellant signed a lease for an apartment on X Road in X, Nova Scotia. The year-to-year lease was effective August 1, 2015, and gave him an actual "address" of his own.[45] He bought tenant's insurance for the apartment.[46] Around this time, he also bought some vacant land in Beaver River, Nova Scotia. While I did not see any documents relating to the purchase in the Tribunal file, I did see a tax document that supports his ownership of this land for several years.[47] He ultimately did not do anything with the land, although he said he had intended to develop it as a residence. He sold the land in July 2020.[48]

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[44] GD2-377
[45] GD1-366 to GD1-369
[46] GD1-377 to GD1-378
[47] GD2-537, GD19-4 to GD19-5
[48] GD2-203

[54] These factors are significant. They demonstrate stronger ties to Canada, although the Appellant continued to travel extensively throughout the world. He was a Canadian citizen who now owned some land and rented an apartment in Canada, while owning a small home and having family members in France. He also appears to have bought a car in Canada on August 4, 2015.[49]

[55] As the Appellant now had comparable ties to both Canada and France, I find that his physical presence in each of those countries becomes much more important in determining where he was resident at any particular time.

[56] The following chart (which I will call the "Presence Chart") sets out the Appellant's approximate whereabouts during the period from January 1, 2015, to the start of the COVID-19 pandemic[50]:

Start	End	Location	Days
January 1, 2015	January 8, 2015	St. Guilhem, France	8
January 8, 2015	January 11, 2015	Chapel Hill NC, US	4
January 11, 2015	January 21, 2015	Tokyo, Japan	11
January 21, 2015	February 2, 2015	Lombok, Indonesia	13
February 2, 2015	February 20, 2015	Tokyo, Japan	19
February 21, 2015	February 26, 2015	Morrisville NC, US	6
February 27, 2015	May 20, 2015	St. Guilhem, France	83
May 20, 2015	May 26, 2015	Chapel Hill NC, US	7
May 26, 2015	August 13, 2015	2 NS Locations, Canada	80
August 13, 2015	August 17, 2015	Chapel Hill NC. US	5
August 17, 2015	August 30, 2015	St. Guilhem, France	14
August 31, 2015	October 14, 2015	Cape Town, South Africa	45
October 15, 2015	October 25, 2015	St. Guilhem, France	11
October 28, 2015	November 1, 2015	Morrisville NC, US	5
November 1, 2015	December 9, 2015	Church Point NS Canada	39
December 9, 2015	January 6, 2016	St. Guilhem, France	29
January 7, 2016	January 30, 2016	Church Point NS Canada	24
January 31, 2016	March 16, 2016	St. Guilhem, France	46
March 17, 2016	March 21, 2016	London, UK	5
March 21, 2016	April 6, 2016	St. Guilhem, France	17
April 6, 2016	April 10, 2016	Morrisville NC, US	5
April 10, 2016	May 3, 2016	Church Point NS Canada	24
May 4, 2016	May 13, 2016	St. Guilhem, France	10
May 14, 2016	July 17, 2016	Church Point NS Canada	65
July 17, 2016	August 8, 2016	St. Guilhem, France	23
August 8, 2016	August 12, 2016	Singapore	5
August 12, 2016	August 20, 2016	Tokyo, Japan	9

[49] GD2-164
[50] See GD2-206 to GD2-211

August 20, 2016	August 22, 2016	Morrisville NC, US	3
August 22, 2016	Sept. 29, 2016	Church Point NS Canada	39
October 1, 2016	October 2, 2016	Doha, Qatar	2
October 2, 2016	December 19, 2016	Cape Town, South Africa	79
December 19, 2016	January 8, 2017	St. Guilhem, France	21
January 8, 2017	January 10, 2017	New York City, US	3
January 10, 2017	February 17, 2017	Church Point NS Canada	39
February 17, 2017	March 27, 2017	St. Guilhem, France	39
March 28, 2017	April 1, 2017	Durham NC, US	5
April 1, 2017	September 4, 2017	Church Point NS Canada	157
September 5, 2017	September 8, 2017	Durham NC US	4
September 8, 2017	December 12, 2017	Church Point NS Canada	96
December 13, 2017	December 14, 2017	Chapel Hill NC US	2
December 15, 2017	March 21, 2018	St. Guilhem, France	97
March 21, 2018	April 27, 2018	Church Point NS Canada	38
April 28, 2018	April 29, 2018	Jersey City NJ, US	2
April 29, 2018	April 30, 2018	Morrisville NC, US	2
April 30, 2018	May 13, 2018	Tokyo, Japan	14
May 14, 2018	June 18, 2018	St. Guilhem, France	36
June 19, 2018	October 14, 2018	Church Point NS Canada	118
October 16, 2018	October 17, 2018	Hong Kong, China	2
October 17, 2018	October 22, 2018	Shanghai, China	6
October 23, 2018	November 12, 2018	Cape Town, South Africa	21
November 13, 2018	April 6, 2019	St. Guilhem, France	145
April 6, 2019	July 31, 2019	Church Point NS Canada	117
July 31, 2019	July 31, 2019	Bangor ME, US	1
July 31, 2019	December 9, 2019	Church Point NS Canada	132
December 10, 2019	January 23, 2020	St. Guilhem, France	45
January 23, 2020	February 23, 2020	Wolfville NS Canada	32
February 23, 2020	February 24, 2020	Bangor ME, US	2
February 24, 2020	---	Wolfville NS, Canada	--

[57] The Appellant was present in Canada for a relatively long period of 80 days, between May 26 and August 13, 2015. In the context of his highly mobile lifestyle, this combines with his other Canadian ties to establish Canadian residence for this period.

The Appellant didn't reside in Canada from August 14, 2015, to October 31, 2015

[58] The Presence Chart shows that the Appellant was not present in Canada at all during this period. This period was nearly as long as his preceding stay in Canada. In contrast to my finding for the preceding period, his lack of presence in Canada here decides the issue. I also note that he stayed in France for two separate periods before returning to Canada. While these stays were not very long, they are evidence that he

had strong ties to France during this time. France was his “base”. As a result, I find that he did not reside in Canada during this time.

The Appellant resided in Canada from November 1, 2015, to January 30, 2016

[59] The Presence Chart shows that the Appellant spent the majority of this period in Canada. While it was interrupted by a 29-day stay in France, I find it significant that he returned to Canada immediately afterward. As with the preceding periods, his significant presence in Canada during this period tilts the scales in favour of Canadian residency. I therefore find that he resided in Canada during this time.

The Appellant didn’t reside in Canada from January 31, 2016, to April 9, 2016

[60] The Presence Chart shows that the Appellant was not present in Canada at all during this period. In contrast to my finding for the preceding period, his lack of presence in Canada is determinative. He spent roughly 90% of this period in France. I also note that he stayed in France for two separate periods before returning to Canada on April 10, 2016. These stays show that France was his “base” during this time. As a result, I find that he did not reside in Canada during this time.

The Appellant resided in Canada from April 10, 2016, to April 5, 2019

[61] During this period of 1091 days, the Appellant had eight separate stays in Canada for a total of 576 days. In contrast, he had only seven separate stays in France for a total of 371 days. As with the preceding periods, his significant presence in Canada during this period is the most persuasive factor in finding that he resided in Canada. I also note that he always had a stay in Canada between any two stays in France. However, on two occasions, I saw no stay in France between two stays in Canada. I therefore find that he resided in Canada during this time.

The Appellant is not entitled to an OAS pension until 2021, if only his periods of residence in Canada are considered

[62] As of April 5, 2019, the Appellant had just over eight years of residence in Canada. This is not enough for an OAS pension, as at least ten years are required. He wouldn't meet this threshold until 2021.

[63] However, the Appellant had some prior periods of residence in the United States. These could help him qualify earlier for an OAS pension.

Canada's agreement with the US may help the Appellant qualify

[64] Canada has a social security agreement with the US. This means that the periods in which the Appellant made social security contributions in the US **may** count toward his eligibility for an OAS pension.[51]

[65] US officials provided information showing that the Appellant made social security contributions in the US continuously from the first quarter of 1979 to the last quarter of 1985. That is a total of 28 quarters.[52] However, four of those quarters are in 1979, and therefore overlap with periods for which he was already resident in Canada. This means those four quarters must be excluded. As a result, he only has 24 quarters of social security contributions in the US that help him meet the OAS eligibility requirements. The agreement says this equals six years of residence in Canada when determining eligibility for an OAS pension.[53] It is important to remember that the US contributions do not affect the **amount** of the OAS pension: they only affect **eligibility** for the pension.

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[51] Section 40 of the OAS Act allows the Government of Canada to make this agreement. See the 1981 *Agreement Between the Government of Canada and the Government of the United States of America With Respect to Social Security* (the "Canada-US Agreement"). The Canada-US Agreement has been amended twice. The first amendment was in 1983, under the *Supplementary Agreement Amending the Agreement Between the Government of Canada and the Government of the United States of America With Respect to Social Security.* The second amendment was in 1996. It was in the *Second Supplementary Agreement Amending the Agreement Between the Government of Canada and the Government of the United States of America With Respect to Social Security* (the "2nd Amendment to the Canada-US Agreement").

[52] GD2-799

[53] See Article 5 of the 2nd Amendment to the Canada-US Agreement. That Article amends Article VIII of the Canada-US Agreement.

[66] Combined with the Appellant's "actual" years of Canadian residence, the six years of residence imputed by the Canada-US Agreement make him eligible for an OAS Pension. However, the amount and timing of the pension depend on the approval date.

The Appellant's approval date

[67] The Appellant has been a Canadian citizen (or a legal resident of Canada) for more than 40 years. This is not in dispute.[54]

[68] With that initial hurdle addressed, payment of an OAS pension starts the month after the application is approved. The approval date depends on the Appellant's age when he applied, his application date, his eligibility for an OAS pension, and the date he requested in his application for the start of his OAS pension.[55]

[69] In this case, the Appellant applied for an OAS pension on September 17, 2018.[56] He was 77 years old when he applied. He would have met the minimum eligibility requirements for the OAS pension a couple of years before 2018. In his application, he said that he wanted his pension to start in July 2018.[57]

[70] The approval date is the latest of the following dates:

(i) One year before the day on which the application is received;
(ii) The day on which the applicant attained the age of 65 years;
(iii) The day on which the applicant became qualified for an OAS pension; and
(iv) The month immediately before the date specified in writing by the applicant.

[71] In this case, the latest date is June 2018. This is the month before the date specified in writing by the Appellant. This means that his OAS pension would start as of July 2018. His pension amount would be 7/40 of a full OAS pension. By June 2018, he had more than 7 years but less than 8 years of actual residence in Canada.[58]

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[54] Sections 3 to 5 of the OAS Act set out the basic requirements. The citizenship/legal resident requirements are in s. 4 of the OAS Act and s. 22(1) of the OAS Regulations.
[55] See s. 8 of the OAS Act and s. 5 of the OAS Regulations.
[56] The application date is when the Minister received the application. See GD2-527.
[57] GD2-528
[58] Partial years do not count toward the OAS pension amount. See s. 3(4) of the OAS Act.

Could the Appellant still qualify for a full OAS pension?

[72] The Appellant doesn't claim he resided in Canada for 40 years after he turned 18. He says he meets other criteria to qualify for a full pension. However, I find that he hasn't proven he is eligible for a full pension without 40 years of residence.

[73] To be eligible for a full OAS pension without 40 years of residence, the Appellant first had to meet these requirements:[59]

- He had to be at least 25 years old on July 1, 1977.
- He had to be residing in Canada on July 1, 1977. If he wasn't, he must have resided in Canada for any period after he turned 18, but before July 1, 1977. Or he must have had a valid immigration visa.

[74] The Appellant met those requirements.

[75] But there is a third requirement. It can be broken down into two different rules: the 10-Year Rule and the 3-for-1 Rule.[60]

[76] To qualify under the **10-Year Rule**, the Appellant has to prove he resided in Canada for the 10 years **immediately before** his application was approved.

[77] The Appellant doesn't qualify under this rule. His application was approved as of June 1, 2018. But, as I explained above, he hasn't proven he resided in Canada from June 1, 2008, to June 1, 2018.

[78] To qualify under the **3-for-1 Rule**, the Appellant has to prove that, for one, he resided in Canada for one year **immediately before** his application was approved.

[79] The Appellant met this first factor. He resided in Canada from June 1, 2017, to June 1, 2018.

[80] But the Appellant still doesn't qualify for a full OAS pension because there is another factor under the 3-for-1 Rule, and he didn't meet it. I explain why below.

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[59] See s. 3(1)(b)(i) of the OAS Act. See also *Flitcroft v. Attorney General of Canada*, 2012 FC 782.
[60] See s. 3(1)(b)(iii) of the OAS Act.

– **The 3-for-1 Rule about presence in Canada**

[81] The 3-for-1 Rule actually looks at two periods:[61]

1. The "First Period" is from April 20, 1959, to June 1, 2008. It started when the Appellant turned 18. It ended 10 years before his OAS application was approved.

2. The "Second Period" is from June 1, 2008, to June 1, 2018. It is the 10 years immediately before the Appellant's OAS application was approved.

[82] The Appellant has to prove he was present in Canada during the First Period. He has proven that.

[83] But this amount of time had to be at least three times as long as the amount of time he was absent from Canada during the Second Period. For example, if the Appellant was absent from Canada for five years during the Second Period, he has to prove he was present in Canada for at least 15 years during the First Period.

o ***When was the Appellant present in Canada during the First and Second Periods?***

[84] During the First Period (from April 20, 1959, to June 1, 2008), the Appellant was present in Canada in the following periods:[62]

Entered Canada	Left Canada	[# days]
May 7, 1975	December 11, 1979	1,680
1980?	?	21*
1981?	?	21*
1982?	?	21*
March 1, 2002	?	14*
September 20, 2003	?	14*
September 6, 2004	?	14*
November 1, 2006	?[63]	14*
March 28, 2008	?[64]	14*
TOTAL		1,813 days

[61] See s. 3(1)(b)(iii) of the OAS Act.
[62] See GD2-641 for entry dates into Canada.
[63] Departure date cannot be later than October 19, 2007, as per GD2-235.
[64] Departure date cannot be later than August 3, 2008, as per GD2-236.

[85] I have already found that the Appellant was **resident** in Canada from May 7, 1975, to December 11, 1979. This does not necessarily mean he was **present** in Canada throughout that period. He likely left Canada on at least one occasion, given the faint passport stamps at GD2-776 that appears to refer to 1978. However, I have given him the benefit of the doubt because he was working in Canada throughout this time. I must make my findings on a balance of probabilities, and it is possible that he only left Canada for day trips connected with his work. This is why I find that he had 1,680 days of presence in Canada up to December 11, 1979.

[86] I will now explain the numbers that appear with an asterisk in the above table. The Appellant claimed that he "returned to Canada on a regular basis" from 1980 to 1982, while he was working in the US for a Canadian company. While he also suggested that he "returned to Canada as a visitor on many occasions", he did not provide specific dates or even years. He submitted that this continued, "into the nineties although on a less frequent basis."[65]

[87] It is difficult to make findings about events that took place 40 or more years ago, when there are little or no supporting documents. Nonetheless, I find it reasonable to conclude that the Appellant spent at least some time in Canada during the years 1980, 1981, and 1982. This is consistent with his employment by a Canadian company.[66] As for the duration of his presence in Canada, I find that 21 days per year is reasonable. This totals 63 days from 1980 to 1982.

[88] I don't see enough evidence to support a finding of presence in Canada between 1983 and February 28, 2002. However, I see records documenting entries to Canada in the years 2002, 2003, 2004, 2006, and 2008. While these do not appear to be work-related, the Appellant may have visited for leisure purposes. For each of those years, I find it likely that he spent 14 days in Canada. This is a reasonable amount of time to spend in Canada as a visitor. This totals 70 days from 2002 to 2008.

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[65] GD1-20 and GD2-430

[66] The Appellant did not meet the requirements following s. 21(5)(a)(vi) of the OAS Regulations. Thus, this period of US employment for a Canadian company cannot count as Canadian residency.

[89] Thus, during the First Period, the Appellant was present in Canada for 1,813 days. This is just short of 5 years.

[90] During the Second Period (from June 1, 2008, to June 1, 2018), the Appellant was present in Canada in the following periods:[67]

Entered Canada	Left Canada	[# days]
June 20, 2011	June 24, 2011	5[68]
June 4, 2012	June 13, 2012	10
July 12, 2012	August 5, 2012	25
May 4, 2013	July 3, 2013	61
August 23, 2013	August 27, 2013	5
July 29, 2014	August 3, 2014	6
May 26, 2015	August 13, 2015	80
November 1, 2015	December 9, 2015	39
January 7, 2016	January 30, 2016	24
April 10, 2016	May 3, 2016	24
May 14, 2016	July 17, 2016	65
August 22, 2016	September 29, 2016	39
January 10, 2017	February 17, 2017	39
April 1, 2017	September 4, 2017	157
September 8, 2017	December 12, 2017	96
March 21, 2018	April 27, 2018	38
TOTAL		713 days

[91] During the Second Period, the Appellant was present in Canada for 713 days. The Second Period had 3,652 days. This means he was absent from Canada for 2,939 days in the Second Period.

[92] To be eligible for a full OAS pension under the 3-for-1 Rule, the Appellant must meet a strict test. He must prove he was present in Canada during the First Period for three times as long as he was absent during the Second Period. That would be for at least 8,817 days, or just over 24 years.

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[67] GD2-556. While the Appellant entered Canada on March 28, 2008 (see GD2-641), I see no evidence that his stay lasted to June 1, 2008. He did not enter Canada again until June 20, 2011 (GD2-641).
[68] See GD2-227, which confirms the Appellant was in Halifax on June 22, 2011. GD2-641 confirms the Appellant entered Canada on June 20, 2011. GD2-751 confirms the Appellant entered the US on June 24, 2011, apparently from Halifax.

[93] The Appellant hasn't proven he was present in Canada long enough. That is because he has proven he was present in Canada during the First Period for only 1,813 days (just under 5 years).

[94] This means he doesn't qualify for a full OAS pension under the 3-for-1 Rule.

Other issues raised by the Appellant

[95] The Appellant has made extensive submissions about the Minister's conduct in this matter. He has also submitted that he should get costs.

The Minister's conduct

[96] Regarding the Minister's conduct, I understand that the Appellant strongly disagreed with the "false choice" that the Minister offered him. He says it was unfair for the Minister to offer him several different options for his OAS pension, when he didn't agree with the underlying basis for any of them. Furthermore, as those options were not in the form of an initial decision, he felt unable to dispute them.

[97] I acknowledge the Appellant's frustration. He suggests that many Canadians are (or feel) forced to accept an option they do not agree with. This may be true. However, the Tribunal cannot help him in that regard. The Tribunal's role is not to assess the Minister's decision-making process or the way it interacts with applicants. Nor does the Tribunal manage the Minister. Instead, the Tribunal takes a fresh look at the facts underlying each case and renders a decision. It does not have the authority to censure or penalize the Minister. Nor can the Tribunal order the Minister to change its practices.

[98] In fact, the Appellant has already argued this issue at the Federal Court of Appeal (the "2021 FCA Decision").[69] In the 2021 FCA Decision, the Court hoped that the Minister would take note of the Appellant's predicament and clarify the matter when

[69] *Mudie v. Canada (Attorney General),* 2021 FCA 239.

communicating with OAS pension applicants.[70] But the Court wouldn't do more than that.

Costs of this appeal

[99] The Appellant also argued the costs issue at the Federal Court of Appeal. In the same 2021 FCA Decision, the Federal Court of Appeal concluded that the Tribunal's Appeal Division did not have the authority to order costs or damages. This would also apply to the Tribunal's General Division. Federal Court of Appeal decisions are binding on the Tribunal.[71]

[100] I understand that the Appellant sought leave to appeal the 2021 FCA Decision at the Supreme Court of Canada. However, I also understand that the Supreme Court of Canada did not grant leave to appeal. As a result, the 2021 FCA Decision remains binding on the Tribunal.

Rescinding the reconsideration decision

[101] The Appellant has frequently submitted that the Minister's reconsideration decision of December 11, 2020 (the "2020 Recon Decision") should be rescinded.[72] I agree that it is legally possible for the Tribunal to rescind the 2020 Recon Decision.[73] However, that happens as a matter of course if the Tribunal reaches a different conclusion in an appeal.

[102] It assists nobody to rescind the 2020 Recon Decision without reaching a different conclusion. It simply forces the Minister to make another reconsideration decision on the same issue it has already decided. If the Minister were inclined to reach a different conclusion than it did before, it surely would not be opposing the appeal at the Tribunal.

[103] The Appellant's remedy would then be launching a new appeal to the Tribunal. However, that results in an excessive duplication of effort. It also violates the Tribunal's

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[70] See *Mudie v. Canada (Attorney General),* 2021 FCA 239, at paragraph 21.
[71] See *Mudie v. Canada (Attorney General),* 2021 FCA 239, at paragraph 24.
[72] This decision is at GD2-3.
[73] See s. 54(1) of the *Department of Employment and Social Development Act*.

regulations. Those regulations say that the Tribunal must conduct proceedings as informally and quickly as the considerations of fairness and natural justice permit.[74] I therefore decline to rescind the 2020 Recon Decision, because my decision on the merits does not require such a rescission. As I have set out above, the Appellant's appeal is successful in part, but parts of the 2020 Recon Decision are also upheld.

Sufficiency of the Minister's productions

[104] The Appellant made several demands for complete "Section 26 productions." He suggests that the Minister withheld relevant information that should have been produced under s. 26(f) of the Tribunal's Regulations. This includes "any documents relevant to the decision." He focuses on documents relating to the Minister's investigation and decision-making process.[75] However, as noted above, the Tribunal's role is not to assess the Minister's investigation or decision-making process. The Tribunal's role is to assess whether the Appellant is entitled to a benefit. I note that documents showing how the Minister made its decision are different from documents that support the decision.

[105] In any case, the Tribunal does not have the authority to compel a party to produce any particular document. The Tribunal is not without options if documents are clearly missing. The Tribunal may make a negative inference about a party's failure to produce a clearly relevant document. However, I am not satisfied that this principle applies in this case. The Minister's decision-making and investigative processes are not clearly relevant for the Tribunal in assessing the Appellant's appeal.

[106] If the Minister did not file documents that the Appellant had provided, the Appellant bears the onus of remedying the situation. He must prove his claim and adduce sufficient evidence. If he has documents or information that he wants the

[74] See s. 3(1)(a) of the *Social Security Tribunal Regulations*.
[75] See, for example, paragraphs 38-40 in the Appellant's submissions at GD5-12 to GD5-13.

Tribunal to consider, it is incumbent upon him to provide that evidence.[76] The Tribunal is not required to compel the production of or obtain such evidence.[77]

The Appellant is eligible for a partial OAS pension

[107] The Appellant doesn't qualify for a full OAS pension. But he qualified for a partial OAS pension of 7/40 in June 2018. This is more than the partial OAS pension awarded by the Minister.

When payments start

[108] The Appellant's pension starts in July 2018.

[109] OAS pension payments start the first month after the pension is approved.[78] The Appellant's pension was approved in June 2018.

Conclusion

[110] The Appellant is eligible for a partial OAS pension of 7/40. Payments start in July 2018.

[111] This means the appeal is allowed in part. The Minister had only awarded a 4/40 partial OAS pension.

Pierre Vanderhout
Member, General Division – Income Security Section

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[76] See *A.N. v. Minister of Employment and Social Development*, 2016 CanLII 58983, 2016 SSTADIS 141, at paragraph 27. This non-binding decision of the Tribunal's Appeal Division is persuasive.
[77] *Minister of Employment and Social Development v. Z.Y.*, 2018 SST 145. This non-binding decision of the Tribunal's Appeal Division is persuasive.
[78] See s. 8(1) of the OAS Act.