Federal Courts Reports

Recueil des décisions des Cours fédérales

A-46-21

2022 FCA 44

Attorney General of Canada (*Applicant*)

v.

Marina Burke (*Respondent*)

INDEXED AS: CANADA (ATTORNEY GENERAL) V. BURKE

Federal Court of Appeal, Gleason, Mactavish and Monaghan JJ.A.—By videoconference, February 1; Ottawa, March 15, 2022.

Pensions — Judicial review of Social Security Tribunal (SST) Appeal Division decision dismissing Minister of Employment and Social Development's appeal from General Division decision holding that Minister having no power to recover spousal allowance benefits paid to respondent between 1997-2001 — Respondent born in Trinidad, living in U.S. before relocating to Canada in 1986, becoming Canadian citizen in 1989 — Respondent's application for old age security spousal allowance approved in 1997 — Respondent stated in application she had resided in Canada since January 1986 — 2013 investigation into respondent's residency, entitlement to benefits pursuant to Old Age Security Regulations (Regulations), s. 23 uncovering new information with respect to her residency, including undeclared absences from Canada, application for U.S. naturalization — Minister determining respondent stopped residing in Canada in January 1992, having to repay improperly received benefits — Appeal Division finding that while Minister having power to reassess eligibility for benefits "at any time", including before or after application approved, that power not extending to reassessment of "initial eligibility" decisions — Concluding Minister entitled to recover benefits paid to respondent from August of 2001 to September of 2013, but holding Minister having no power to recover spousal allowance benefits paid to respondent between 1997 and July of 2001 — Whether reasonable for Appeal Division to find that Regulations, s. 23, Old Age Security Act (Act), s. 37 precluding Minister from reassessing initial eligibility decisions to approve old age security benefits in order to recover overpayments — Appeal Division's interpretation of s. 23 unreasonable — Appeal Division in B. R. v. Minister of Employment and Social Development deciding that once pension approved, investigatory provisions of Regulations only allowing Minister to investigate claimant's future entitlement to benefits — Series of SST decisions adopting this restrictive view of Minister's powers, others following traditional, more expansive interpretation of Act, Regulations — Question then whether restrictive view of Minister's powers adopted by Appeal Division in this case reasonable — Necessary to consider extent of Minister's investigation, verification powers under Act, s. 37, Regulations, s. 23 — Clear that s. 23 not limited in manner suggested by Appeal Division — In concluding that power to reassess eligibility "at any time" not including reassessment of "initial eligibility", Appeal Division reading temporal limitation into Minister's investigatory power that does not appear in text of s. 23 — Appeal Division's comfort or lack thereof with particular interpretation of legislative provision not a reason to read words into

legislation that do not appear in text in question — Parliament, not Appeal Division, responsible for balancing of competing policy considerations — Words of Act, s. 37, Regulations, s. 23 "precise and unequivocal", authorizing Minister to reconsider eligibility of individual to old age security benefits "at any time", to recover payments that should not have been made — Interpretation of legislation leading to different conclusion unreasonable — Act making Minister's approval contingent on claimant meeting statutory residence criteria — Appeal Division's understanding that it is Minister's approval that makes someone eligible or entitled to benefits, not claimant's factual circumstances, unreasonable — Minister can reassess initial eligibility decisions, require repayment of benefits claimant has already received — Residency in Canada key to scheme of Act, Regulations — Interpretation of legislation allowing respondent to keep benefits producing absurd result contrary to purpose of operating old age security scheme using sound financial management — In this case, interpretation of legislation precluding Minister from reassessing initial eligibility for benefits, recovering benefits improperly paid not consistent with one of purposes of Act — Respondent declared ineligible to receive any benefits under Old Age Security Act — Application allowed.

Construction of Statutes — Social Security Tribunal (SST) Appeal Division decision dismissing Minister of Employment and Social Development's appeal from General Division decision holding that Minister having no power to recover spousal allowance benefits paid to respondent between 1997-2001 — Respondent's application for old age security spousal allowance approved in 1997 — Respondent stated in application she had resided in Canada since January 1986 — 2013 investigation into respondent's residency, entitlement to benefits pursuant to Old Age Security Regulations (Regulations), s. 23 uncovering new information with respect to her residency, including undeclared absences from Canada, application for U.S. naturalization — Minister determining respondent stopped residing in Canada in January 1992, having to repay improperly received benefits — Appeal Division finding that while Minister having power to reassess eligibility for benefits "at any time", including before or after application approved, that power not extending to reassessment of "initial eligibility" decisions — Concluding Minister entitled to recover benefits paid to respondent from August of 2001 to September of 2013, but holding Minister having no power to recover spousal allowance benefits paid to respondent between 1997 and July of 2001 — Appeal Division's interpretation of s. 23 unreasonable — In concluding that power to reassess eligibility "at any time" not including reassessment of "initial eligibility", Appeal Division reading temporal limitation into Minister's investigatory power not appearing in text of s. 23 — Appeal Division's comfort or lack thereof with particular interpretation of legislative provision not a reason to read words into legislation that do not appear in text in question — Goal of statutory interpretation not to arrive at conclusion with respect to meaning of legislation that is "not wholly inconsistent" with object, purpose of legislation in question — Rather, goal is to ascertain authentic meaning of legislation, one that best reflects text, context, purpose of Act, is harmonious with scheme of Act as a whole.

This was an application for judicial review of a decision of the Appeal Division of the Social Security Tribunal (SST) dismissing the Minister of Employment and Social Development's appeal from a decision of the General Division of the SST holding that the Minister had no power to recover any of the spousal allowance benefits that had been paid to the respondent between 1997 and 2001.

The respondent was born in Trinidad. In 1982, she and her husband moved to Florida, and in 1986, both relocated to Canada. She became a Canadian citizen three years later. While the respondent maintained that she continued to be resident in Canada until 2014, the General Division found, and the Appeal Division accepted, that the respondent stopped residing in Canada in 1992, becoming a permanent resident of the United States that same year.

In June 1997, the respondent's application for an old age security spousal allowance was approved, retroactive to July of 1996. The respondent had stated in her application that she had resided in Canada since January 1986, making no mention of the years that she had spent living in the U.S. or the fact that she was a permanent resident of that country. The Minister approved a partial allowance. The respondent's application for an old age security benefit was subsequently approved, in 2000, and she also began to receive a guaranteed income supplement.

In 2013, an investigation into the respondent's residency and entitlement to benefits pursuant to

section 23 of the *Old Age Security Regulations* (Regulations) uncovered new information with respect to her residency, including inconsistent addresses for her in Canada, information regarding her undeclared absences from Canada and her application for U.S. naturalization. Payment of the respondent's benefits was suspended and the Minister determined that she had stopped residing in Canada in January of 1992. In accordance with section 37 of the *Old Age Security Act* (Act), the respondent was asked to repay the benefits that she had improperly received in the period between July of 1996 and September of 2013. The General Division of the SST found that the respondent stopped residing in Canada in 1992, and that she had not re-established residence in Canada at any time thereafter. As a result, she did not meet the statutory residency requirements for the spousal allowance that she had been receiving as of July of 1996. The General Division nevertheless found that the respondent had been entitled to receive spousal allowance benefits from July of 1996 up to July of 2001, on the basis that there was no express provision in either the Act or the Regulations that gave the Minister the authority to reassess an initial eligibility decision. The General Division held that the Minister was entitled to recover the benefits that had been paid to the respondent from August of 2001 to September of 2013, but held that the Minister had no power to recover any of the spousal allowance benefits that had been paid to the respondent between 1997 and July of 2001. The Appeal Division found that the General Division had erred in law in its interpretation of section 23 of the Regulations by failing to carry out a complete statutory interpretation analysis, in concluding that the Minister did not have the power to reassess initial eligibility decisions. However, the Appeal Division came to the same conclusion as the General Division with respect to the limits on the ability of the Minister to reassess eligibility for benefits, albeit for different reasons. The Appeal Division found, *inter alia*, that while the Minister has the power to reassess eligibility for benefits "at any time", including before or after an application is approved, that power does not extend to the reassessment of "initial eligibility" decisions. The Appeal Division also found that it does not necessarily follow that a person who is reassessed following an investigation and found to be ineligible for benefits was never "entitled" to the benefits in the first place, and that they must therefore repay all of the benefits received.

The main issue was whether it was reasonable for the Appeal Division to find that section 23 of the Regulations and section 37 of the Act preclude the Minister from reassessing initial eligibility decisions to approve old age security benefits in order to recover overpayments.

Held, the application should be allowed.

The Appeal Division's interpretation of section 23 of the Regulations was unreasonable. For many years the SST operated on the assumption that the Minister had the power to revisit initial eligibility decisions in order to verify that claimants were in fact eligible for benefits. This assumption changed in *B. R. v. Minister of Employment and Social Development*, wherein an Appeal Division member decided that once a pension had been approved, the investigatory provisions of the Regulations only allowed the Minister to investigate the claimant's future entitlement to benefits. A series of decisions of both the General and Appeal Divisions of the SST followed, with some adopting the more restrictive view of the Minister's powers espoused by the SST in *B. R.*, and others following the traditional, more expansive interpretation of the Act and the Regulations. The question, then, was whether the restrictive view of the Minister's powers adopted by the Appeal Division in this case was reasonable, recognizing that there can be more than one reasonable interpretation of legislation. There is no provision in either the Act or the Regulations providing the Minister with the express power to go back and change initial eligibility decisions. The focus, therefore, had to be on related provisions, such as section 37 of the Act and section 23 of the Regulations. The question for determination was the extent of the Minister's investigation and verification powers conferred by section 23 of the Regulations and recovery powers conferred by section 37 of the Act.

It is true that section 23 of the Regulations speaks to the *eligibility* of claimants for benefits, whereas section 37 of the Act refers to their *entitlement* to benefits. However, when regard is had to the text, context and purpose of the Act and Regulations, it is clear that section 23 of the Regulations is not limited in the manner suggested by the Appeal Division. In concluding that the power to reassess eligibility "at any time" does not include reassessment of "initial eligibility", the Appeal Division reads a temporal limitation into the Minister's investigatory power that does not appear in

the text of section 23. The Appeal Division's finding on this point was inconsistent with the wording of section 23 itself. The Appeal Division's comfort or lack thereof with a particular interpretation of a legislative provision is not a reason to read words into legislation that do not appear in the text in question. It is Parliament, and not the Appeal Division, that is responsible for the balancing of competing policy considerations such as who should bear the burden for the improper payment of legislative benefits. The words of section 37 of the Act and section 23 of the Regulations are "precise and unequivocal", inasmuch as they authorize the Minister to reconsider the eligibility of an individual to old age security benefits "at any time", and to recover payments that should not have been made. An interpretation of the legislation that leads to a different conclusion is thus unreasonable. The conclusion that the Appeal Division erred in its interpretation of section 37 of the Act and section 23 of the Regulations is confirmed when regard is had to the role of these provisions in the context of the old age security scheme as a whole. Subsection 5(1) of the Act contains a conjunctive list of three requirements that must be satisfied for a person to be qualified for a pension. The Act thus makes the Minister's approval contingent on a claimant meeting the statutory residence criteria. The Appeal Division's understanding that it is the Minister's approval that makes someone eligible or entitled to benefits, and not the claimant's factual circumstances, was unreasonable in light of the statutory text. The fact that the Minister approved an application does not qualify the person for benefits for all time. It follows that the investigative power described in section 23 of the Regulations means that the Minister can reassess initial eligibility decisions and require repayment of benefits the claimant has already received. A present day determination that a person is not entitled means that they must return benefit payments that they received in the past. The Minister has the power to reassess its decision to pay the benefits, if the individual's circumstances have changed, and to consider whether they were in fact entitled to receive benefits in the first place. Residency in Canada is key to the scheme of the Act and the Regulations. An interpretation of the section 23 investigative power that allows a person to keep a benefit, despite their not meeting the relevant residency requirement, is a result that is inconsistent with a scheme that provides benefits only to people who meet the eligibility requirement of residency.

Any old age assistance program that is financed through the general tax revenues of the Government of Canada has to balance the need to process benefits applications quickly with financial stewardship of the program. An interpretation of the legislation that would allow the respondent to keep benefits that she had received when she was not eligible for them would produce "an absurd result" that is contrary to the purpose of operating the old age security scheme using sound financial management. The goal of statutory interpretation is not to arrive at a conclusion with respect to the meaning of legislation that is "not wholly inconsistent" with the object and purpose of the legislation in question. It is, rather, to ascertain the authentic meaning of that legislation—one that best reflects the text, context and purpose of the Act, and is harmonious with the scheme of the Act as a whole. In this case, an interpretation of the legislation that would preclude the Minister from reassessing initial eligibility for benefits and recovering benefits improperly paid is one that is not consistent with one of the purposes of the Act, which is to pay benefits only to people who meet the eligibility criteria set out in the Act. The Appeal Division nevertheless adopted an interpretation of the legislation that allowed precisely that result. Such an interpretation was unreasonable.

The decision of the Appeal Division was set aside, and the appeal from the decision of the General Division was allowed. The matter was not remitted to the Appeal Division. Instead, the respondent was declared to be ineligible to receive benefits under the *Old Age Security Act* from the time that the first benefits were awarded to her on June 2, 1997, up until September of 2013, when the payment of benefits to the respondent was suspended.

STATUTES AND REGULATIONS CITED

Bill No. 13, *Old Age Security Act*, 21st Parl., 5th Sess., 1951.

Canada Pension Plan, R.S.C., 1985, c. C-8, s. 81(3).

Employment Insurance Act, S.C. 1996, c. 23, s. 111.

Old Age Security Act, R.S.C., 1985, c. O-9, ss. 3, 5, 9, 11(7), 34, 37.

Old Age Security Regulations, C.R.C., c. 1246, ss. 21(1), 23, 26.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

CONSIDERED:

B. R. v. Minister of Employment and Social Development, 2018 SST 844; *Canada (Minister of Human Resources Development) v. Stiel*, 2006 FC 466, [2006] 4 F.C.R. 489.

REFERRED TO:

Canada (Attorney General) v. Redman, 2020 FCA 209; *Cameron v. Canada (Attorney General)*, 2018 FCA 100; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, (1999), 179 D.L.R. (4th) 577; *M. A. v. Minister of Employment and Social Development*, 2020 SST 269; *H. Z. v. Minister of Employment and Social Development*, 2020 SST 550; C*. T. v. Minister of Employment and Social Development and C. A.*, 2021 SST 204; *L. L. v. Minister of Employment and Social Development*, 2020 SST 314; *M. H. v. Minister of Employment and Social Development*, 2020 SST 1128; *C. H. v. Minister of Employment and Social Development*, 2020 SST 368; *C. B. v. Minister of Employment and Social Development*, 2021 SST 57; *S. B. v. Minister of Employment and Social Development*, 2020 SST 822; *L. L. v. Minister of Employment and Social Development*, 2021 SST 288; *K. B. v. Minister of Employment and Social Development*, 2021 SST 268; *C. T. v. Minister of Employment and Social Development and C. A.*, 2020 SST 1227; *S. A. v. Minister of Employment and Social Development*, 2021 SST 509; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556, [2019] 2 F.C.R. D-3; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1.

AUTHORS CITED

House of Commons Debates, 21st Parl., 5th Sess., Vol. 1, November 1, 1951.

APPLICATION for judicial review of a decision by the Appeal Division of the Social Security Tribunal (SST) (*Minister of Employment and Social Development v. M. B.*, 2021 SST 8) dismissing the Minister of Employment and Social Development's appeal from a decision of the General Division of the SST (*M. B. v. Minister of Employment and Social Development*, 2020 SST 22) holding that the Minister had no power to recover any of the spousal allowance benefits that had been paid to the respondent between 1997 and 2001. Application allowed.

APPEARANCES

Tiffany Glover for applicant.

Richard Bohrer and *David Mellor* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for applicant.

The following are the reasons for judgment rendered in English by

[1] MACTAVISH J.A.: For many years, Marina Burke collected old age security benefits without disclosing the fact that she was residing in the United States, contrary to the residency requirements of the *Old Age Security Act*, R.S.C., 1985, c. O-9 (the Act).

[2] The Appeal Division of the Social Security Tribunal of Canada (SST) found that the Minister of Employment and Social Development could not revisit the original decisions awarding benefits to Ms. Burke, and could only reassess her entitlement to benefits on a going-forward basis. This meant that Ms. Burke would be able to keep the tens of thousands of dollars of benefits that she had received while residing in the U.S.

[3] The Minister seeks judicial review of the decision of the Appeal Division, asserting that it erred in its interpretation of the governing legislation. For the reasons that follow, I agree that the Appeal Division erred in its statutory interpretation analysis, and that its decision was not reasonable. I would therefore grant the Minister's application for judicial review.

I. Background

[4] Ms. Burke was born in Trinidad, and in 1982, she and her husband moved to Florida. In 1986, the couple relocated to Canada, and Ms. Burke became a Canadian citizen three years later. The Minister does not dispute that Ms. Burke resided in Canada from January of 1986 to 1992.

[5] While Ms. Burke maintained that she continued to be resident in Canada until 2014, the General Division of the SST found, and the Appeal Division accepted, that Ms. Burke stopped residing in Canada in 1992, becoming a permanent resident of the United States that same year. In 1996, Ms. Burke applied for American naturalization, stating in her application that she had been a permanent resident of the United States since January of 1992, and that she had only left the country for a few brief visits to Trinidad and Canada between 1992 and 1996. Ms. Burke became a naturalized U.S. citizen in 1999.

[6] On June 2, 1997, Ms. Burke's application for an old age security spousal allowance was approved, retroactive to July of 1996, the month after she turned 60. Ms. Burke had stated in her application that she had resided in Canada since January 1986, making no mention of the years that she had spent living in the U.S. or the fact that she was a permanent resident of that country. The Minister approved a partial allowance for Ms. Burke, based upon her ostensibly having 10 years of residency in Canada between 1986 and 1996.

[7] In June of 2000, Ms. Burke applied for an old age security pension benefit, stating in her application that she had not been outside of Canada for more than six months in the previous five years. The Minister approved the application, granting Ms. Burke a partial pension based upon her having 15 years' residency in Canada between

1986 and 2001. When Ms. Burke turned 65, the Minister deemed her to have applied for a guaranteed income supplement (GIS) and she began receiving both benefits as of July of 2001.

[8] In 2013, two old age security forms addressed to Ms. Burke were returned to the Minister as “undeliverable”. This caused the Minister to initiate an investigation into Ms. Burke’s residency and entitlement to benefits pursuant to section 23 of the *Old Age Security Regulations*, C.R.C., c. 1246 (the Regulations). Subsection 23(2) of the Regulations states that “[t]he Minister may at any time make an investigation into the eligibility of a person to receive a benefit”. The full text of this and other relevant legislative provisions is attached as an appendix to these reasons.

[9] The Minister’s investigation uncovered new information with respect to Ms. Burke’s residency, including inconsistent addresses for her in Canada, information regarding her long, undeclared absences from Canada and her 1996 application for U.S. naturalization.

[10] In accordance with section 26 of the Regulations, payment of Ms. Burke’s benefits was suspended, and, in October of 2015, the Minister determined that Ms. Burke had stopped residing in Canada in January of 1992. Consequently, she was not entitled to any of the benefits that she had received, as she did not meet the statutory 10-year minimum residency requirement.

[11] In accordance with section 37 of the Act, Ms. Burke was asked to repay the $115,522.49 in benefits that she had improperly received in the period between July of 1996 and September of 2013. Subsection 37(1) of the Act states that a person who has received a benefit payment to which the person is not entitled shall forthwith return the amount of the benefit payment. Subsection 37(2) of the Act provides that the amount of the benefit overpayment constitutes a debt due to Her Majesty and is recoverable at any time.

[12] Ms. Burke’s request for reconsideration of the Minister’s decision was dismissed, and she then appealed the Minister’s decision to the General Division of the SST. Ms. Burke’s appeal was allowed in part, but that decision was subsequently set aside by the Appeal Division of the SST on procedural fairness grounds, and the matter was referred back to the General Division for redetermination.

II. The General Division Decision

[13] On the redetermination, the General Division [*M. B. v. Minister of Employment and Social Development*, 2020 SST 22] found that Ms. Burke had stopped residing in Canada in January of 1992, and that she had not re-established residence in Canada at any time thereafter. As a result, she did not meet the statutory residency requirements for the spousal allowance that she had been receiving as of July of 1996.

[14] The General Division nevertheless found that Ms. Burke had been entitled to receive spousal allowance benefits from July of 1996 up to July of 2001, when her application for an old age pension had been approved. This was because there was no express provision in either the Act or the Regulations that gave the Minister the authority to reassess an initial eligibility decision.

[15] While the Minister could not go back and revisit the original eligibility decision, the General Division found that the Minister could reassess Ms. Burke's eligibility for benefits on a going-forward basis at any time after July of 2001, when her application for an old age pension was approved. No exception was made for cases where there had been fraud, or where new facts emerged.

[16] As Ms. Burke had not been eligible for pension benefits as of August of 2001, the General Division held that the Minister was entitled to recover the benefits that had been paid to her from August of 2001 to September of 2013, which was when the Minister had suspended the payment of benefits to Ms. Burke. However, the General Division held that the Minister had no power to recover any of the spousal allowance benefits that had been paid to Ms. Burke between 1997 and July of 2001.

III. The Appeal Division Decision

[17] The Minister was granted leave to appeal the General Division's decision, and it is the Appeal Division's January 15, 2021, decision [*Minister of Employment and Social Development v. M. B.*, 2021 SST 8] dismissing the Minister's appeal that underlies this application for judicial review.

[18] The Appeal Division accepted the General Division's finding that Ms. Burke had ceased residing in Canada in January of 1992. However, it found that the General Division had erred in law in its interpretation of section 23 of the Regulations by failing to carry out a complete statutory interpretation analysis, in concluding that the Minister did not have the power to reassess initial eligibility decisions.

[19] In particular, the General Division erred because it failed to identify and explore the purpose of the Act, to explain or give context to the words "entitled" in section 37 of the Act and "eligibility" in section 23 of the Regulations, or to consider whether its interpretation was consistent with Parliament's intention in creating the old age security regime.

[20] However, after considering the text, context and purpose of the legislative provisions at issue here, the Appeal Division came to the same conclusion as the General Division with respect to the limits on the ability of the Minister to reassess eligibility for benefits, albeit for different reasons.

IV. Issues

[21] Ms. Burke did not file a memorandum of fact and law in response to the Minister's application, and she was thus not entitled to make any representations at the hearing of the Minister's application. However, the panel granted leave to Ms. Burke's nephew, David Mellor, to make representations at the hearing on Ms. Burke's behalf.

[22] Mr. Mellor raised a number of issues in his oral submissions, apart from the statutory interpretation issue at the heart of this application. In particular, he argued that it was unfair to make Ms. Burke go back to try to reconstruct her whereabouts years before, when documents and records were no longer available to her.

[23] I agree with counsel for the Attorney General that the only issue that is properly before the Court is the statutory interpretation issue identified in the Attorney General's

notice of application. No issue had been taken by Ms. Burke prior to the hearing with the finding made by the General Division and adopted by the Appeal Division of the SST that she did not reside in Canada after January of 1992.

[24] Consequently, there are two questions for determination:

(1) What is the standard of review?

(2) Was it reasonable for the Appeal Division to find that section 23 of the Regulations and section 37 of the Act preclude the Minister from reassessing initial eligibility decisions to approving old age security benefits in order to recover overpayments?

V. Standard of Review

[25] The standard of review applicable to decisions of the Appeal Division is that of reasonableness: *Canada (Attorney General) v. Redman*, 2020 FCA 209, at paragraph 12; *Cameron v. Canada (Attorney General)*, 2018 FCA 100, at paragraph 3. This includes decisions involving questions of statutory interpretation: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paragraph 115.

[26] This is the case even where there has been persistent discord on questions of law in an administrative body's decisions: *Vavilov*, above, at paragraphs 72 and 129. Where, however, a decision maker departs from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable: *Vavilov*, above, at paragraph 131.

[27] That said, it would be antithetical to the rule of law and would lead to legal incoherence if the meaning of a law was to depend on the identity of the individual decision maker. Rather than considering this to be a situation where the correctness standard of review ought to be applied, however, the Supreme Court stated that the more robust form of reasonableness review described in *Vavilov* is capable of guarding against threats to the rule of law: *Vavilov*, above, at paragraph 72.

[28] In reviewing the interpretation of statutory provisions by administrative tribunals, the reviewing court does not undertake its own, *de novo* analysis of the question. Nor does it ask itself what the correct interpretation of the legislation should be. Instead, as is the case where a reviewing court is applying the reasonableness standard to questions of fact, discretion or policy, the Court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached, in order to determine whether the decision was reasonable: *Vavilov*, above, at paragraphs 75, 83 and 116.

[29] In so doing, the reviewing court must focus on the decision maker's interpretation, keeping in mind that there may be more than one reasonable interpretation of legislation available to an administrative decision maker, based on the text, context and purpose of the legislation: *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156, [2022] 1 F.C.R. 3, at paragraphs 16 and 18.

[30] That said, the decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision in question. A decision maker cannot adopt an interpretation it knows to be inferior, even if it is plausible, because the interpretation in question appears to be both available and expedient. The decision maker's responsibility is to discern meaning and legislative intent, and not to "'reverse-engineer'" its analysis in order to achieve a desired outcome: *Vavilov*, above, at paragraphs 120 and 121.

VI. Principles of Statutory Interpretation

[31] Before considering whether the Appeal Division's interpretation of section 37 of the Act and section 23 of the Regulations was reasonable, it is useful to summarize the principles of statutory interpretation that the Appeal Division was required to apply.

[32] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, the Supreme Court of Canada stated that the words of a statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": at paragraph 10, citing *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, (1999), 179 D.L.R. (4th) 577, at paragraph 50.

[33] While language in a statutory provision is not to be interpreted independently of its context and legislative purpose, the Court nevertheless went on in *Canada Trustco* to observe that where the words of a statutory provision are precise and unequivocal, the ordinary meaning of the words will play a dominant role in the interpretive process: above, at paragraph 10. Where, however, the words are capable of supporting more than one reasonable meaning, the ordinary meaning of the words will play a lesser role. Although the relative effects of ordinary meaning, context and purpose on the interpretive process may vary from case to case, courts must seek to read the provisions as a harmonious whole in every case: *Canada Trustco*, above, at paragraph 10.

[34] With these principles in mind, I turn now to consider the Appeal Division's interpretation of the old age security regime generally, and, in particular, its interpretation of section 37 of the Act and section 23 of the Regulations, and whether that interpretation was reasonable.

VII. The Appeal Division's Statutory Interpretation Analysis

[35] The Appeal Division found that the purpose of the old age security regime established by the Act and the Regulations is to provide modest income support to senior residents of Canada in recognition of their contributions to this country. The "metre stick" used by the Minister to measure those contributions is residency in Canada [Appeal Division decision, at paragraph 71] .

[36] The Appeal Division further found that while the Minister has the power to reassess eligibility for benefits "at any time", including before or after an application is approved, that power does not extend to the reassessment of "initial eligibility" decisions. In coming to this conclusion, the Appeal Division had regard to a number of sections in the Act and the Regulations. It noted that when someone applies for benefits, the Minister has to decide whether the individual meets the eligibility criteria for

such benefits. If the Minister decides that the person meets the eligibility criteria, that person “qualifies” for the benefit and is thereafter “entitled” to receive payment of that benefit.

[37] The Appeal Division noted that the Minister has the power under the Regulations to investigate a person’s “eligibility” after an application for benefits has been approved. However, the Regulations do not distinguish between “initial” or “continued” eligibility. If the investigation concludes that a person was not “eligible” for a benefit, payment of their benefit must stop.

[38] That said, the Appeal Division found that it does not necessarily follow that a person who is reassessed following an investigation and found to be ineligible for benefits was never “entitled” to the benefits in the first place, and that they must therefore repay all of the benefits received. According to the Appeal Division “‘[e]ligible’ is about the Minister deciding, based on the information they have at a particular time, that the person meets the criteria. ‘Entitled’ is about the Minister having approved a benefit and paying it” [at paragraph 82].

[39] The Appeal Division also had regard to section 5 of the Act. Amongst other things, this section provides that the Minister is not to pay benefits to people unless they are “qualified” under the residency requirements, and the Minister has approved the application. The Appeal Division noted [at paragraph 94] that the definition of the verb “to qualify” speaks to having “‘the legal right to have or do something because of the situation you are in’”.

[40] The Appeal Division understood from this that a person qualifies for benefits when the Minister approves their application. Once approved, the person is entitled to receive benefit payments, and this entitlement can only be reassessed thereafter on a going-forward basis.

[41] That is, after reviewing the plain meaning of the words “eligible” and “entitled” as they appear in section 23 of the Regulations and in section 37 as well as in other parts of the Act, the Appeal Division concluded [at paragraph 97] that the Minister has the power to assess eligibility at any time, but that “eligibility” does not mean “initial eligibility”.

[42] In coming to this conclusion, the Appeal Division noted that section 37 of the Act provides for the return of benefits when people are not “entitled” to them. Under section 23 of the Regulations, the Minister has the power to investigate whether a person is “eligible” for the benefit in question. “Eligible” and “entitled” are not precisely the same word, and neither term is expressly defined in the legislation.

[43] The fact that different terms are used in the two provisions suggested to the Appeal Division that there is a difference between investigating whether a person was *eligible* for a benefit in the first place, and deciding whether a person has to repay a benefit already received because they were never *entitled* to it at all.

[44] The Appeal Division found that the concept of “eligibility” is connected to the process for deciding whether a person meets the threshold criteria for benefits, and that the Minister assesses eligibility under the Act at a particular point in time. In contrast,

“entitlement” seems to arise almost exclusively in relation to the payment of benefits, and not in assessing an individual’s threshold eligibility for those benefits.

[45] The Appeal Division observed that the Act establishes eligibility criteria for each type of benefit. Claimants apply for a benefit, and the Minister applies the eligibility criteria, and, if the application is approved, this approval entitles claimants to payment of the benefit.

[46] According to the Appeal Division, the determination that an individual is “eligible” for a benefit is not a statement about whether the Minister’s decision is an error-free assessment of the eligibility criteria. Where new facts come to light, they could impact any new assessment as to whether the claimant meets the eligibility criteria. The Appeal Division found, however, that this affects the individual’s *eligibility* for, and not their *entitlement* to benefits.

[47] The Appeal Division concluded [at paragraph 113] that reading the investigation section as giving the Minister the power to reassess initial eligibility is to ignore the difference in the use of the words “eligibility” and “entitlement”, and to misinterpret what makes people eligible for a benefit in a benefits-conferring scheme. According to the Appeal Division, what makes people “eligible” is the Minister approving the application and deciding that the claimant is eligible. Their “entitlement” (the state of having satisfied a set of conditions reached through assessment) can change in the future if the Minister reassesses under the investigative power.

[48] The Appeal Division found that, interpreted this way, it makes more sense that the section 23 investigative power refers to when the investigation itself can take place, but not necessarily what the impact of that investigation can be in terms of repayment. The use of the term “eligible” marks the time and suggests this is a current and forward-looking exercise. If the investigation section worked together with section 37 of the Act to allow the Minister to reassess initial eligibility and to collect overpayments from initial eligibility to reassessment, the use of the term “eligibility” or “initial eligibility” would have been necessary, not the word “entitlement”.

[49] The Appeal Division emphasized that what makes a person *eligible* for benefits is their age and their residence in Canada. What makes them *entitled* is the Minister approving the application and paying the benefit. Fraudulent applications nullify entitlement. New facts affect new decisions on eligibility.

[50] In sum, an investigation can change eligibility, which is forward-looking, but not entitlement, which was already (perhaps mistakenly) decided. Based on subsection 5(1) of the Act, eligibility is what underlies “entitlement” to a benefit, and the Minister can investigate but cannot reassess and collect past benefits based on the power to “investigate”.

[51] The Appeal Division acknowledged that its interpretation of the Act and the Regulations meant that Ms. Burke would be able to keep benefits that she had received for which we now know she was not eligible. It further acknowledged that this would be an absurd result—and one that would be inconsistent with the purpose of the Act—if the legislative intent was only to provide benefits to persons who meet the eligibility criteria. The Appeal Division observed that the ability of the Minister to forgive repayment in

cases of financial hardship would also be inconsistent with the purpose of the legislation if the legislative intent were so limited.

[52] However, the Appeal Division found that the purpose of the Act is broader than just to provide benefits to persons who meet the eligibility criteria. It is part of the social safety net for seniors, providing them with modest income support to alleviate poverty. It is altruistic, universal, non-contributory and vital for seniors. That purpose is important and, according to the Appeal Division, "goes a long way to soften the blow dealt by situations in which a reassessment ends in a new decision about entitlement but not a reassessment of the initial eligibility" [at paragraph 123]. Moreover, as old age security benefits are part of the social safety net for seniors, the Appeal Division [at paragraph 132] was unprepared to infer that there is a power to "reassess initial eligibility and collect giant overpayments" when the legislation does not clearly say so.

[53] The Appeal Division did acknowledge that its approach required it to draw a different inference: that is, that the power to investigate is limited to "ongoing" eligibility when the word "ongoing" does not appear in the legislation. However, the Appeal Division stated [at paragraph 135] that it had a "fundamental discomfort" in inferring a meaning in legislation where that meaning is ambiguous, and where that inference would result in assessing overpayments years and years after the fact against vulnerable seniors. The Appeal Division stated that it was the Minister who had mistakenly approved Ms. Burke's application for benefits. Given that the legislation does not clearly state who should bear the burden for the initial eligibility assessment, it would be "extraordinary" to assume that the Minister has such a power.

[54] The Appeal Division thus concluded that the Minister did not have the power to go back to reconsider the June 1997 decision to approve Ms. Burke's spousal allowance, or the July 2001 decision approving her partial pension and GIS benefits. Ms. Burke could therefore keep all of the benefits that she had received up to September of 2013, when the payment of benefits to her was suspended.

VIII. Was the Appeal Division's Statutory Interpretation Analysis Reasonable?

[55] It appears that for many years the SST operated on the assumption that the Minister had the power to revisit initial eligibility decisions in order to verify that claimants were in fact eligible for benefits. This assumption changed, however, in 2018, when a member of the Appeal Division decided otherwise.

[56] That is, in *B. R. v. Minister of Employment and Social Development*, 2018 SST 844, an Appeal Division member decided that once a pension had been approved, the investigatory provisions of the Regulations only allowed the Minister to investigate the claimant's future entitlement to benefits. According to *B. R.*, section 23 of the Regulations did not permit the Minister to go back and revisit the initial approval decision.

[57] What followed the release of the decision in *B. R.* was a series of decisions of both the General and Appeal Divisions of the SST, with some, such as the decision of the Appeal Division in this case, adopting the more restrictive view of the Minister's powers espoused by the SST in *B. R.*: *M. A. v. Minister of Employment and Social Development*, 2020 SST 269; *H. Z. v. Minister of Employment and Social Development*, 2020 SST 550; C*. T. v. Minister of Employment and Social Development and C. A.*,

2021 SST 204; *L. L. v. Minister of Employment and Social Development*, 2020 SST 314; *M. H. v. Minister of Employment and Social Development*, 2020 SST 1128; *C. H. v. Minister of Employment and Social Development*, 2020 SST 368; *C. B. v. Minister of Employment and Social Development*, 2021 SST 57; and *S. B. v. Minister of Employment and Social Development*, 2020 SST 822.

[58] Other decisions followed the traditional, more expansive interpretation of the Act and the Regulations: *L. L. v. Minister of Employment and Social Development*, 2021 SST 288; *K. B. v. Minister of Employment and Social Development*, 2021 SST 268; *C. T. v. Minister of Employment and Social Development and C. A.*, 2020 SST 1227; and *S. A. v. Minister of Employment and Social Development*, 2021 SST 509.

[59] The question, then, is whether the restrictive view of the Minister's powers adopted by the Appeal Division in this case is reasonable, recognizing that there can be more than one reasonable interpretation of legislation: *Vavilov*, above, at paragraph 110; see also *Wilson v. Atomic Energy of Canada Ltd*., 2016 SCC 29, [2016] 1 S.C.R. 770, at paragraph 34.

[60] Unlike other benefits-conferring legislation (such as the *Canada Pension Plan*, R.S.C., 1985, c. C-8, subsection 81(3) and the *Employment Insurance Act*, S.C. 1996, c. 23, s. 111), there is no provision in either the Act or the Regulations providing the Minister with the express power to go back and change initial eligibility decisions. The focus, therefore, must be on related provisions, such as section 37 of the Act and section 23 of the Regulations, interpreted in light of their text, the context in which they appear in the Act and Regulations and the purpose of the old age security regime as a whole.

[61] I will examine the context in which the legislative provisions appear and the purpose of the old age security regime as a whole in greater detail further on in these reasons. However, brief reference will be made at this point to the purpose of the legislation and the context in which the provisions are situated, by way of introduction to my analysis.

[62] As the Appeal Division observed in Ms. Burke's case, the purpose of the old age security regime established by the Act and the Regulations is to provide modest income support to senior residents of Canada in recognition of their contributions to this country, and the "metre stick" used by the Minister to measure those contributions is residency in Canada.

[63] Section 3 of the Act identifies when a pension will be payable, either in full or in part. A full pension is payable to individuals who have resided in Canada for at least 40 years after the age of 18: subparagraph 3(1)(c)(iii) of the Act. If a person does not have 40 years of residency, the legislation provides for the possibility of a partial pension. Paragraph 3(2)(b) of the Act sets out a cumulative list of criteria that must be satisfied before a claimant may be paid a partial pension.

[64] To be eligible for a partial pension, the claimant must:

(1) Have reached 65 years of age;

(2) Have resided in Canada after age 18 for an aggregate of 10 years prior to the approval of their application, but less than 40 years; and

(3) Reside in Canada on the day preceding the day on which their application is approved if the aggregate period of residency after age 18 is less than 20 years.

[65] The actual amount of the pension is based on the number of years that a person has resided in Canada.

[66] Eligibility for the spousal allowance benefit similarly depends on claimants having resided in Canada for 10 years at the time of the application for benefits. The GIS is a benefit for pensioners with a low income. Eligibility for the GIS benefit is premised on the claimant's eligibility for a pension, which, as noted in the preceding paragraph, requires residency in Canada: subsection 3(2), paragraphs 11(7)(c) and 11(7)(d) of the Act, and subsection 21(1) of the Regulations.

[67] In accordance with subsection 21(1) of the Regulations, a person resides in Canada if they make their home and ordinarily live in any part of this country.

[68] The Appeal Division recognized that residency in Canada is fundamental to the old age security scheme. It is also not disputed that the pension, spousal allowance and GIS benefits at issue in this case are not payable to a claimant who stops residing in Canada, or is absent from Canada for longer than six months: sections 9 and 11(7) of the Act. Indeed, subsection 5(1) of the Act provides that subject to certain exceptions (none of which apply here) "[n]o pension may be paid to any person unless that person is qualified under subsection 3(1) or (2)" of the Act. As noted above, subsection 3(2) is the provision of the Act that establishes the residency requirement that must be satisfied for a person to be eligible for a partial pension such as that awarded to Ms. Burke.

[69] How does the Minister verify that an individual does in fact meet the residency requirements of the Act once a benefit has been approved? By using the investigation and verification powers conferred by section 23 of the Regulations and the recovery powers conferred by section 37 of the Act. The question for determination is the extent of those powers.

IX. Text

[70] Insofar as the text of section 23 of the Regulations is concerned, it states that the Minister may verify that an individual who applied for old age security benefits is in fact eligible to receive such benefits. Subsection 23(1) provides that "[t]he Minister, at any time before or after approval of an application … may require the applicant … to make available or allow to be made available further information or evidence regarding the eligibility of the applicant … for a benefit". As mentioned earlier, subsection 23(2) of the Regulations provides that "[t]he Minister may at any time make an investigation into the eligibility of a person to receive a benefit".

[71] Subsection 37(1) of the Act states that a person who has received a benefit payment to which the person is not entitled shall forthwith return the amount of the benefit payment. Subsection 37(2) of the Act states that if a person has received or

obtained a benefit payment to which the person is not entitled, the amount of the benefit payment constitutes a debt due to Her Majesty and is recoverable at any time.

[72] It is true that section 23 of the Regulations speaks to the *eligibility* of claimants for benefits, whereas section 37 of the Act refers to their *entitlement* to benefits. However, when regard is had to the text, context and purpose of the Act and Regulations it is clear that section 23 of the Regulations is not limited in the manner suggested by the Appeal Division.

[73] Returning to the text of section 23 itself, as was noted earlier, subsection 23(2) of the Regulations provides that "[t]he Minister may at any time make an investigation into the eligibility of a person to receive a benefit" (my emphasis). In concluding that the power to reassess eligibility "at any time" does not include reassessment of "initial eligibility", the Appeal Division reads a temporal limitation into the Minister's investigatory power that does not appear in the text of section 23. The Appeal Division's finding on this point is, accordingly, inconsistent with the wording of section 23 itself.

[74] Indeed, subsection 23(1) expressly states that the Minister may, "at any time before or after approval of an application", require the applicant to make available further information or evidence regarding the eligibility of the applicant for a benefit (my emphasis). If, one day after an application was approved, the Minister were to reconsider the claimant's entitlement to benefits, it would, of necessity involve the reconsideration of the claimant's "initial eligibility" for benefits.

[75] The Appeal Division acknowledged that its interpretation of section 23 of the Regulations required it to infer that the power to investigate is limited to "ongoing" eligibility when the word "ongoing" does not appear in the text of the legislation, nor does any other word with a similar meaning. Once again, the Appeal Division's interpretation of section 23 requires the reading in of words that do not appear in the text of the provision.

[76] The Appeal Division justified its finding that the investigatory power conferred on the Minister by section 23 is limited to "ongoing" or "continued" eligibility based on its "fundamental discomfort" with interpreting what it found to be an ambiguous provision in a way that would permit the Minister to assess "giant overpayments" against vulnerable seniors, years after the fact. With respect, the Appeal Division's comfort or lack thereof with a particular interpretation of a legislative provision is not a reason to read words into legislation that do not appear in the text in question. The potential size of an overpayment is also irrelevant to the proper interpretation of section 23.

[77] The Appeal Division also incorporated into its analysis the policy question of who should bear the burden of an overpayment caused by an application for benefits being approved despite the claimant's lack of entitlement to such benefits. However, it is Parliament, and not the Appeal Division, that is responsible for the balancing of competing policy considerations such as who should bear the burden for the improper payment of legislative benefits: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556, [2019] 2 F.C.R. D-3, at paragraph 26; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174, at paragraphs 46–52.

[78] It also bears noting that the Appeal Division found that the Minister had erred by mistakenly approving Ms. Burke's application for benefits. In so doing, it seemingly ignored the fact that it was Ms. Burke who had provided inaccurate and misleading information to the Minister with respect to her place of residence, thereby inducing the error.

[79] Moreover, the Appeal Division's concern with respect to the repayment of benefits is addressed, at least in part, by subsection 37(4) of the Act. Amongst other things, this provision gives the Minister the discretionary power to remit some or all of the excess payment where the Minister is satisfied that the repayment would cause undue hardship to the debtor.

[80] Finally, while the Appeal Division recognized that the Minister can suspend the payment of benefits while it reassesses an individual's eligibility, it found [at paragraph 92] that this "tells us nothing about the impact of reassessment retroactively" and that "[i]t is not necessarily inconsistent with the idea that reassessment is a forward-looking exercise". The problem with this statement is that it ignores the express language of subsection 23(2), which provides that "[t]he Minister may at any time make an investigation into the eligibility of a person to receive a benefit" (my emphasis).

[81] As was noted earlier, while regard also has to be given to the context and purpose of a statutory provision in ascertaining its meaning, where the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco*, above, at paragraph 10.

[82] The words of section 37 of the Act and section 23 of the Regulations are "precise and unequivocal", inasmuch as they authorize the Minister to reconsider the eligibility of an individual to old age security benefits "at any time", and to recover payments that should not have been made. An interpretation of the legislation that leads to a different conclusion is thus unreasonable.

X. Context

[83] The conclusion that the Appeal Division erred in its interpretation of section 37 of the Act and section 23 of the Regulations is confirmed when regard is had to the role of these provisions in the context of the old age security scheme as a whole.

[84] Section 34 of the Act gives the Governor in Council the power to make regulations carrying out the purposes and provisions of the Act. Paragraph 34(j) authorizes the making of regulations providing for the suspension of the payment of benefits during an investigation into the *eligibility* of the beneficiary for such benefits. The Appeal Division concluded that the term "eligibility" referred to the initial decision approving an application for benefits. On the Appeal Division's own interpretation of the word "eligible", paragraph 34(j) of the Act clearly contemplates investigations into an original determination that an individual meets the residency requirements of the Act.

[85] This interpretation is borne out by subsection 26(1) of the Regulations, which provides that "[t]he Minister shall suspend the payment of a benefit in respect of any beneficiary where it appears to him that the beneficiary is ineligible for payment of the benefit" (my emphasis). Subsection 26(1) further states that the Minister "may suspend the payment where it appears to him that further inquiry into the eligibility of the

beneficiary is necessary" (my emphasis). Such suspension is to continue "until evidence satisfactory to the Minister is given that the beneficiary is eligible for the benefit" (my emphasis).

[86] This provision clearly contemplates the re-examination of an individual's eligibility for benefits, as a person is not eligible for a pension if the law says one cannot be paid to them. Subsection 5(1) of the Act says precisely that: pensions may only be paid to persons who qualify for benefits.

[87] That is, subsection 5(1) of the Act contains a conjunctive list of three requirements that must be satisfied for a person to be qualified for a pension. These are:

> (1) That person is qualified under subsection 3(1) or (2) of the Act;
>
> (2) An application for a pension has been made by or on behalf of that person; and
>
> (3) The application has been approved.

[88] These are three separate requirements, and no pension may be paid to any person unless they satisfy all three requirements. Thus, the fact that an application for a pension has been made does not mean that the person is qualified for a pension. Similarly, and more importantly for our purposes, the fact that an application for benefits has been approved does not mean that a pension may be paid to the person if they are not qualified under subsection 3(1) or (2) of the Act.

[89] The Act thus makes the Minister's approval contingent on a claimant meeting the statutory residence criteria. The Appeal Division's understanding that it is the Minister's approval that makes someone eligible or entitled to benefits, and not the claimant's factual circumstances is thus unreasonable in light of the statutory text.

[90] There is an ongoing prohibition against paying pensions to people who do not meet all three of the requirements, even if they have applied for a pension, and the Minister has approved the application. The fact that the Minister approved an application does not qualify the person for benefits for all time under subsection 3(1) or (2) of the Act. All it means is the Minister was satisfied at the time that the application was approved time that the person qualified for benefits, based upon the information available to the Minister.

[91] It follows from this that, when read in conjunction with the requirement in section 37 of the Act to return benefits to which people are not entitled, the investigative power described in section 23 of the Regulations means that the Minister can reassess initial eligibility decisions and require repayment of benefits the claimant has already received.

[92] The text of section 37 also contradicts the Appeal Division's finding that "entitlement" to benefits cannot be reassessed retroactively, or that "entitlement" means having a legal right to benefits that starts with the Minister's approval of an application.

[93] Subsection 37(1) requires that "[a] person who has received or obtained … a benefit payment to which the person is not entitled … shall forthwith return … the

amount of the benefit payment". The past tense of the verbs "has received or obtained" describes past benefit payments, whereas "entitled" is described in the present tense with "is not" [my emphasis]. Taken together, this means a present day determination that a person is not entitled means that they must return benefit payments that they received in the past.

[94] In addition, subsection 37(4) of the Act allows a claimant to ask the Minister to forgive some portion of an overpayment if, amongst other things, it resulted from an administrative error, or if repayment would cause the individual undue hardship. If the Minister were not entitled to look back and reassess a claimant's entitlement to benefits that were paid prior to the reassessment, then the Minister would not be able to collect past benefit amounts owing, rendering subsection 37(4) of the Act meaningless. Parliament is presumed to avoid including superfluous sections in legislation: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paragraph 178.

[95] Section 37 thus recognizes there will be cases where individuals have been paid benefits to which they are not entitled. It does not limit in any way the obligation to repay such benefits. In particular, it does not exempt payments that are made after an application is first approved. It follows that the Minister has the power to reassess its decision to pay the benefits, if the individual's circumstances have changed, and to consider whether they were in fact entitled to receive benefits in the first place.

[96] As the Appeal Division itself acknowledged, residency in Canada is key to the scheme of the Act and the Regulations. Indeed, as noted above, section 5 of the Act is clear that no pension may be paid to any person unless that person satisfies the residency requirements set out in section 3 of the Act. This prohibits paying a pension to a person who is not qualified for benefits, even if the Minister has approved their application.

[97] The Appeal Division further acknowledged that an interpretation of the section 23 investigative power that allows a person to keep a benefit, despite their not meeting the relevant residency requirement, is a result that is inconsistent with a scheme that provides benefits only to people who meet the eligibility requirement of residency. I agree.

[98] However, the Appeal Division justified its seemingly inconsistent interpretation of the section 23 investigative power on the basis that the purpose of the old age security scheme is broader than just providing benefits to people who meet the eligibility requirement of residency in Canada. This then takes us to a consideration of the purpose of the legislative scheme in general, and section 23 of the Regulations in particular.

XI. Purpose

[99] As noted earlier, the Appeal Division found that the old age security program is a benefits-conferring scheme, and that the object and purpose of the Act and the Regulations is to provide modest income support to seniors in recognition of their contributions to Canada. The Appeal Division further found that residency in Canada is the "metre stick" used by the Minister to measure those contributions.

[100] The Appeal Division further observed that in *Canada (Minister of Human Resources Development) v. Stiel*, 2006 FC 466, [2006] 4 F.C.R. 489, the Federal Court held that the old age security regime is "altruistic in purpose". Unlike the benefits conferred under the *Canada Pension Plan*, old age security benefits are "universal and non-contributory, based exclusively on residence in Canada": *Stiel*, above, at paragraphs 28–29.

[101] The Appeal Division found [at paragraph 128] that the Minister's "most compelling argument" was that a restrictive interpretation of the Act and the Regulations would mean that Ms. Burke could keep benefits that she had received for a period during which, as we now know, she was not eligible for benefits. The Appeal Division acknowledged that this would be "an absurd result", and one that would be inconsistent with the purpose of the Act, if the legislative intent were only to provide benefits to persons who meet the eligibility criteria.

[102] However, as noted earlier, the Appeal Division found that the purpose of the Act is broader than that, in that it is part of the social safety net for seniors, providing them with modest income support. According to the Appeal Division [at paragraph 123], this purpose is important, and it goes a long way to "soften the blow" created by situations where a reassessment results in a new decision about entitlement, but not a reassessment of the initial eligibility.

[103] The Appeal Division's description of the purpose of the old age security scheme is accurate, as far as it goes. There is, however, another aspect to the scheme's purpose that was not considered by the Appeal Division but cannot be ignored.

[104] The Minister filed an affidavit with the SST from Elizabeth Charron, a legislative officer for Old Age Security Policy, Legislation and Statistics at Employment and Social Development Canada. Ms. Charron observes that any old age assistance program that is financed through the general tax revenues of the Government of Canada has to balance the need to process benefits applications quickly with financial stewardship of the program.

[105] This need for sound financial management of the program is illustrated by a statement by the Honourable Paul Martin Sr., the then-Minister of Health and Welfare during second reading of the Bill [No. 13] that introduced the *Old Age Security Act* in 1951. Minister Martin stated [at page 645 of the *House of Commons Debates*, 21st Parl., 5th Sess., Vol. 1 (November 1, 1951)] that "it is clearly my duty to make sure that those who are qualified get the pension, and the implication quite clearly was, and properly so, that the man or woman who is not entitled cannot legitimately, in the name of good government, be given a pension which the Act does not provide for" (my emphasis). Indeed, subsection 5(1) of the Act provides precisely that.

[106] Put simply, the investigative authority under section 23 of the Regulations allows the Minister to reassess an individual's eligibility for benefits where, for example, new information surfaces, or where errors, misrepresentation or even fraud has occurred, ensuring that only those entitled to benefits actually receive them. Section 37 of the Act allows the Minister to recover benefits that were improperly paid to a claimant.

[107] An interpretation of the legislation that would allow Ms. Burke to keep benefits that she had received when she was not eligible for them would indeed produce, to use

the Appeal Division's language, "an absurd result" that is contrary to the purpose of operating the old age security scheme using sound financial management and paying benefits only to those who meet the clear residency requirements of the Act.

[108] Finally, the Appeal Division stated [at paragraph 75] that narrowly interpreting the Minister's investigative power to preclude the reassessment of initial eligibility decisions, thereby allowing individuals who did not meet the threshold residency requirement to collect benefits for a period was "not wholly inconsistent with the object and purpose of the … Act" (my emphasis). This was because the result would be that the Minister provided modest income support to a senior who contributed to Canada.

[109] With respect, the goal of statutory interpretation is not to arrive at a conclusion with respect to the meaning of legislation that is "not wholly inconsistent" with the object and purpose of the legislation in question. It is, rather, to ascertain the authentic meaning of that legislation—one that best reflects the text, context and purpose of the Act, and is harmonious with the scheme of the Act as a whole.

[110] In this case, an interpretation of the legislation that would preclude the Minister from reassessing initial eligibility for benefits and recovering benefits improperly paid is one that is not consistent with one of the purposes of the Act, which is to pay benefits only to people who meet the eligibility criteria set out in the Act. The Appeal Division nevertheless adopted an interpretation of the legislation that allowed precisely that result.

XII. Conclusion

[111] Despite the fact that Ms. Burke failed to meet the clear residency requirements of the Act, the Appeal Division found that the Minister could not recover the overpayments made to her. This finding was based on the Appeal Division's unreasonable conclusion that the legal basis for entitlement to benefits was the Minister's approval, and not whether Ms. Burke met the residency requirements of the Act.

[112] The Appeal Division's interpretation of section 23 of the Regulations would allow individuals such as Ms. Burke to provide misleading or incomplete information in support of an application for old age security benefits, and to then keep any benefits that are paid to them up until the point at which their deception is uncovered by the Minister.

[113] I agree with the Minister that an interpretation of the powers in section 37 of the Act and section 23 of the Regulations that allows people to keep benefits despite their not meeting the specific residency requirements of the Act is one that is inconsistent with a scheme that provides benefits only to people who meet the eligibility requirement of residency. It is thus unreasonable.

[114] Ms. Burke's appeal has now been through each of the General Division and Appeal Division processes on two separate occasions. Sending the matter back to the Appeal Division for a third redetermination would give rise to what the Supreme Court described as an "endless merry-go-round of judicial reviews and subsequent reconsiderations": *Vavilov*, above, at paragraph 142.

[115] It is true that courts should generally respect Parliament's intention to entrust matters to administrative decision makers: *Vavilov*, above, at paragraph 142. That said, there is now no dispute with respect to the underlying facts of the case, with both the General Division and the Appeal Division having found that Ms. Burke ceased residing in Canada in January of 1992.

[116] This, as well as other factors identified by the Supreme Court at paragraph 142 of *Vavilov* such as concerns about delay, fairness to the parties, costs to the parties and the efficient use of public resources, support a finding that the matter should not be remitted to the Appeal Division for redetermination. So, too, do concerns with respect to Ms. Burke's advanced age and her state of ill health.

[117] Declining to remit a matter to the administrative decision maker may also be appropriate where it becomes evident to the Court that a particular outcome is inevitable: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1, at paragraphs 228–230. Given the finding that Ms. Burke ceased to reside in Canada in January of 1992, only one outcome is possible in this case, based on a reasonable interpretation of section 37 of the Act and section 23 of the Regulations. Ms. Burke's representative has further indicated that she is waiting for a decision on the statutory interpretation issue before bringing an application for remission under subsection 37(4) of the Act. The interests of justice are thus better served by this Court making the decision that the Appeal Division should have made, leaving Ms. Burke free to apply for remission of some or all of the amount owing in accordance with subsection 37(4) of the Act.

[118] Consequently, I would grant the application for judicial review, the decision of the Appeal Division dated January 15, 2021, is set aside, and the appeal from the decision of the General Division dated October 17, 2019, is granted. I would also declare that Ms. Burke was ineligible to receive benefits under the *Old Age Security Act* from the time that the first benefits were awarded to her on June 2, 1997, up until September of 2013, when the payment of benefits to Ms. Burke was suspended.

GLEASON J.A.: I agree.

MONAGHAN J.A.: I agree.

APPENDIX

Old Age Security Act, R.S.C., 1985, c. O-9

Payment of full pension

3(1) Subject to this Act and the regulations, a full monthly pension may be paid to

(a) every person who was a pensioner on July 1, 1977;

(b) every person who

(i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved; and

(c) every person who

(i) was not a pensioner on July 1, 1977,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least forty years.

Payment of partial pension

(2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and

(a) has attained sixty-five years of age; and

(b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.

Amount of partial pension

(3) Subject to subsection 7.1(3), the amount of a partial monthly pension, for any month, shall bear the same relation to the amount of the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining 18 years of age and before the day on which the application is approved, determined in accordance with subsection (4), bears to 40 years.

Rounding of aggregate period

(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.

Additional residence irrelevant for partial pensioner

(5) Once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person under this Part may not be increased on the basis of subsequent periods of residence in Canada.

….

Limitations

5(1) No pension may be paid to any person unless that person is qualified under subsection 3(1) or (2), an application therefor has been made by or on behalf of that person and the application has been approved, and, except as provided in this Act, no pension may be paid to any person in respect of any period prior to the day on which that person's application is approved.

Application deemed to have been made and approved

(2) Where an allowance ceases to be payable to a person by reason of that person having reached sixty-five years of age, the Minister may deem an application under subsection (1) to have been made by that person and approved, on the day on which the person reached that age.

Incarcerated persons

(3) No pension may be paid in respect of a period of incarceration — exclusive of the first month of that period — to a person who is subject to a sentence of imprisonment

(a) that is to be served in a penitentiary by virtue of any Act of Parliament; or

(b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Employment and Social Development Act*.

Waiver of application

(4) The Minister may, on the day on which a person attains 65 years of age, waive the requirement referred to in subsection (1) for an application if the Minister is satisfied, based on information that is available to him or her under this Act, that the person is qualified under subsection 3(1) or (2) for the payment of a pension.

Notice of intent

(5) If the Minister intends to waive the requirement for an application in respect of a person, the Minister shall notify the person in writing of that intention and provide them with the information on which the Minister intends to rely to approve the payment of a pension.

Inaccuracies

(6) The person shall, before the day on which they attain 65 years of age, file with the Minister a statement in which the person corrects any inaccuracies in the information provided by the Minister under subsection (5).

Declining waiver

(7) The person may, before the day on which they attain 65 years of age, decline a waiver of the requirement for an application by notifying the Minister in writing of their decision to do so.

Cancellation of waiver

(8) Even if the requirement for an application is intended to be waived in respect of a person under subsection (4), the Minister may, before the day on which the person attains 65 years of age, require that the person make an application for payment of a pension and, in that case, the Minister shall notify the person in writing of that requirement.

….

Regulations

34 The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect and, without restricting the generality of the foregoing, may make regulations

(a) prescribing the manner of making any application, statement or notification required or permitted by this Act, the information and evidence to be made available or allowed to be made available in connection therewith and the procedure to be followed in dealing with and approving applications;

(b) prescribing the manner in which the average of the Consumer Price Index for any period of months shall be determined and the manner in which any such average that is determined to be a fraction of a whole number shall be expressed;

(c) defining the expression “pension income” for the purposes of section 14;

(d) for determining, for the purposes of any provision of section 14, the month in which or the month immediately before the month in which an applicant or an applicant’s spouse or common-law partner ceased to hold an office or employment, ceased to carry on a business or suffered a loss of income due to termination or reduction of pension income;

(e) prescribing the circumstances that shall be deemed to constitute, or prescribing what shall be or shall be deemed to be, an application by or on behalf of persons who are qualified for a pension under this Act and who, on or before December 31, 1951, applied for or were granted a pension as defined in the *Old Age Pensions Act*, chapter 156 of the Revised Statutes of Canada, 1927, and prescribing the time at which such applications shall be deemed to have been made or approved;

(f) prescribing the information and evidence to be made available or allowed to be made available by beneficiaries and the circumstances and form in which the information or evidence shall be submitted;

(g) providing for the assignment of Social Insurance Numbers by the Minister to applicants and beneficiaries, and to the spouses or common-law partners of applicants and beneficiaries, to whom such numbers have not earlier been assigned;

(h) defining residence and presence in Canada and defining intervals of absence from Canada that shall be deemed not to have interrupted residence or presence in Canada;

(i) providing, in the case of an allowance the amount of which is less than such amount not exceeding two dollars as may be prescribed in the regulations, for the payment of the allowance to the beneficiary at such intervals less frequently than monthly as may be prescribed in the regulations, or for the payment monthly of the prescribed amount to the beneficiary;

(j) providing for the suspension of payment of a benefit during an investigation into the eligibility of the beneficiary and the reinstatement or resumption of the payment thereof;

(k) prescribing the circumstances in which the spouse or common-law partner of a pensioner shall be deemed to be separated from the pensioner for the purposes of paragraph 19(1)(a) and subsection 19(5);

(l) prescribing the circumstances in which a pensioner shall be deemed to be separated from the pensioner’s spouse for the purposes of subsections 15(4.1) and (6.1);

(m) prescribing the manner in which any amount required by this Act to be deducted and retained out of any benefit payment shall be so deducted and retained;

(m.1) setting out the circumstances in which the Minister may allow a longer period to make a request under subsection 27.1(1) or (1.1);

(n) prescribing the procedure to be followed on any reference under subsection 28(2);

(o) providing for the making of any application or statement, or the doing of any other act or thing required or permitted by this Act, by any person or agency, and for the payment of a benefit to any person or agency, on behalf of any other person or beneficiary if it is established in any manner and by any evidence that may be prescribed by the regulations that the other person or beneficiary is, by reason of infirmity, illness, insanity or other cause, incapable of managing their own affairs, and prescribing the manner in which any benefit authorized to be paid to the person or agency shall be administered and expended for the benefit of the other person or beneficiary and accounted for;

(p) providing events for the purposes of subsections 11(8), 19(6.2) and 21(9.1); and

(q) prescribing anything that must or may be prescribed by regulations made under this Act.

….

Return of benefit where recipient not entitled

37(1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.

Recovery of amount of payment

(2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

…

Remission of amount owing

(4) Notwithstanding subsections (1), (2) and (3), where a person has received or obtained a benefit payment to which that person is not entitled or a benefit payment in excess of the amount of the benefit payment to which that person is entitled and the Minister is satisfied that

(a) the amount or excess of the benefit payment cannot be collected within the reasonably foreseeable future,

(b) the administrative costs of collecting the amount or excess of the benefit payment are likely to equal or exceed the amount to be collected,

(c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or

(d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error in the administration of this Act,

the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the *Criminal Code* in connection with the obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.

***Old Age Security Regulations*, C.R.C., c. 1246**

23(1) The Minister, at any time before or after approval of an application or after the requirement for an application is waived, may require the applicant, the person who applied on the applicant's behalf, the beneficiary or the person who receives payment on the applicant's behalf, as the case may be, to make available or allow to be made available further information or evidence regarding the eligibility of the applicant or the beneficiary for a benefit.

(2) The Minister may at any time make an investigation into the eligibility of a person to receive a benefit including the capacity of a beneficiary to manage his own affairs.

….

26(1) The Minister shall suspend the payment of a benefit in respect of any beneficiary where it appears to him that the beneficiary is ineligible for payment of the benefit and may suspend the payment where it appears to him that further inquiry into the eligibility of the beneficiary is necessary, and such suspension shall continue until evidence satisfactory to the Minister is given that the beneficiary is eligible for the benefit.

…