Citation: *GG v Minister of Employment and Social Development*, 2024 SST 295

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	G. G.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated May 12, 2023 (issued by Service Canada)

Tribunal member:	James Beaton
Type of hearing:	In writing
Decision date:	March 21, 2024
File number:	GP-23-1440

Decision

[1] The appeal of the Appellant, G. G., is dismissed. But I am also varying the decision of the Minister of Employment and Social Development. The Minister granted the Appellant a partial Old Age Security (OAS) pension of 7/40. I am reducing the Appellant's entitlement to 1/40 of an OAS pension. This decision explains why I am varying the Minister's decision.

Overview

[2] The Appellant was born in Canada on June 21, 1941.[1] He was raised in Alberta. On February 12, 1961, after graduating from high school, he left Canada to attend university in the United States. He says he attended:

- Benton Harbor Community College from 1961 to 1962
- Western Michigan University from 1962 to 1965
- Colorado State University from 1965 to 1967
- University of Colorado from 1968 to 1974

[3] He remained in the US after graduating and is now a dual Canadian-US citizen.[2]

[4] The Appellant applied for an OAS pension on May 14, 2019. He said he wanted his pension to start as soon as he qualified.[3]

[5] The Minister granted the Appellant a pension of 1/40 on the basis that the Appellant resided in Canada from his 18th birthday until February 12, 1961.[4]

[6] The Appellant asked the Minister to reconsider its decision. On reconsideration, the Minister increased the Appellant's pension to 7/40 on the basis that his time attending university in the US counted as Canadian residence. It seems that the

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[1] See GD2-20.
[2] See GD2-27 and GD3-1.
[3] See GD2-25 to 32.
[4] See GD2-22 to 24.

Minister only counted academic terms, and not the periods in between terms, as residence.[5]

[7] The Appellant appealed to the Social Security Tribunal's General Division. He thinks the entire time he attended university (including between academic terms) should count as Canadian residence. That would increase his pension to 14/40.

[8] After reviewing all of the evidence, I determined that the Appellant only resided in Canada until February 12, 1961. The Minister's initial decision was correct. Its reconsideration decision was incorrect because it was based on a misinterpretation of the *Old Age Security Regulations* (Regulations). As a result, the Appellant is only eligible for a pension of 1/40.

What the Appellant must prove

[9] To receive a **full** OAS pension, the Appellant must prove he resided in Canada for at least 40 years after he turned 18.[6] This rule has some exceptions. But the exceptions don't apply to the Appellant.[7]

[10] 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. To receive a partial OAS pension, the Appellant must prove he resided in Canada for at least 20 years after he turned 18.[8]

[11] The Appellant must prove he resided in Canada. He must prove this on a balance of probabilities. This means he must show it is more likely than not that he resided in Canada during the relevant periods.[9]

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[5] See GD2-3 to 6. See also GD4.
[6] See section 3(1)(c) of the *Old Age Security Act* (OAS Act). The Appellant must also 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.
[7] See section 3(1)(b) of the OAS Act.
[8] See section 3(2) of the OAS Act. If an applicant resided in Canada the day before their application was approved, they only need 10 years of residence. The Appellant didn't reside in Canada the day before his application was approved, so he needs 20 years of residence.
[9] See *De Carolis v Canada (Attorney General)*, 2013 FC 366.

Matters I have to consider first

My authority as a Tribunal member is broad

[12] My decision-making authority as a member of the Tribunal's General Division isn't limited to choosing between the options presented by the Minister (7/40 of a pension) and the Appellant (14/40 of a pension). My decision-making authority is broad. I have the authority to:

- dismiss an appeal
- confirm, rescind or vary the Minister's decision in whole or in part
- give the decision that the Minister should have given[10]

[13] So I have the authority to award the Appellant a pension of 1/40 even though that is less than what both the Appellant and the Minister think is correct.

The Appellant asked for a hearing in writing

[14] The Appellant asked for his hearing to proceed in writing rather than orally. Section 2 of the *Social Security Tribunal Regulations, 2022* requires me to hold a hearing in the format requested by the Appellant unless doing so would not allow for a full and fair hearing.

[15] For a hearing to be full and fair, an appellant must have the opportunity to make arguments on every fact or factor relevant to their case.[11] When an appellant is unrepresented by a lawyer or other professional, like the Appellant in this case, the Tribunal member might have to take a more active role in the proceedings to ensure that the hearing is full and fair. This could involve asking the appellant a combination of specific and open-ended questions.

[10] See section 54(1) of the *Department of Employment and Social Development Act*.
[11] See *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319.

[16] To respect the Appellant's hearing choice and ensure procedural fairness, I asked the Appellant written questions that invited him to present evidence on the issue of residence. For example, I asked him:

- when and where he lived in Canada
- whether he owned or rented his accommodations
- where he went to university
- when he was enrolled as a university student
- when he physically attended university
- what he did in between academic terms
- whether he left personal property in Alberta
- whether he had an Alberta driver's licence or vehicle
- whether he is a US citizen
- whether he worked in the US as a representative, employee or member of a Canadian company or Canadian municipal, provincial or federal government

[17] I gave him sufficient time to respond to my questions. I also asked the Minister to clarify when the Appellant contributed to US social security.[12] After reviewing their responses, together with the evidence, I sent this final letter to the parties:

> The Minister granted the Appellant 7/40 of an OAS pension based partly on sections 21(4)(a) and (b) of the *Old Age Security Regulations*. These provisions say that any interval of absence from Canada of a person resident in Canada that is (a) of a temporary nature and does not exceed one year, or (b) for the purpose of attending a school or university, shall be deemed not to have interrupted that person's residence or presence in Canada. For these provisions to apply, it is arguable that a person must reside in Canada **both before and after** their absence from Canada.
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> The parties may respond to this letter by **March 18, 2024**. The parties may wish to state whether they agree or disagree with the above interpretation of sections 21(4)(a) and (b). The Appellant may wish to state whether he believes that he resided in Canada

[12] See GD0.

> both before and after he attended university in the United States, and in between academic terms, and why.[13]

[18] The Appellant responded to my letter, restating his belief that he resided in Canada for 14 years.[14] The Minister did not respond.

[19] Although the Appellant may be surprised and disappointed with the outcome of his appeal, I am satisfied that he had a full and fair hearing. He had the opportunity to present evidence and arguments on every fact or factor relevant to his case.

Reasons for my decision

[20] I find that the Appellant is eligible for a partial OAS pension of 1/40.

[21] The Appellant resided in Canada for 1 year and 237 days. The time he worked in the US also counts as residence in Canada. It helps him **qualify** for an OAS pension. But it doesn't change the **amount** of his pension.

[22] I considered the Appellant's eligibility from June 21, 1959, up to and including December 31, 1974. I chose the first date because that is when the Appellant turned 18. I chose the second date because the Appellant says he resided in Canada until then.

[23] Here are the reasons for my decision.

The test for residence

[24] 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.

[25] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.[15]

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[13] See GD8.
[14] See GD9.
[15] See section 21(1)(a) of the Regulations.

[26] A person is **present** in Canada when they are physically present in any part of Canada.[16]

[27] When I am deciding whether the Appellant resided in Canada, I must look at the overall picture and factors such as:

- where he had property
- where he had social ties
- where he had other ties, like 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 and elsewhere
- what his lifestyle was like in Canada
- what his intentions were[17]

[28] This isn't a complete list. Other factors may be important to consider. I must look at **all** of the Appellant's circumstances.[18]

When the Appellant resided in Canada

[29] The Appellant resided in Canada from June 21, 1959 (his 18th birthday), up to and including February 12, 1961 (when he left Canada to study in the US). He didn't reside in Canada after that.

[30] The parties agree that the Appellant resided in Canada from June 21, 1959, to February 12, 1961. I see no reason to find otherwise. The Appellant was born and raised in Canada. He was already deep-rooted and settled here when he turned 18, and nothing changed in that regard until he started his postsecondary education.

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[16] See section 21(1)(b) of the Regulations.
[17] 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.
[18] See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

[31] The following factors support that the Appellant **continued** to reside in Canada from February 13, 1961, to December 31, 1974:

- He considered Canada his home.
- He retained Canadian citizenship.
- He held a Canadian passport and an Alberta driver's licence.
- In between academic terms, he returned to Alberta to visit his parents.
- He considered his parents' house to be his main residence.
- Between 1968 and 1974, he returned to Canada to consider teaching opportunities in Alberta and British Columbia.

[32] By contrast, the following factors support that the Appellant **did not continue** to reside in Canada from February 13, 1961, to December 31, 1974:

- He didn't leave any personal property in Alberta when he started his studies.
- He spent most of his time in the US, where he studied at several postsecondary institutions.
- He contributed to US social security beginning in 1962 while working part-time to help pay for his education.
- He didn't have a permanent residence in Alberta to return to when he finished university in 1974.
- He remained in the US after graduating in 1974 and became a US citizen. He still lives in the US.[19]

[33] The Appellant provided documentary evidence, including:

- an Alberta birth certificate
- a Canadian passport issued in 1987
- copies of his diplomas and transcripts from US institutions
- copies of news articles regarding his accomplishments as a student

[19] See GD1-1 to 3; GD2-25 to 32 and 100; GD3; GD6-1; and GD9. The Appellant initially said he became a US citizen in about 1972 (GD3-1) but corrected this to around 1988 (GD3-3).

- a photo of him standing in front of a bus that says, “National Speech and Hearing Survey—Colorado State University”[20]

[34] These documents confirm that the Appellant was born in Alberta, retained his Canadian citizenship until at least 1987, and studied in the US after graduating from high school in Alberta. But they don’t support that he had other ties to Canada throughout 1961 to 1974.

[35] When I consider all of the evidence, I find that the Appellant’s ties to the US were stronger than his ties to Canada from February 13, 1961, to December 31, 1974.

[36] It is true that he retained Canadian citizenship and visited his parents in Canada. He thought of Canada as his home. And the fact that he thought about taking up teaching positions in Canada toward the end of his studies suggests that he was considering moving back to Canada—perhaps long-term.

[37] However, he didn’t move back to Canada. Significantly, he left no possessions behind when he began his studies in the US, and he had no permanent residence to go back to even if he decided to return to Canada. He spent most of his time in the US, where he studied, worked, and contributed to US social security. He visited his parents in Alberta, but his life was clearly centred around his endeavours elsewhere. His overall lifestyle doesn’t support Canadian residence.

[38] I will now consider whether exceptions to the general rules about residence and presence help the Appellant increase his residence in Canada.

– Exceptions to the general rules about residence and presence don’t apply

[39] As I explained earlier, a person resides in Canada when they make their home and ordinarily live in any part of Canada. A person is present in Canada when they are physically present in any part of Canada.

[20] See GD2-86, 87, 92, 96, 99, and 101 to 108; and GD6-3 to 5 and 7.

[40] The Regulations set out some exceptions to these general rules. Section 21(4) says:

> Any interval of absence from Canada of a person resident in Canada that is
>
> (a) of a temporary nature and does not exceed one year,
>
> (b) for the purpose of attending a school or university, or
>
> (c) specified in subsection (5)
>
> shall be deemed not to have interrupted that person's residence or presence in Canada.

[41] Subsection (5) sets out the types of absences from Canada to which section 21(4)(c) applies. They include situations where a person is employed outside Canada by certain types of employers. Those situations don't apply to the Appellant because he wasn't employed by one of those employers.[21] However, when the Minister decided to grant the Appellant a pension of 7/40 instead of 1/40, it appears to have relied on section 21(4)(b) and possibly section 21(4)(a) as well. I will call these sections the "University Rule" and the "Temporary Absence Rule."

[42] I find that these rules don't apply to the Appellant. I will explain why.

– **Why the Temporary Absence Rule doesn't apply**

[43] The Temporary Absence Rule doesn't apply. Even if the Appellant visited Canada at least once per year (making his absences from Canada less than a year long), his absences were not of a temporary nature. He spent most of his time in the US. During academic breaks, he visited his parents in Alberta, but he also worked in the US. The fact that he took all of his personal possessions with him in 1961 supports that his trips to Canada were simply visits. They didn't represent a return to "home base" in between academic terms. His absences from the US may be characterized as temporary, but his absences from Canada cannot be characterized as temporary.

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[21] See GD0 and GD3-1.

– Why the University Rule doesn't apply

[44] The Minister thinks the University Rule applies to extend the Appellant's residence after he left Canada in 1961 until he finished his studies in the US in 1974. The Minister seems to have counted as residence only the dates when the Appellant was actively enrolled in courses, not the breaks in between academic terms, although it is unclear from the documentary evidence how the Minister even determined the dates of the academic terms.

[45] The Appellant thinks the University Rule should extend his Canadian residence to 1974, including his academic breaks.

[46] I respectfully disagree with both the Minister and the Appellant.

[47] For the University Rule to apply, a person must first establish residence in Canada.[22] There is no dispute that the Appellant was resident in Canada until February 12, 1961. The person must also be absent from Canada "for the purpose of attending school or university." I accept that the Appellant was absent from Canada for that purpose, at least when he was actively enrolled in classes or an academic program.

[48] However, I believe that there is a third requirement which the Appellant does not meet. Before the rule can deem a person's residence to be uninterrupted, the person must actually **resume residing** in Canada.

[49] The Tribunal has addressed this requirement before, but not conclusively. In *IB v Minister (Employment and Social Development)*, the General Division found that a person must immediately resume residing in Canada after completing their studies in order to take advantage of the University Rule. On appeal, the Appeal Division objected to the General Division's assumption that a person must resume residing in Canada "immediately." However, the Appeal Division left open the possibility that a person might be required to resume residing in Canada at some point before the rule may apply.[23]

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[22] See *Duncan v Canada (Attorney General)*, 2013 FC 319.
[23] See 2021 SST 428 and 2021 SST 429.

[50] There are a few reasons why I believe the University Rule only applies to preserve a person's residence when a person resumes residing in Canada. Those reasons are based on the purpose, text, and context of the University Rule.

[51] The **purpose** of the University Rule and of most of the other rules in section 21 is to carve out exceptions to the general rules. Exceptions should be interpreted precisely and narrowly so as not to undermine the general rules that Parliament set out when defining "presence" and "residence."[24]

[52] The **text** of the University Rule shows that the rule applies to an "interval of absence." The Cambridge Dictionary defines "interval" as "a period between two events or times."[25] Similarly, the Merriam-Webster Dictionary defines it as "a space of time between two events or states."[26] These definitions tell me that an interval is a temporary state occurring between two other states.

[53] The text of the University Rule also shows that it only has the effect of not "interrupting" a person's presence or residence. It doesn't preserve their presence or residence indefinitely. The Cambridge Dictionary explains that "interrupt" means "to stop something from happening for a short period."[27] This suggests that the University Rule is meant to preserve a person's presence or residence for a limited period of time.

[54] Finally, the **context** of the University Rule supports that it only preserves a person's residence if they resume residing in Canada. Other rules in section 21 that preserve a person's presence or residence in Canada generally require that person to resume their presence or residence in Canada at some point.[28] That requirement isn't stated as explicitly in the University Rule, but the meaning is still conveyed by the use of words like "interval of absence" and "interrupt." The surrounding context reinforces that conclusion.

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[24] See *BA v Minister (Employment and Social Development)*, 2023 SST 1865.
[25] See https://dictionary.cambridge.org/dictionary/english/interval.
[26] See https://www.merriam-webster.com/dictionary/interval.
[27] See https://dictionary.cambridge.org/dictionary/english/interrupt.
[28] See, for example, sections 21(5)(a), (b), (c), (d), (e), and (f).

[55] For the reasons I discussed earlier, I find that the Appellant didn't resume residing in Canada at any time after February 12, 1961. So the University Rule can't extend his period of residence. Although it might be used to extend his period of presence in Canada (by deeming absence as presence), that alone isn't enough to extend his residence. Only years of residence count toward an OAS pension.

Canada's agreement with the US helps the Appellant qualify

[56] Canada has a social security agreement with the US. This means that the time the Appellant worked in the US counts toward his eligibility for an OAS pension.[29]

[57] The US government provided information that shows that the Appellant worked in the US. That time is converted into quarters (three-month periods) of Canadian residence. The Minister calculated that the Appellant earned 207 quarters of Canadian residence through his work in the US.[30]

[58] When I am deciding whether the Appellant has enough years of residence to qualify for an OAS pension, I can add this time to his actual years of residence in Canada. This gives him a total of more than 20 years of Canadian residence.

The Appellant qualified for a partial OAS pension in May 2019

[59] The Appellant qualified for a partial OAS pension of 1/40 on May 14, 2019.

[60] The Appellant met the minimum residence requirement of 20 years before that date. But he still had to meet the other requirements for an OAS pension.[31] He met those requirements on the following dates:

- He met the age requirement (65) on June 21, 2006.

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[29] Section 40 of the OAS Act allows the Government of Canada to make this agreement. See article VIII of 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.
[30] See GD2-54 and GD4 for the Minister's explanation of this calculation.
[31] Sections 3 to 5 of the OAS Act set out the requirements. There is no dispute that the Appellant is a Canadian citizen or legal resident of Canada. These requirements are in section 4 of the OAS Act and section 22(1) of the Regulations.

- He applied for the pension on May 14, 2019.

[61] The latest of these dates is May 14, 2019. That is when the Appellant qualified for a partial OAS pension. The amount of his pension is based on how many years he had resided in Canada by that date.

[62] The Appellant began residing in Canada on June 21, 1959. He continued residing in Canada up to February 12, 1961. As of May 14, 2019, he had resided in Canada for 1 full year after he turned 18.

When payments start

[63] The Appellant's pension starts in June 2018.

[64] OAS pension payments start the first month after the pension is approved.[32] The Appellant's pension is considered approved in May 2018, one year before he applied.[33]

Conclusion

[65] The Appellant is eligible for a partial OAS pension of 1/40. This means the Appellant's appeal is dismissed and the Minister's reconsideration decision is varied.

James Beaton

Member, General Division – Income Security Section

[32] See section 8 of the OAS Act.
[33] The law sets out several possible dates for approval of an OAS pension. The approval takes place on the latest of those dates. In the Appellant's case, the latest date was in May 2018. See section 8 of the OAS Act and section 5 of the Regulations.