Docket: 2016-2158(OAS)

BETWEEN:

RÉAL LÉVESQUE,

Appellant,

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 12, 2016, at Montréal, Quebec

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Stéphanie Côté

JUDGMENT

The appeal filed by the appellant from the decision of the Minister of Employment and Social Development under subsection 27.1(2) of the *Old Age Security Act*, R.S.C. 1985, c. O-9, is allowed, without costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 20th day of March 2017.

"Robert J. Hogan"

Hogan J.

Citation: 2017 TCC 44
Date: 20170320
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REASONS FOR JUDGMENT

Hogan J.

I. Introduction and relevant facts

[1] Réal Lévesque, the appellant, is appealing a decision made by the Minister of Employment and Social Development (the Minister) concerning the determination of the amount of the monthly Guaranteed Income Supplement (GIS) under the *Old Age Security Act* (OAS Act),[1] for the payment period from July 2012 to December 2012.

[2] In this regard, even though the respondent maintains that the period in dispute is the period from July 2012 to June 2013, it appears clear to me that the appellant is not contesting the calculation made by the Minister for the payment period from January to June 2013. Since it was never contested by the appellant, the Minister's calculation for this payment period must remain such as it is now.

[3] Therefore, in light of these comments, only one payment period is currently in dispute, that is, the period from July to December 2012.

[4] The appellant has been receiving an old age security pension since December 2009, the month following his 65th birthday. In his initial application,

[1] *Old Age Security Act*, R.S.C. 1985, c. O-9.

the appellant had also indicated that he wanted to receive the GIS, as provided in the OAS Act.[2]

[5] From 2009 to 2011, the appellant received his monthly Guaranteed Income Supplement without problem. The supplement remained essentially the same as his income did not change during this period.

[6] On August 3, 2012, the appellant submitted a form to the Minister entitled "Statement of Estimated Income after Retirement or Reduction in Retirement Income –2012". The appellant had retired on September 30, 2011.

[7] Due to this loss of income resulting from income from an office, employment or business, the Minister calculated the amounts for the monthly Guaranteed Income Supplement to which the appellant was entitled for the period from July 2012 to December 2012 based on the appellant's estimated income, as provided in the OAS Act,[3] rather than on the base calendar year, as had been done for earlier periods.

[8] Moreover, since the appellant is married, his spouse's income was also taken into consideration in order to calculate the combined income of the appellant and his spouse.

[9] Therefore, for the period from July 2012 to December 2012, the appellant's income was initially calculated as follows:

Estimated pension income for the 2012 taxation year	
Quebec Pension Plan	$8,158.74
Other sources of income for the 2011 taxation year	
RRSP deduction	($9,000.00)
Appellant's total income	$0.00
Spouse's total income	$5,583.96
Combined income	**$5,583.96**

[10] Initially therefore, the Minister relied on the information provided by the appellant to calculate the monthly supplement to which the appellant was entitled for the period in dispute. However, following the production of statements of income for the 2012 taxation year for the appellant and his spouse, the Minister revised the calculation for the period from July 2012 to December 2012, in order to

[2] Subsection 11(2) of the OAS Act
[3] Subsection 14(5) of the OAS Act.

reflect their true income. Following the receipt of this information, the combined income of the appellant and his spouse was revised as follows:

Estimated pension income for the 2012 taxation year	
Quebec Pension Plan	$8,192.00
LIF	$*21,314.00*
Other sources of income for the 2011 taxation year	
RRSP deduction	($9,000.00)
Appellant's total income	$20,506.00
Spouse's total income	$5,583.96
Combined income	$**26,089.96**

[11] What emerges from this second calculation is that a significant amount from a Life Income Fund (LIF) had not been taken into account by the appellant when establishing his income for the purpose of calculating the GIS. In his Notice of Appeal, the appellant admits that he withdrew $21,314 from his account (the lump sum) and subsequently transferred $19,951 into a Registered Retirement Savings Plan (RRSP).[4]

[12] According to the evidence presented by the parties, it appears that the lump sum came from a Locked-In Retirement Account (LIRA) held by the appellant thanks to his former job. A total of $39,902.87 was apparently transferred from the LIRA to the LIF, which is considered to be like a RRIF (Registered Retirement Income Fund) within the meaning of the *Income Tax Act* (ITA).[5]

[13] On June 14, 2012, $19,951.43 was again transferred from the LIF into an RRSP Account, which allowed the appellant to claim a significant deduction that greatly reduced the tax impact of these transactions on his statement of income for the 2012 taxation year.

II. Issues in dispute

[14] There are two issues to be determined:

[4] Essentially, the Appellant is contesting the inclusion of the amount of $21,314, which was taken from an RRSP, since, according to the Appellant, this withdrawal was prompted by an error made by his financial broker. An investment of $19,951.43, taken from this amount, into an RRSP largely corrected the error made by his financial broker.

[5] *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, subsection 146.3(1).

(a) The first issue concerns the way in which the appellant's "actual income" is to be determined, in the event that the GIS must be calculated on the basis of estimated income for the calendar year following the year in which the income loss occurred, in accordance with subsection 14(5) of the Act. According to the Minister, the appellant's "actual income" is calculated as follows: actual income = 2012 pension income + income from any office, employment or business in 2012 + income from any other source in 2011. Therefore, the question is whether this approach is in line with the OAS Act.

(b) As mentioned above, the Minister considered the lump sum to be pension income for the purposes of the aforementioned calculation. The term "pension income" is defined in section 14 of the *Old Age Security Regulations*. Consequently, the second issue is whether the lump sum is pension income within the meaning of this definition.

III. Background

[15] Under the OAS Act, taxpayers who wish to receive the monthly Guaranteed Income Supplement are required to apply for it as it is not paid automatically. This application must be accompanied by a statement of income for the base calendar year, that is, the calendar year preceding the current payment period.[6]

[16] Since the appellant retired in September 2011, he had the option of producing an additional statement if he had ceased to hold an office or employment or carry on a business, in accordance with subsection 14(5) of the OAS Act.

[17] According to the Minister, this additional application is an option offered in order to reassess a taxpayer's income on the basis of the estimated income for the calendar year following the loss, in accordance with subsection 14(5) of the OAS Act, rather than the base calendar year. Consequently, this allows the Minister to increase the monthly Guaranteed Income Supplement to which a taxpayer is entitled, by immediately considering income losses that would not be reflected in income for the base calendar year.

IV. Analysis and conclusion

[6] Section 10 of the OAS Act, "base calendar year".

[18] According to the respondent, "actual income" must be calculated using the approach provided in subsection 14(5), in cases where this option was exercised, rather than on the basis of income for the preceding year. This provision is reproduced below:

> Additional statement if retirement before current payment period
>
> **(5)** If, in the circumstances described in paragraphs (a) and (b), a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), ceases to hold an office or employment or ceases to carry on a business, the person may, not later than the end of the payment period that is immediately after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner,
>
> **(a)** if the person ceases to hold that office or employment or to carry on that business in the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of
>
> i. **(i)** any pension income received by the person in that calendar year,
>
> ii. **(ii)** the income from any office or employment or any business for that calendar year, other than income from the office, employment or business that has ceased, and
>
> iii. **(iii)** the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income; and
>
> . . .

[19] Using this provision to establish the appellant's income, the Minister therefore added pension income in 2012, income from any office, employment or business in 2012 (excluding his salary, since it related to the office, employment or business that the appellant had ceased), and lastly, his income for 2011, excluding income received from any office, employment or business and pension plans.

[20] In so doing, the Minister initially included the amounts received from the Quebec Pension Plan to which the appellant was entitled for the 2012 taxation year, that is, a total of $8,158.74; the Minister also included an RRSP deduction of

$9,000 for the 2011 taxation year, which resulted in total income of $0 (and a combined income of $5,583.96).

[21] However, once the appellant's statement of income for the 2012 taxation year was produced, the Minister revised the appellant's income to include the lump sum, thereby increasing his income from $0 to $20,506 (which resulted in a combined income of $26,089.96).

[22] The Minister therefore recorded an overpayment when the amount of $26,089.96 was compared to the amount initially reported, that is, $5,583.96.

[23] The Minister maintains that it is section 18 of the OAS Act which confers the authority to reassess the appellant's income and thereby offset any fluctuations in income by claiming an overpayment or remitting an underpayment. This section reads as follows:

> Adjustment of Payments
>
> **Adjustment of payments of supplements**
>
> **18** Where it is determined that the income for a base calendar year (in this section referred to as the "actual income") of an applicant for a supplement does not accord with the income of the applicant (in this section referred to as the "shown income") calculated on the basis of a statement or an estimate made under section 14, the following adjustments shall be made:
>
> **(a)** if the actual income exceeds the shown income, any amount by which the supplement paid to the applicant for months in the payment period exceeds the supplement that would have been paid to the applicant for those months if the shown income had been equal to the actual income shall be deducted and retained out of any subsequent payments of supplement or pension made to the applicant, in any manner that may be prescribed; and
>
> **(b)** if the shown income exceeds the actual income, there shall be paid to the applicant any amount by which the supplement that would have been paid to the applicant for months in the payment period if the actual income had been equal to the shown income exceeds the supplement paid to the applicant for those months.

[24] In the Minister's opinion, the appellant's "actual income" within the meaning of this provision, would be the appellant's true income based on his statement of income as calculated in accordance with subsection 14(5) of the OAS Act, while the "shown income" would be the income that the appellant had

expected to receive in his initial application, also in accordance with subsection 14(5) of the OAS Act.

[25] Having established that the appellant's true income within the meaning of the OAS Act for the period in dispute was $26,089.96 and that his shown income was $5,583l.96 [*sic*], the Minister required the appellant to reimburse the overpayment.

[26] With respect, even though this interpretation has been used by the Minister for some time, it is not clear, on a *prima facie* basis, that this is allowed under the OAS Act.

[27] Indeed, the Act does not give the concept of "actual income" the same meaning given by the Minister. According to section 18 of the OAS Act, what is in fact defined as actual income is the appellant's income for the base calendar year, rather than his true income as calculated under subsection 14(5) of the OAS after the production of his statement of income. In my opinion, this is indeed made clear by the following words: "the income for a base calendar year (in this section referred to as the "actual income") of an applicant for a supplement".

[28] The term "base calendar year" is defined in section 10 of the OAS Act as "the last calendar year ending before the current payment period". In this case, since the payment period in dispute is the period between July and December 2012, the base calendar year is the 2011 taxation year. The appellant's income for the base calendar year was $23,807 (and the combined income of the appellant and his spouse was $29,390.96).

[29] In light of the foregoing and based on a literal interpretation, the Minister should have calculated the overpayment by comparing the amount of $29,390.96 to the amount of $5,583.96 and not to the amount based on the appellant's true income, as was done by the Minister.

[30] However, even though I consider this interpretation to be appropriate according to the letter of the law, it is my opinion that the Minister's interpretation must prevail.

[31] Indeed, if the law were to be applied in the manner we have just presented, not only would this be less advantageous for the appellant, but this would destroy the usefulness of subsections 2 to 7 of section 14 of the OAS Act.

[32] Indeed, the purpose of these provisions is to allow the Minister to take certain declines in income into account in an anticipatory manner, that is, before they necessarily affect the economic reality of taxpayers. In certain cases, this option could be advantageous because if it did not exist, the Minister would have no choice but to calculate the monthly Guaranteed Income Supplement based on income for the base calendar year, which sometimes no longer represents the taxpayer's true financial situation.

[33] However, recognizing that section 18 of the OAS Act was enacted so that income for the base calendar year can be compared with income indicated in an additional statement referred to in section 14 of the OAS Act would inevitably create an overpayment. Obviously, since subsections 2 to 7 of section 14 of the OAS Act seek to offset declines in certain income, it is safe to assume that income for the base calendar year would necessarily be higher than income reported by a taxpayer under subsections 14(2) to (7) of the OAS Act. Consequently, in all cases, the taxpayer would be in a situation involving overpayment, and this overpayment would subsequently have to be reimbursed.

[34] This therefore raises the following question: from this point of view, why would Parliament have enacted subsections 14(2) to (7) of the OAS Act? Why adopt provisions which seek to account for any declines in income if these provisions will inevitably create an overpayment that the Minister must ask to have reimbursed?

[35] In this context, I think it is appropriate here to reiterate the principle of statutory interpretation known as the rule of effectivity. According to author Pierre-André Côté,[7] this rule holds that "an interpretation that gives legislation some effect is preferable to one that does not, because the legislature is presumed not to intervene gratuitously".

[36] It is my opinion that this rule applies in this case. Indeed, recognizing a literal interpretation of subsections 2 to 7 of section 14 of the OAS Act would be tantamount to denying their fundamental purpose and even their existence, which seems contrary to Parliament's intention.

[37] In any event, in this case, the Minister's interpretation is more advantageous for the appellant than the literal one. Indeed, according to the literal interpretation, the overpayment should be calculated based on the difference between the income

[7] Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th edition, Toronto: Carswell, 2011, p. 554.

for the base calendar year, that is, $29,390.96 and the income declared by the appellant in accordance with subsection 14(5) of the OAS Act, that is, $5,583.96. However, in this case, the Minister calculated the overpayment by using the appellant's true income for the 2012 taxation year, calculated in accordance with subsection 14(5) of the OAS Act, that is, $26,089.96 instead of $29,390.96, thereby reducing the overpayment.

[38] In light of this information, I therefore believe that there is justification for confirming the Minister's interpretation of section 18 of the OAS Act in terms of the calculation method to be used.

V. Is the "lump sum" pension income within the meaning of the *Old Age Security Regulations*?

[39] The second issue is whether the lump sum received by the appellant constitutes pension income within the meaning of section 14 of the *Old Age Security Regulations*. The relevant provisions of this section read as follows in French:

> 14 Pour l'application de l'article 14 de la Loi, le revenu provenant d'un régime de pension est le total des montants perçus au titre :
>
> (a) de rentes;
>
> [. . .]
>
> (f) de pensions ou de pensions de retraite, autres que les prestations reçues aux termes de la Loi et tout versement semblable reçu en vertu d'une loi provinciale;
>
> [. . .]

They read as follows in English:

> 14 For the purposes of section 14 of the Act, pension income means the aggregate of amounts received as
>
> (a) annuity payments;
>
> . . ,
>
> (f) superannuation or pension payments, other than a benefit received pursuant to the Act or any similar payment received pursuant to a law of a provincial legislature;
>
> . . .

[40] The term "superannuation" used in the English version of section 14 of the Regulations is defined in the *Canadian Oxford Dictionary* (2nd edition) as follows:

> **1** a pension paid to a retired person. **2** a regular payment made towards this by an employed person. [. . .]

[41] The English term "pension" is defined in the same dictionary as follows:

> **1** a regular payment made by a government to people above a specified age, to the disabled, or to such a person's surviving dependants. **2** a similar payment made by an employer etc. to a retired employee. **3** a regular payment from a fund etc. to which the recipient has contributed (usu. with an employer) as an investment during his or her working life in order to realize a return upon retirement (also *attributive*: *pension plan*). [. . .]

[42] The term "pension" used in the French version of the Regulations is defined in the French dictionary the *Petit Robert* as follows:

> 1 Allocation périodique versée régulièrement à une personne. [. . .]

[43] According to the common meaning of the two versions of the provisions in question, the payment must be recurring or regular in nature to be considered to be a "superannuation or pension payment" or an amount received in the form of "pensions ou de pensions de retraite".

[44] The early withdrawal of the lump sum from the appellant's LIF is not an annuity because it was not a recurring payment. For the reasons provided above, the lump sum was not received in the form of a superannuation or pension payment since these terms imply that the payment is recurring or regular in nature. Because of its form, the lump sum does not satisfy the requirements of this definition; instead, it was a discretionary withdrawal which was not converted to an annuity.

[45] In this regard, the respondent maintains that the decision rendered in *Ward* v. *Canada* (*Minister of Human Resources and Social Development)*, 2008 TCC 25, written by my colleague the Honourable Justice Hershfield, clearly establishes that funds from an RRIF are considered to be pension income and that this decision should be followed by our Court.

[46] I recognize that in certain cases, funds from an RRIF could be considered to be pension income. However, I disagree with the respondent's generalization. Whether or not something is a pension income within the meaning of the OAS Act is not determined by the financial vehicle; it is a question of law: do the funds in

question constitute an annuity or pension income? Section 14 of the Regulations was written in a restrictive and comprehensive manner; it was therefore Parliament's intent to fully define what constitutes pension income within the meaning of section 14 of the OAS Act. For this reason, I believe that a generalization based on the nature of the financial vehicle is risky, even wrong.

[47] Indeed, as mentioned earlier, in order for funds to constitute an annuity or pension income for the purposes of section 14 of the Regulations, the funds must be paid on a recurring or regular basis. Therefore, if a taxpayer received $1,500 annually from an RRIF, it is my opinion that these funds would constitute an annuity or pension income within the meaning of the law. However, if this same taxpayer withdrew $15,000 from this same RRIF within a particular taxation year, this withdrawal would not transform the funds into an annuity or a pension within the meaning of section 14 of the Regulations, since the withdrawal is not and will never be made on a recurring or regular basis. It is therefore appropriate to consider each case as being unique rather than assuming that a specific financial vehicle will always produce an annuity or a pension.

[48] I would also point out that the interpretation proposed by the respondent could, under certain circumstances, produce an unfair result. On the one hand, according to the respondent, the lump sum reduced the appellant's GIS for the year following the loss of income. As indicated earlier, this amount was placed in an RRSP. If the appellant had converted his RRSP into an RRIF, which is often the method chosen by taxpayers in order to receive an annuity, the converted amount could once again reduce his GIS, as this amount would be included in the calculation of "actual income" for the base calendar year.

[49] For all these reasons, it is my opinion that the lump sum is not pension income within the meaning of section 14 of the Regulations. Consequently, this amount should not be included in the taxpayer's actual income as calculated in accordance with subsection 14(5) of the OAS Act.

[50] For these reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 20th day of March 2017.

"Robert J. Hogan"

Hogan J.

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