



Citation: TS v Minister of Employment and Social Development, 2024 SST 1316

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** T. S.

**Respondent:** Minister of Employment and Social Development  
**Representative:** Marcus Dirnberger

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**Decision under appeal:** General Division decision dated February 2, 2024  
(GP-23-439)

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**Tribunal member:** Pierre Vanderhout

**Type of hearing:** Teleconference

**Hearing date:** September 19, 2024

**Hearing participants:** Appellant  
Respondent's representative

**Decision date:** October 30, 2024

**File number:** AD-24-394

## Decision

[1] The appeal is dismissed. The Appellant is not entitled to additional retroactive Old Age Security (OAS) pension payments. He is also not entitled to increased monthly OAS pension payments. This is because he did not reside in Canada after July 2013.

## Overview

[2] In this decision, I will refer to the Appellant, T. S., as the “Claimant.”

[3] The Claimant is 89 years old. He currently works and lives in South Africa. However, he says he has had a “permanent place of abode” in the Toronto area for many years. This is important because it could help him obtain a larger OAS pension.

[4] The Claimant first applied for an OAS pension in July 2013.<sup>1</sup> I will call this the First Application. The Minister of Employment and Social Development (Minister) did not grant him an OAS pension at that time. I do not see a reconsideration decision for the First Application.

[5] The Claimant applied for an OAS pension again in July 2020.<sup>2</sup> I will call this the Second Application. The Minister denied the Second Application initially and on reconsideration. The Claimant then appealed to the General Division of the Social Security Tribunal (Tribunal). The Tribunal’s General Division allowed his appeal. He was granted a partial OAS pension. This was equal to 12/40 of a full OAS pension. The payment start date was August 2019.<sup>3</sup>

[6] The Claimant then appealed to the Tribunal’s Appeal Division. He wanted his payments to start as of August 2012 instead of August 2019, based on when he filed his First Application. He also wanted a finding that he had been a Canadian resident since August 1, 2013. This would increase his monthly OAS pension amount. The Tribunal’s General Division said his latest period of Canadian residency ended on July 31, 2013.

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<sup>1</sup> See AD11-3.

<sup>2</sup> See GD2-55.

<sup>3</sup> See AD1A-1.

[7] The Claimant said his OAS pension's effective date should be based on the timing of his First Application. He also said his current stint in South Africa should be considered residency in Canada. He said he was employed out of Canada by a Canadian company and had a permanent place of abode to which he intended to return. As authority, he cited sections 21(4)(c) and 21(5)(a) of the *Old Age Security Regulations* (OAS Regulations). I will call these provisions the "Canadian Company Rule."

[8] The Minister said the First Application is legally irrelevant and outside the jurisdiction of the Tribunal. The Minister said the Claimant failed to request a reconsideration of the First Application. The Minister also said the Claimant has not proven that he resided in Canada for a decade during which he lived and worked in South Africa. The Minister noted the Claimant's 2020 statement that he had resided in South Africa since 1973.

[9] At the start of the Appeal Division hearing, I confirmed that I must decide the following two issues in this appeal:

- (1) the start date of the Claimant's OAS pension, and
- (2) whether the Claimant resided in Canada at any time after July 31, 2013.

[10] For the reasons set out below, I find that:

- (1) the correct start date of the Claimant's OAS pension is August 2019, and
- (2) the Claimant did not reside in Canada after July 31, 2013.

## **Preliminary matters**

[11] The final filing deadlines in this appeal were (1) August 16, 2024, for new evidence or arguments, and (2) August 28, 2024, for any replies to such new evidence or arguments. However, the Claimant continued to file materials up to, and even after, the hearing date of September 19, 2024. I will review the three main batches of materials filed by the Claimant.

### **– The materials filed on September 17, 2024**

[12] Just two days before the hearing, the Claimant filed seven pages of documents (indexed as "AD10"). This consisted mostly of blended narrative and submissions.

However, it also included two pages of new evidence. A sizable portion of the blended narrative and submissions explained the new evidence.

[13] At the start of the hearing, I told the parties that I would accept the AD10 documents. I based this decision on section 42 of the *Social Security Tribunal Rules of Procedure* (the SST Rules). The new evidence was potentially relevant. As it dated from September 2024, it was new and could not have been filed earlier. However, I also offered the Minister an opportunity to respond to AD10. This was to ensure that the proceedings were fair.<sup>4</sup> The Minister reserved the right to ask for time to make separate submissions on AD10. In the end, the Minister did not do so.

– **The materials filed between September 21, 2024, and September 24, 2024.**

[14] The Claimant sent four separate e-mails to the Tribunal between these dates. They were indexed as AD11 through AD14. AD11 consisted of new evidence that the Claimant received after the hearing from the Minister. AD12 had a narrative partly relating to the AD11 evidence. AD12 also contained new evidence in the form of an up-to-date residence chart. AD13 and AD14 consisted of procedural correspondence and contained no new evidence. I did not find them relevant.

[15] In the Tribunal letter dated October 2, 2024, I said I would accept AD11 and AD12 as late documents, but not AD13 or AD14.<sup>5</sup> The AD11 and AD12 documents were potentially relevant. Some parts were new. Other parts were not new, but the Claimant did not have access to them until after the hearing. In keeping with section 42 of the SST Rules, I gave the Minister two weeks to make submissions on AD11 and AD12. On October 8, 2024, the Minister filed submissions on AD11 and AD12 (indexed as “AD16”). The Tribunal shared AD16 with the parties on October 9, 2024.

– **The materials filed on October 11, 2024.**

[16] The Claimant sent a reply to the Minister’s AD16 submissions on October 11, 2024 (indexed as “AD17”). AD17 also contained some evidence related to the

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<sup>4</sup> See sections 42(1) and (2) of the *Social Security Tribunal Rules of Procedure*.

<sup>5</sup> See AD15-1.

Claimant's reply. I found the evidence potentially relevant, although it was not new. He did not explain why it was not filed earlier. However, the potential relevance outweighed my concerns about the late filing or the age of the evidence.

[17] Given the nature of the AD17 evidence, I decided that it was not necessary for the Minister to make submissions on it. The contents were self-evident. This meant that accepting AD17 would not further delay the proceedings. As a result, considering section 42 of the SST Rules, I accepted AD17. However, in the Tribunal's letter of October 11, 2024, I also advised the parties that they should not file any more evidence or submissions.

## Issues

[18] The issues in this appeal are:

- a) What is the relevant application date for the Claimant's OAS pension?
- b) Without considering the Canadian Company Rule, did the Claimant reside in Canada at any point after July 31, 2013?
- c) Can the Claimant be deemed resident in Canada for any other periods after July 31, 2013, under the Canadian Company Rule?
- d) What is the impact of these findings on the Claimant's OAS pension?

## Analysis

[19] The parties did not dispute the General Division's findings about the Claimant's residency up to July 31, 2013.<sup>6</sup> As a result, I see no reason to interfere with those findings. This means I am limiting my residency findings to the period starting on August 1, 2013.

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<sup>6</sup> These findings appear in paragraph 76 at AD1A-17 to AD1A-18.

[20] The law says that being present in Canada is not the same as residing in Canada. “Residence” and “presence” each have their own definition. I must use these definitions in making my decision.

[21] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.<sup>7</sup>

[22] A person is **present** in Canada when they are physically present in any part of Canada.<sup>8</sup>

[23] When I decide whether the Claimant resided in Canada, I must look at both the overall picture and the factors set out in Federal Court decisions such as *Ding*.<sup>9</sup> I will call these the Ding Factors. The Ding Factors include:<sup>10</sup>

- 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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<sup>7</sup> See section 21(1)(a) of the *Old Age Security Regulations* (OAS Regulations).

<sup>8</sup> See section 21(1)(b) of the OAS Regulations.

<sup>9</sup> See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.

<sup>10</sup> 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.

[24] This is not a complete list. Other factors may be important to consider. I must look at **all** of the Claimant's circumstances. However, before I do that, I will determine the relevant application date for the Claimant's OAS pension.

### **What is the relevant application date for the Claimant's OAS pension?**

[25] I find that July 7, 2020, is the relevant application date for the Claimant's OAS pension. I will now explain why.

[26] I accept that the Claimant applied for the OAS pension on at least two occasions. As noted, he filed the First Application in July 2013 and the Second Application in July 2020. He described the Second Application as a continuation of the First Application. If I accept this argument, then I could find that the relevant application date for this appeal is July 2013. The Claimant would then be entitled to seven more years of retroactive OAS pension payments.

#### **– History of the First Application**

[27] After receiving the First Application, the Minister needed more information from the Claimant. The Minister sent letters to him in January 2014 and October 2014, but I see no evidence that he filed the requested information.<sup>11</sup> At best, he signed a consent form to communicate with Citizenship and Immigration Canada in September 2015.<sup>12</sup>

[28] On October 15, 2015, the Minister advised the Claimant that he had still not provided the requested information. As a result, the Minister declined the First Application. The Minister advised the Claimant he could request a reconsideration of that decision within 90 days of receiving it.<sup>13</sup> This 90-day limit is also set out in the *Old Age Security Act* (OAS Act).<sup>14</sup>

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<sup>11</sup> See AD11-11 and AD11-20.

<sup>12</sup> See AD11-16.

<sup>13</sup> See AD11-22.

<sup>14</sup> See section 27.1(1) of the *Old Age Security Act* (OAS Act).

[29] I see no evidence that the Claimant requested a reconsideration of that October 2015 decision within 90 days. In fact, it appears that his next communication with the Minister was when the Claimant filed the Second Application in July 2020.

– **The law about appealing to the Tribunal**

[30] The lack of a reconsideration decision for the First Application is critical. Initial decisions by the Minister, such as the Minister's October 2015 decision to deny the First Application, cannot be appealed to the Tribunal. If a person is unhappy with an initial decision, their recourse is to request a reconsideration by the Minister.<sup>15</sup> Only reconsideration decisions can be appealed to the Tribunal.<sup>16</sup>

[31] In this case, the Claimant filed his appeal to the Tribunal on March 7, 2023. In his appeal materials, he made it clear that he was appealing the reconsideration decision of October 28, 2022. He included a copy of that October 2022 decision, which was based on a reconsideration request dated August 2, 2022.<sup>17</sup> That reconsideration request was filed in response to the Minister's decision of June 16, 2022.<sup>18</sup> The June 16, 2022, decision was in response to the application made on July 7, 2020.<sup>19</sup>

[32] The Claimant's application of July 7, 2020, was not the First Application. It was the Second Application. This means that the Tribunal's decision, including the start date of any OAS pension, flows from the Second Application.

[33] The Claimant suggested that the Minister made an administrative error with his First Application. However, the Tribunal does not have the jurisdiction to make rulings on such issues. If the Claimant is not satisfied with the Minister's finding about administrative error, his remedy is to apply to the Federal Court for judicial review.<sup>20</sup>

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<sup>15</sup> See section 27.1(1) of the OAS Act.

<sup>16</sup> See section 28(1) of the OAS Act. See also *Canada (Attorney General) v Bannerman*, 2003 FCT 208, at paragraph 15.

<sup>17</sup> See GD1-2, GD1-4, GD1-6, and GD1-9.

<sup>18</sup> See GD2-8.

<sup>19</sup> See GD2-33, GD2-35, and GD9-40.

<sup>20</sup> See *Stevens Estate v Canada (Attorney General)*, 2012 FC 622, at paragraphs 20 and 21.

[34] I will now decide whether the Claimant resided in Canada after July 31, 2013. I will do this in two distinct ways. First, I will apply the Ding Factors without considering the Canadian Company Rule. Second, I will apply the Canadian Company Rule to any remaining periods for which he was not resident in Canada.

**Without considering the Canadian Company Rule, did the Claimant reside in Canada at any point after July 31, 2013?**

[35] When I apply only the Ding Factors, I find that the Claimant did not reside in Canada after July 31, 2013.

[36] Before I apply these factors, I will consider what the Claimant says about his presence and residence in Canada since the end of July 2013.

**– What the Claimant says about residence**

[37] I see very little objective documentary evidence confirming the Claimant's presence and residence in Canada since July 31, 2013.

[38] In October 2021, X. (X) sent a letter saying that the Claimant was an associate of X from August 2013 to March 2019 (the 2021 X Letter). X added that the Claimant was based in Cape Town, South Africa.<sup>21</sup> Also in October 2021, Y (Y) sent a letter saying that the Claimant had been employed as Vice President (Africa) since April 2019 (the 2021 Y Letter).<sup>22</sup>

[39] The Claimant relies on the 2021 X Letter and the 2021 Y Letter. He says he can rely on the Canadian Company Rule to accumulate Canadian residency because X and Y are based in Canada. This was the focus of his appeal. However, he has also suggested that he resided in Canada for some time after the end of July 2013. This is why I should first decide whether he resided in Canada after July 2013 without considering the Canadian Company Rule.

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<sup>21</sup> See GD1-12.

<sup>22</sup> See GD1-13.

[40] The Claimant has made many statements, both orally and in writing, about where he lived, worked, and resided after July 2013. The following chart, which I will call the Location Chart, contains his main statements on this subject:

<u>Statement date</u>	<u>Statement with applicable dates</u>
June 18, 2020	Resided in South Africa from December 15, 1973, to present <sup>23</sup>
January 11, 2021	Worked in South Africa from August 2013 to present <sup>24</sup>
October 8, 2021	Worked in South Africa from August 2013 to March 2019 <sup>25</sup>
July 20, 2022	Makes Ontario his “primary place of residence” <sup>26</sup>
July 27, 2022	Worked overseas from August 2013 <sup>27</sup>
March 7, 2023	Resided in South Africa from December 1973 to present <sup>28</sup>
March 7, 2023	Worked in South Africa from August 1973 to present <sup>29</sup>
May 31, 2023	Employed in South Africa since 2013 <sup>30</sup>
June 16, 2023	Returned to live permanently in Canada in 2013 <sup>31</sup>
June 16, 2023	Left Canada for South Africa in September 2013 <sup>32</sup>
June 16, 2023	Wants “Fish Farm Project” time (August 1, 2013, to December 1, 2016) considered equivalent to full-time residence in Canada <sup>33</sup>
Sept. 21, 2023	Returned to live permanently in Canada by Thanksgiving 2012 <sup>34</sup>
October 11, 2023	Was mostly in Canada from August 1, 2013, to November 2016 <sup>35</sup>
June 12, 2024	Worked in South Africa from August 2013 to October 2023 <sup>36</sup>
August 4, 2024	Employed in Newfoundland in September 2013, to be based in South Africa <sup>37</sup>

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<sup>23</sup> See GD2-48, GD2-63.

<sup>24</sup> See GD2-133.

<sup>25</sup> See GD2-145.

<sup>26</sup> See GD2-9 and AD4-6.

<sup>27</sup> See GD2-10.

<sup>28</sup> See GD1-15.

<sup>29</sup> See GD1-15.

<sup>30</sup> See GD7-3.

<sup>31</sup> See GD9-3. See also GD13-3.

<sup>32</sup> See GD9-3.

<sup>33</sup> See GD9-3 to GD9-4

<sup>34</sup> See GD16-1.

<sup>35</sup> See recording of General Division hearing, at 0:54:50 to 0:55:56 and 0:57:32 to 0:58:26.

<sup>36</sup> See AD1B-1.

<sup>37</sup> See AD6-1.

August 16, 2024	Employed in Newfoundland in September 2013 on “Fish Farm Project” and returned to South Africa in January 2015 <sup>38</sup>
Sept. 17, 2024	Divided time between Newfoundland, China (one trip) and South Africa from August 2013 to November 2016 <sup>39</sup>
Sept. 19, 2024	Went to Newfoundland in September 2013 (or August 2013) and spent half his time there until November 30, 2016 <sup>40</sup>
Sept. 21, 2024	Resided in Newfoundland between July 2013 and August 2013 <sup>41</sup>
Sept. 21, 2024	Resided in South Africa between September 2013 and present <sup>42</sup>

[41] The Location Chart statements cannot all be reconciled. At the Appeal Division hearing, the Claimant expressed repeated frustration with trying to remember the precise dates of events that happened so long ago. However, when viewed chronologically, most of his earlier statements point to a return to South Africa in August 2013. His earlier statements should also be at least as accurate as later statements about the same period.

[42] At the hearing, the Claimant said his compensation for X was in the form of expenses and commissions. He was not paid a regular salary. This means that, at the time, he ought to have kept careful track of his whereabouts and expenses. This makes it more problematic that he could not produce objective documents specifically locating him in Canada around this time. As will be discussed later, he described two different document losses during his appeal.

[43] The Claimant’s statements about the nature of his work starting in August 2013 were also not consistent. At the hearing, he said that he worked only on the “Fish Farm Project” between August 2013 and November 2016. However, he earlier said X hired him to arrange South African joint ventures for contracts with Canada’s Department of

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<sup>38</sup> See AD8-2

<sup>39</sup> See AD10-2.

<sup>40</sup> This is oral evidence from the Appeal Division hearing.

<sup>41</sup> See AD12-4.

<sup>42</sup> See AD12-4.

National Defence.<sup>43</sup> He said he also worked as a “full-time” consultant for Z and W, starting in October 2014.<sup>44</sup>

[44] Finally, the Claimant’s brother advised the Minister in November 2020 that the Claimant resided in South Africa.<sup>45</sup> In October 2021, X said the Claimant was based in South Africa when he was a X associate from August 2013 to March 2019.<sup>46</sup>

[45] Considering the above, I find it likely that the Claimant first returned to South Africa in August 2013. He likely spent some time in Canada after that, particularly given his involvement with the Fish Farm Project in Newfoundland. However, I see much less evidence of Canadian presence after that project ended in either January 2015 or November 2016. Even then, he was likely doing other work at the same time as the Fish Farm Project.

– **Applying the Ding Factors**

[46] By applying the Ding Factors, I find it likely that the Claimant has resided in South Africa since August 2013.

[47] Many of the Ding Factors do not clearly point to residence in either Canada or South Africa. They point to both countries, or they are very weak with little probative value. Much of this is due to a lack of objective evidence from the time in question. A lot of the evidence consists of mere assertions. However, the factors clearly pointing to South Africa are more persuasive than the single factor clearly pointing to Canada. I will now explain these findings in more detail.

***Many of the Ding Factors are weak or inconclusive.***

*Where the Claimant had property*

[48] This is often a critical Ding Factor. However, it is difficult to determine the extent of the Claimant’s property after 2012. Before then, he owned businesses in South Africa

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<sup>43</sup> See GD-7.

<sup>44</sup> See GD2-128 and GD2-133.

<sup>45</sup> See GD2-130.

<sup>46</sup> See GD1-12.

and had hundreds of employees. But now, even the ownership of his apparent South African residence is difficult to ascertain.

[49] At the Appeal Division hearing, the Claimant said his wife returned to South Africa less than a year after coming to Canada in 2012. He said she owned a home, where he also lived, in South Africa that was now about 6-7 years old. But as the home was custom-built to her specifications, she had been in South Africa for 2-3 years before the new house was completed. At the General Division hearing in October 2023, he said she bought the property about 9 years before, and they initially rented a property across the street.<sup>47</sup> He did not produce any objective evidence of her sole ownership.

[50] Despite what he said about the legal ownership, he also appears to consider it **their** home. He and his wife pay the bills together. For example, he said “we” had the house built and “we” rented a house across the street. He also said “we” will sell it when they move back to Canada. He also said “we” paid for insurance on the car and house.<sup>48</sup> He did not have insurance in Canada.<sup>49</sup>

[51] He said he did not “own” a car, but he and his wife had two cars. One of those cars is apparently from an uncle.<sup>50</sup> He did not produce any objective evidence about the cars. Similarly, he described an outboard boat and a recently scrapped car that he used in Canada.<sup>51</sup> But he did not produce any objective evidence about that car or boat either.

[52] The Claimant produced two undated blank cheques from a Canadian bank account. Both his name and his wife’s name appeared on the cheque showing a South African address. There is no name or address on the other cheque. His wife was the original owner of the account. In July 2022, June 2023, and August 2024, he said this

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<sup>47</sup> See the recording of the Appeal Division hearing. See also the recording of the General Division hearing, at 2:06:54 to 2:07:24.

<sup>48</sup> See the recording of the Appeal Division hearing. See also the recording of the General Division hearing, at 2:06:54 to 2:07:24.

<sup>49</sup> See the recording of the General Division hearing, at 2:04:47 to 2:04:53.

<sup>50</sup> See the recording of the Appeal Division hearing.

<sup>51</sup> See AD10-3.

was his only bank account.<sup>52</sup> But I saw little objective evidence of that account's activity level. So, it is difficult to verify that this was really the only account he used.

[53] The Claimant later mentioned other bank accounts. At the General Division hearing, he said he had another account in the United Kingdom. However, at the Appeal Division hearing, he said that account was closed a few years ago. He said he was not allowed to have a bank account in South Africa. But he also said his wife had bank accounts in South Africa. He would put money into those accounts, so that he could share payment of the bills with her.<sup>53</sup> I see no objective evidence of these bank accounts, their ownership, or their activity levels.

[54] The Claimant also described an interest in a Canadian drone company called V. He said he established this company with his brother, but produced no objective evidence of his ownership or the operating dates.<sup>54</sup> He said he was unable to play his part in operating the business due to his Covid-related absence from Canada. The company was now dormant. But he hoped to revive it when he returned.<sup>55</sup>

*Where the Claimant had social ties*

[55] The Claimant had social ties in both countries. He said he had good friends in both Canada and South Africa.<sup>56</sup> He lived with his wife in South Africa. She is South African by birth and does not currently have any legal status in Canada.<sup>57</sup> However, he also has several siblings in Canada. This includes his brother A., who supported his application and lets the Claimant stay in his Toronto-area home (the Toronto House).

[56] The Claimant said he has been a member of the Canadian Owners and Pilots Association since 2005, although the card he produced expired in 2011. He said he was a member of the Canadian Association of Defence and Security Industries since 2019,

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<sup>52</sup> See GD2-9, GD9-11, GD9-50, AD8-2, AD17-1, and AD17-9.

<sup>53</sup> See the recording of the General Division hearing, at 1:23:10 to 1:24:08. See also the recording of the Appeal Division hearing.

<sup>54</sup> See GD9-9.

<sup>55</sup> See GD7-3, GD9-9, GD15-1, AD4-2.

<sup>56</sup> See the recording of the Appeal Division hearing.

<sup>57</sup> See the recording of the General Division hearing, at 1:43:59 to 1:45:11.

but did not provide any supporting documents for that group. He also produced an old undated membership card from a Toronto-area public library. I saw no objective evidence of recent activity in these organizations. He said he has had a Canadian pilot's license since 1958.<sup>58</sup>

[57] However, the Claimant is currently an active member of a South African yacht club. He sails there with friends, and was going sailing the week after the Appeal Division hearing. He said flying and sailing were his two passions.<sup>59</sup>

*Where the Claimant had other ties, besides property and social ties*

[58] Regarding other ties, the Claimant has held Ontario health cards since 2013.<sup>60</sup> He said he received eyed care from Dr. Chong in the Toronto area. But he did not provide any evidence of recent treatment by Dr. Chong or anyone else in Ontario. He only submitted a 2005 prescription from Dr. Chong.<sup>61</sup> On the other hand, he had private health insurance in South Africa. He also said dental care was excellent and cheap in South Africa, so he had dental work done there.<sup>62</sup>

[59] The Claimant does not have a valid Canadian driver's licence. He said he could rely on an International Driver's Licence.<sup>63</sup> He has not had insurance in Canada since moving back to South Africa. He said he last voted in Canada in 2015, although I saw no objective evidence that he was on a voter's list.<sup>64</sup>

[60] The Claimant said he had leased the downstairs of the Toronto House from his brother since 2005. But he could not produce a lease. Nor could he provide any evidence of payment for any rent or expenses. He had no idea of what he might have contributed, even as recently as 2021 or 2022. He said, "money comes and goes," and

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<sup>58</sup> See GD9-9 to GD9-10 and GD9-47. See also the recording of the General Division hearing, at 2:00:35 to 2:00:52.

<sup>59</sup> See the recording of the Appeal Division hearing.

<sup>60</sup> See GD2-29, GD2-30, GD9-54, and AD4-2.

<sup>61</sup> See GD20-10 and GD20-13. See also the recording of the Appeal Division hearing.

<sup>62</sup> See the recording of the Appeal Division hearing.

<sup>63</sup> See the recording of the General Division hearing, at 2:03:55 to 2:04:38.

<sup>64</sup> See the recording of the General Division hearing, at 2:04:47 to 2:05:20.

said his brother would know better. He was given an opportunity to provide details of his contributions after the General Division hearing, but did not file anything.<sup>65</sup>

[61] At the Appeal Division hearing, he said it was not in his family's heritage to have a written lease. He also said he paid no rent. He only made vague references to "settling" financial matters with his brother from time to time.<sup>66</sup>

*The Claimant's lifestyle in Canada*

[62] Another Ding Factor is a person's lifestyle in Canada. As noted in the Location Chart, the Claimant has claimed on many occasions that he lived and worked in South Africa after July 2013. This was particularly true for his earliest statements.

[63] However, even if I disregard the bulk of the Location Chart evidence, I do not see a deep-rooted and stable lifestyle for the Claimant in Canada since July 2013. As noted above, I have trouble accepting that he worked only on the Fish Farm Project for his first few years with X. But even if I did accept that, the Claimant admitted that his lifestyle in Canada was very unsettled during that time. After the Appeal Division hearing, he commented on that period:<sup>67</sup>

"During that time, I was literally living out of a suite case [*sic*]."

[64] His other evidence supports this. The Claimant said he rented a room in St. John's, Newfoundland, from his cousin. He used this as his postal address. On a form completed in 2013, he said this was his home address as well. But he also travelled to and from St. Alban's, Newfoundland, where he would stay at X Motel. And he sometimes stayed at a cabin in Terra Nova, Newfoundland. He said he visited his wife at the Toronto House too, although she appears to have gone back to South Africa

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<sup>65</sup> See the recording of the General Division hearing, at 1:00:05 to 1:04:07 and 1:06:32 to 1:07:46.

<sup>66</sup> See the recording of the Appeal Division hearing. See also AD9-3.

<sup>67</sup> See AD17-2.

in 2013. He was also travelling back and forth to South Africa himself, and made one visit to China.<sup>68</sup>

[65] Moreover, the Claimant repeatedly said that he was maintaining a permanent abode at the Toronto House and considered that his home in Canada.<sup>69</sup> He also said he stored important documents at X Motel in Newfoundland, but an infestation of rats later ate them.<sup>70</sup> He did not mention this extensive loss of documents until after the General Division hearing. Instead, he previously mentioned a loss of documents to a fire at his home in South Africa.<sup>71</sup>

[66] Furthermore, the Claimant did not mention the Terra Nova cabin until after the Appeal Division hearing ended. More than four years had passed since he filed the Second Application. He attended two lengthy hearings and made extensive written submissions during that time. The only objective evidence linking him to that cabin was a land permit (and receipt) from 1981.<sup>72</sup>

[67] In recent years, the Claimant has rarely been in Canada. He has been here only once since the beginning of 2019. The time spent in Canada was so small that it is difficult to describe any type of regular lifestyle. At best, his lifestyle in Canada was a “neutral” Ding Factor.

***One of the Ding Factors favours residence in Canada.***

[68] The Claimant repeatedly cited his intention to reside in Canada.<sup>73</sup> This is a Ding Factor. By July 2022, he said he intended to retire in Canada when he found a suitable person to replace him in his South African job.<sup>74</sup> But even this Ding Factor does not

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<sup>68</sup> See, for example, GD9-3, GD9-4, GD14-1, AD11-3, AD11-16, AD17-1 to AD17-2. See also the recording of the General Division hearing, at 0:51:58 to 0:54:50, 0:57:51 to 0:59:35, and 2:18:45 to 2:20:05. See, further, the recording of the Appeal Division hearing.

<sup>69</sup> See, for example, GD2-9 to GD2-10, GD7-2, GD9-12, GD13-3, GD14-1, GD15-1, GD16-1, AD1B-1, AD4-2, AD17-2. See also the recording of the General Division hearing, at 1:00:05 to 1:00:54. See, further, the recording of the Appeal Division hearing.

<sup>70</sup> See, for example, AD4-3 to AD4-4, AD12-1, AD17-2, and the recording of the Appeal Division hearing.

<sup>71</sup> See GD9-2.

<sup>72</sup> See AD17-4 to AD17-8.

<sup>73</sup> See, for example, GD1-11, GD7-3, and GD15-1. See also the recording of the General Division hearing, at 1:10:10 to 1:11:03.

<sup>74</sup> See GD2-10.

carry a lot of weight in this appeal. More than two years later, he still has not returned here permanently. I saw little in the way of objective evidence to support his intention. Such evidence could include documents to get his wife legal status in Canada.

***Some Ding Factors favour residence in South Africa.***

*Where the Claimant filed tax returns*

[69] The Claimant did not file tax returns in Canada. He said he did not need to file Canadian tax returns in his situation. He said he would pay Canadian taxes when he moved back to Canada permanently.<sup>75</sup> This is not consistent with Canadian residency. It favours residence in the place (South Africa) where he is living and working.

*The Claimant's ties to another country*

[70] The Claimant has significant ties to South Africa.

[71] For example, the Claimant had contacts within the Canadian Embassy in South Africa and G, a South African counterinsurgency organization.<sup>76</sup> This is not surprising. The Claimant lived in South Africa from 1973 to 2012, and appears to have lived there again since 2013. He had successfully run large construction and forestry businesses in South Africa with hundreds of employees.<sup>77</sup> He said he networked all the time there to “hustle up work” for his current Y role. He also said he had excellent connections for raising funds in South Africa when he started with X in 2013.<sup>78</sup>

*The Claimant's presence (covering both (1) how much time he spent in Canada, and (2) the frequency, location, and duration of time spent outside Canada)*

[72] In this appeal, presence is a persuasive Ding Factor. It reflects where the Claimant actually spent his time. He clearly spent most of his time since July 2013 in South Africa. Even during the Fish Farm Project, he estimated spending only half of his

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<sup>75</sup> See the recording of the General Division hearing, at 2:03:30 to 2:03:55.

<sup>76</sup> See GD1-11, GD9-8, and AD8-3. He also referred to these contacts at the Appeal Division hearing.

<sup>77</sup> See the recording of the General Division hearing, at 1:39:43 to 1:40:50 and 1:46:57 to 1:48:12.

<sup>78</sup> See the recording of the Appeal Division hearing.

time in Canada. Other than a trip to China, he spent the rest of his time in South Africa. As noted, I see little objective evidence to support his claim that he spent half his time in Canada, and he likely spent time on other projects too.

[73] Since the Fish Farm Project ended, I see very little evidence of the Claimant's time in Canada. Between December 2016 and December 2018, he guessed that he was in Canada twice. Since January 2019, he has only been in Canada once. That stay was about nine months ago, and was for about 1½ months.<sup>79</sup> Earlier, he said that he attended two trade shows in Canada since he started working for Y in early 2019.<sup>80</sup> But I see no objective evidence of these recent visits either.

### ***Summary of Ding Factor analysis***

[74] Only one of the Ding Factors (intention) favours residence in Canada, but even that factor is not particularly strong or supported by objective evidence. Several factors are inconclusive. The other factors favour residence in South Africa, including the Claimant's ties to South Africa and the factors related to his physical presence. He spent far more of his time in South Africa than in Canada. Thus, when considered together, the Ding Factors do not point to Canadian residence after July 2013.

### **Can the Claimant be deemed resident in Canada for any other periods after July 31, 2013, under the Canadian Company Rule?**

[75] The Claimant was not resident in Canada for any periods after July 2013 under the Canadian Company Rule. I will now explain how I reached that conclusion.

#### **– The key parts of the Canadian Company Rule**

[76] The key parts of the Canadian Company Rule are as follows:<sup>81</sup>

21(4) Any interval of absence from Canada of a person resident in Canada that is  
...(c) specified in subsection (5),

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<sup>79</sup> See the recording of the Appeal Division hearing.

<sup>80</sup> See the recording of the General Division hearing, at 2:00:48 to 2:02:17.

<sup>81</sup> See sections 21(4) and 21(5) of the OAS Regulations.

shall be deemed not have interrupted that person's residence or presence in Canada.

(5) The absences from Canada referred to in paragraph 4(c) of a person residing in Canada are absences under the following circumstances:

- (a) while that person was employed out of Canada [...]
  - (vi) by a Canadian firm or corporation as a representative or member thereof

if during his employment out of Canada he

- (vii) had in Canada a permanent place of abode to which he intended to return, or

- (viii) maintained in Canada a self-contained domestic establishment,

and he returned to Canada within six months after the end of his employment out of Canada or he attained, while employed out of Canada, an age at which he was eligible to be paid a pension under the Act.

[77] The Canadian Company Rule requires the Claimant to be resident in Canada immediately before the rule could apply. This is because the Canadian Company Rule only applies to an "interval of absence" for a person resident in Canada. In this case, the Claimant was resident in Canada up to July 31, 2013. This means the Canadian Company Rule could possibly assist him for a period starting in August 2013. That was when he became an associate with X. He said he accepted X's offer on August 1, 2013.<sup>82</sup>

[78] I see two potential periods for which the Canadian Company Rule could assist the Claimant. One period is his work with X only. That ended in March 2019, according to X.<sup>83</sup> The second period is the combined period of his work for X and Y. Y said it

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<sup>82</sup> See GD13-4 and GD16-1. See also the recording of the General Division hearing, at 0:53:52 to 0:54:22.

<sup>83</sup> See GD1-12.

started employing him in April of 2019.<sup>84</sup> He still works for Y now. Both the first and second periods started immediately after July 31, 2013.

– **How does the Canadian Company Rule apply to the Claimant's work with X only?**

[79] The Canadian Company Rule does not assist the Claimant for the period he worked with X.

[80] The Claimant's work with X ended in March 2019. The Canadian Company Rule explains how that affects his claim of Canadian residency.

[81] A key part of the Canadian Company Rule is that a person must (1) return to Canada within six months of the end of his employment, or (2) attain an age, while employed out of Canada, at which he was eligible to be paid a pension under the OAS Act. The Claimant does not meet either of these conditions.

[82] The Claimant does not meet the first condition because he testified that he only returned to Canada once since January 2019. That happened about nine months before the Appeal Division hearing.<sup>85</sup> That would have been roughly around December 2023. That was not within six months of March 2019.

[83] The Claimant does not meet the second condition either. He was eligible to be paid an OAS pension in Canada after he resumed residency in Canada in late 2012. At that time, he had more than 10 years of Canadian residency, was at least 65 years old, and resided in Canada. By July 2013, he had more than 20 years of Canadian residency. That meant he was eligible for an OAS pension even if he did not reside in Canada. In turn, this means he did not become eligible for an OAS pension while working outside Canada with X.

[84] The Claimant was not a Canadian resident for the period from August 2013 to March 2019. This means he could not be a Canadian resident for the period starting in April 2019 either. This is because, as noted, the Canadian Company Rule only applies

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<sup>84</sup> See GD1-13.

<sup>85</sup> See the recording of the Appeal Division hearing.

to periods starting immediately after a period of Canadian residency. But he was not a Canadian resident at the end of March 2019.

[85] This means the only other option for the Claimant under the Canadian Company is to treat his work with X and Y as one continuous term.

– **How does the Canadian Company Rule apply to the Claimant’s combined work with X and Y?**

[86] Even if I consider the Claimant’s time with X and Y as one continuous period of work, the Canadian Company Rule does not help him.

[87] Again, the Canadian Company Rule says a person must (1) return to Canada within six months of the end of his employment, or (2) attain an age, while employed out of Canada, at which he was eligible to be paid a pension under the OAS Act. The Claimant does not meet either of these conditions.

[88] The Claimant does not meet the first condition because his work with Y had not ended by the date of the Appeal Division hearing.<sup>86</sup> This means he has not shown that he returned to Canada within six months after his employment ended.

[89] The Claimant does not meet the second condition, for the same reasons set out in my finding about his work with X only. He was already eligible for an OAS pension, as a Canadian resident, after he resumed residency in Canada in late 2012. By July 2013, he was eligible for an OAS pension even if he no longer resided in Canada. In turn, that means he did not become eligible for an OAS pension while working outside Canada with either X or Y.

[90] This means the Claimant was not a Canadian resident for the period starting in August 2013.

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<sup>86</sup> In an e-mail dated September 17, 2024, the Claimant said he was still working for Y on an agreement between a German company and a Canadian company (see AD10-4 and AD10-6). This was only two days before the hearing. At the hearing, he referred to Y as his employer. He said nothing about ending his Y work in the two days since September 17, 2024.

– **Questions I do not need to consider**

[91] The Claimant did not meet either of the above two Canadian Company Rule conditions. This means I do not need to decide certain other questions in this appeal.

[92] First, I do not need to decide whether the Claimant had two distinct terms of employment (one term with X and another with Y) or just one continuous term. I saw evidence that could support either approach. At the hearing, the Claimant said that Y hired him away from X. X appeared to continue until at least October 2021.<sup>87</sup> But he also said Y “absorbed” X. Either way, for the reasons above, the Canadian Company Rule does not assist him.

[93] Second, I do not need to decide whether the Claimant had a permanent place of abode in Canada to which he intended to return. I do not need to decide whether he maintained a self-contained domestic establishment in Canada either. The parties did not agree on whether the Toronto House met either of these requirements. He would need to meet at least one of those requirements to use the Canadian Company Rule.

[94] Third, I do not need to decide whether the Claimant was “employed” by either X or Y. I note that the Claimant was not paid wages or a regular salary in either of those roles. The Canadian Company Rule requires these roles to be “employment” and not some other relationship.

**What is the impact of these findings on the Claimant’s OAS pension?**

[95] I found that the Claimant’s relevant application date for this appeal was July 7, 2020. The OAS Act says pension payment begins with the first month after the pension is approved.<sup>88</sup>

[96] The Claimant was more than 65 years old when he applied. This means pension approval is effective on the latest of the following dates:<sup>89</sup>

- One year before his application was received,

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<sup>87</sup> See GD1-12.

<sup>88</sup> See section 8(1) of the OAS Act.

<sup>89</sup> See section 8(2) of the OAS Act and section 5(2) of the OAS Regulations.

- The day he turned 65,
- The day he qualified for the pension under the OAS Act, or
- The month immediately before the date he specified in writing.

[97] The applicable dates for the Claimant are:

- July 7, 2019 (one year before the day his application was received),
- May 13, 2000 (the day he turned 65),<sup>90</sup>
- June 8, 2013 (when he reached 20 years of Canadian residency and could receive an OAS pension outside Canada), was the date when the Claimant qualified for a pension under the OAS Act,<sup>91</sup> and
- June 2013 was the date specified in writing by the Claimant on his application, as he wanted his pension to start as soon as he was eligible.<sup>92</sup>

[98] The latest of those dates is July 2019. This means the Claimant's pension approval date is July 2019. This means his pension payments start in August 2019.

[99] The Minister has already started paying the Claimant's OAS pension with an effective date of August 2019.<sup>93</sup> This means he is not entitled to additional retroactive OAS pension payments.

[100] As for his OAS pension amount, the Claimant has a total of 12 years, 10 months, and 23 days of actual Canadian residency after reaching age 18. This consists of the following:<sup>94</sup>

- May 13, 1953, to August 11, 1959 (inclusive): 6 years, 2 months, and 30 days.

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<sup>90</sup> See GD1-22.

<sup>91</sup> He actually qualified for an OAS pension in late 2012 when he briefly resumed residency in Canada. However, that was contingent on him continuing to reside in Canada. He only qualified for a pension outside Canada in June 2013. Ultimately, it does not matter which date is used. This is because he did not make the relevant application until July 7, 2020.

<sup>92</sup> See GD2-47.

<sup>93</sup> See AD1-6.

<sup>94</sup> See AD1A-17 to AD1A-18. These dates are from the General Division decision. The parties did not dispute those dates in the current appeal. Rather, the Claimant sought additional periods of Canadian residence after July 31, 2013: see AD1B-1.

- February 17, 1960, to October 12, 1962 (inclusive): 2 years, 7 months, and 26 days.
- May 26, 1963, to April 24, 1964 (inclusive): 10 months and 30 days.
- July 25, 1971, to December 14, 1973 (inclusive): 2 years, 4 months, and 20 days.
- November 22, 2012, to July 31, 2013 (inclusive): 8 months and 10 days.

[101] While the Claimant has less than 20 years of actual Canadian residency after age 18, and does not currently reside in Canada, he is still entitled to an OAS pension. This is because he also had 7 years and 3 months of deemed residence, under an international social security agreement with Australia.<sup>95</sup> That residency in Australia counts toward Canadian residency, but does not count toward the resulting OAS pension amount.

[102] My findings in this decision do not change the Claimant's actual Canadian residency after reaching age 18. The Claimant had between 12 and 13 full years of actual Canadian residency after reaching age 18. Earlier this year, the Minister began paying the Claimant an OAS pension worth 12/40<sup>ths</sup> of a full OAS pension.<sup>96</sup> That is the correct amount, based on the payment provisions in the OAS Act.<sup>97</sup>

## Conclusion

[103] The appeal is dismissed. The Claimant is not entitled to additional retroactive OAS pension payments. He is also not entitled to increased OAS pension payments, as he does not have any additional Canadian residency after July 2013.

Pierre Vanderhout  
Member, Appeal Division

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<sup>95</sup> See AD1A-18. This is from the General Division decision. The parties did not dispute this finding in the current appeal.

<sup>96</sup> See AD1-6.

<sup>97</sup> See section 3(3) of the OAS Act.