

CANADA / JUDGMENT

Stachowski v. Canada (Attorney General)

2005 FC 1435

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DECIDED

26 October 2005

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Stachowski v. Canada (Attorney General)

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Decision Content

Date: 20051026

Docket: T-1944-04

Citation: 2005 FC 1435

Ottawa, Ontario, October 26, 2005

PRESENT: THE HONOURABLE MADAM JUSTICE SNIDER

BETWEEN:

MR. LEONHARD STACHOWSKI

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Stachowski, a resident of Canada since July, 1991, applied for an Old Age Security ("OAS") pension under the Old Age Security Act, R.S.C. 1985, c. O-8 (the "OAS Act"). The Minister of Human Resources Development Canada (now the Minister of Social Development) determined that Mr. Stachowski was entitled to an OAS pension of 5/40ths of a full OAS pension, limiting his entitlement to his residency in Canada between 1991 and 1996. Believing that he is entitled to a full OAS pension, based on "deemed residency" for the period between 1968 and 1991, Mr. Stachowski appealed that decision to the Canada Pension Plan - Old Age Security Review Tribunal (the "Review Tribunal"). The Review Tribunal, in a decision dated October 4, 2004, dismissed his appeal. Mr. Stachowski seeks judicial review of the decision of the Review Tribunal.

Issues [2] The overarching issue in this application is whether the Review Tribunal erred in concluding that the period between 1968 and 1991 did not count towards the calculation of Mr. Stachowski's OAS pension. The response to this question requires that I address the following:

1. In order to obtain qualifying deemed residence for purposes of calculating OAS pension benefits, do the OAS Act and the Old Age Security Regulations, C.R.C. 1978, c. 1246, as amended (the "Regulations") require that the spouse of a person abroad on missionary service have an initial period of actual residence in Canada? Stated in other words directly applicable to Mr. Stachowski, is the period of time from 1968, when Mr. Stachowski married a person deemed to be resident in Canada, to 1991, when he became a landed immigrant in Canada, "residence" for purposes of calculating Mr. Stachowski's OAS pension, notwithstanding that he had no period of initial residence in Canada before 1968?

Is Mr. Stachowski deemed not to be resident in Canada for the period from 1968 to 1988 because of his contributions to the German mandatory pension scheme? Facts [3] The material facts are not disputed. In summary form, they are as follows:

Mr. Stachowski is a German citizen who was born in Poland on October 6, 1931.

On July 25, 1968, he was married, in Germany, to Erika Martha Sommerfeld.

Ms. Stachowski lived in Canada, as a legal resident, from January, 1953 to 1961. The Review Tribunal accepted (and this was not disputed by the Respondent in this application) that Ms. Stachowski's period of interruption in residence from 1961 until 1989, during which time she was engaged in studies followed by missionary work, is deemed as residency for OAS calculation purposes, pursuant to s. 21(5)(b)(vi) of the OAS Regulations. (Because of her long absence from Canada, however, Ms. Stachowski was required to reapply for residence in Canada; this issue is

not material to this application.)

Mr. Stachowski and his wife worked in missionary service, in a number of countries, until 1988 (Mr. Stachowski) and 1989 (Ms. Stachowski).

Mr. Stachowski contributed to the German Social Security System from 1948 to 1961 and from 1967 to 1988 and began receiving a German Pension on June 23, 1995.

Mr. Stachowski was admitted to Canada as a landed immigrant in July, 1991.

Mr. Stachowski applied for OAS pension on June 21, 2001.

Mr. Stachowski's Calculation [4] Mr. Stachowski has argued to the Minister, the Review Tribunal and this Court that he is entitled to a full monthly OAS pension commencing November, 1996. In his revised Notice of Appeal to the Review Tribunal, he described his entitlement as follows:

- (a) attained sixty-five years of age prior to that date,
- (b) submitted my application for German benefits on June 23, 1995,
- (c) On the 1st day of January, 1977, I was considered to be resident and present in Canada by virtue of subsection 21(3) of the Regulations,
- (d) I resided in Canada for 8 years, 11 months and 9 days prior to the day my application for a pension was approved and I was considered to be present in Canada by virtue of subsection 21(3) of the Regulations for more than three years and sixty-six days prior to ten years immediately preceding the day on which my application was approved, and
- (e) I resided in Canada for more than one year immediately preceding the day on which my application for a pension was approved.

[5] But for two questions, Mr. Stachowski's interpretation of his entitlement would be correct. First, under (c), was he "considered to be a resident in Canada by virtue of subsection 21(3) of the Regulations"? Secondly, does his payment into the German Social Security System between 1948 and 1988 impact on the calculation? These, of course, are the issues that were before the Review Tribunal and which are before me in this application.

Analysis Standard of Review [6] The questions raised by this application require the interpretation of relevant provisions of the OAS Act and Regulations. To the extent that these are questions of pure law and do not require an application of the facts to that law, the parties agree that the applicable standard of review is correctness.

Principles of Statutory Interpretation [7] Since issues of statutory interpretation are at the heart of this dispute, it is useful to begin with an overview of the principles related to such matters. On a number of occasions, the Supreme Court of Canada has given guidance on how to approach a problem of statutory interpretation. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at

paragraph 21, Mr. Justice Iacobucci, speaking for the unanimous Court, endorsed the statement of Elmer Driedger in *Driedger on the Construction of Statutes*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1983) that:

Today there is only one principle or approach, namely, the words of an Act 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.

[8] Accordingly, the task of the Court in interpreting legislation cannot be restricted to analysing the plain meaning of the provision in question. Further, while the statutory words must be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objectives" (Interpretation Act, R.S.C. 1985, c. I-21, s. 12), attention must be directed to the scheme and objective of the Act, the intention of the legislature, and the context of the words in issue (Rizzo, *supra*, at para. 23). The Court in Rizzo, *supra*, at para. 31, approved of the use of legislative history as a tool for determining the intention of the legislature. And, regardless of how clear and unambiguous the words of a provision may be, the further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found to be an error (Rizzo, *supra*, at paras. 23, 31). It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.

Issue #1: Was Mr. Stachowski deemed resident of Canada from the date of his marriage in 1968? Review Tribunal Decision [9] Mr. Stachowski's submissions to the Review Tribunal were, as before me, based on two arguments. The first of these is that s. 21(3) of the OAS Regulations applies to his situation on the basis that he returned to Canada with his wife within six months of terminating his missionary service abroad. In Mr. Stachowski's submission, he became deemed to be resident in Canada for OAS purposes upon his marriage. He argues that, if s. 21(3) requires a non-resident to have been resident in Canada prior to completing missionary service, the provision would be "virtually inoperative".

[10] The Review Tribunal did not accept Mr. Stachowski's submissions. Its reasons were as follows:

The overriding entitlement of the Old Age Security regime is residence in Canada. The provisions of Section 21(4) of the Regulations deems certain intervals or absence from Canada to be continued residence even though the person is not actually physically in Canada. Accordingly section 21(4) of the Regulations continues to import a requirement that the person initially be in Canada and then excludes "any interval of absence from Canada", not to have "interrupted that person's residence or presence in Canada". Accordingly the Appellant's submission that the provision would be rendered nugatory, is not accepted by the panel, as there would clearly be situations where a couple leaves Canada to serve outside Canada but only one acts as a missionary. The non-missionary spouse would but for the provision of section 21(5)(c) of the Regulations lose qualifying residency for the purposes of entitlement to benefits under the Act. A

spouse of the missionary would continue to earn eligibility for Old Age Security by virtue of the deemed residence provided in Section 21(5)(c) of the Regulations. In order to obtain qualifying deemed residence the spouse of the missionary must have an initial period of actual residence in Canada as required by the Act and Regulations in order to trigger the benefit of section 21(5)(c). [emphasis added]

Statutory Scheme [11] Section 3 of the OAS Act provides for the payment of a full or partial monthly pension to persons 65 years or older. The full text of this and other statutory provisions relevant to this application are attached as Appendix A to these reasons.

- [12] Residency in Canada is the key to the OAS pension. Entitlement to and the amount of the pension depends on the number of years a claimant has resided in Canada after reaching the age of 18. Normally, a full pension is paid after 40 years of residence in Canada (or deemed residence, as discussed later in these reasons). However, under the special circumstances described in s. 3(1)(b) of the OAS Act, a claimant may still be eligible for a full pension with fewer than 40 years of residence. This provision is referred to as the "3-for-1 Rule".
- [13] The OAS Act also authorizes the payment of a partial monthly pension for certain persons who do not qualify for a full monthly pension. Such partial payments are set out in s. 3(2) and (3) of the OAS Act. The amount of a partial pension is determined by dividing the number of years of Canadian residence by 40, with the aggregate number of years rounded down to a whole number of years.
- [14] The terms "resided" and "residence in Canada" are not defined in the Act but are described in section 21 of the OAS Regulations. Certain time abroad may be deemed to be residence in Canada for purposes of the calculation of eligibility for OAS pension. Of particular relevance to this application, a person whose presence in Canada is interrupted to serve as a missionary is deemed resident in Canada during the period of the interruption (s. 21(5)(b)(vi)).
- [15] The OAS Regulations also address the situation of spouses or partners of persons whose interruptions satisfy the deeming provisions. Subsection 21(3) of OAS Regulation appears to apply in situations where the marriage takes place after the person in missionary service is already abroad and operates to deem the spouse or partner resident from the date of the marriage. Subsection 21(5) appears to apply when the partner accompanies the person in missionary service throughout his or her service and operates to deem residence for the partner from the date of departure from Canada.

Review Tribunal's reference to s. 21(5) of the OAS Regulations [16] Various provisions of the OAS Regulations apply to permit persons outside of Canada to be deemed resident for purposes of OAS pension calculations. It was not disputed that s. 21(4) and 21(5)(b)(vi) apply to Ms. Stachowski to deem her time served abroad in missionary service as residence for OAS calculation purposes.

- [17] Both s. 21(3) and s. 21(5) of the OAS Regulations apply to situations where a person is out of Canada with a partner who would be deemed resident by virtue of the OAS Regulations. The obvious intent of these provisions is to allow couples to live abroad together without negative impact on OAS eligibility for the partner who does not qualify under one of the interruption provisions in s. 21(4). The difference between s. 21(3) and (5) appears to be one of timing. If the persons were partners who left Canada together, s. 21(5)(c) applies to deem the time abroad for the accompanying partner as residence. However, if the two persons became partners while the missionary or soldier, for example, was already abroad, s. 21(3) applies.
- [18] The Review Tribunal decision refers only to s. 21(5), a provision that may not be applicable since Mr. Stachowski did not accompany his wife when she left Canada. No reference whatsoever was made to s. 21(3) in the decision, in spite of the fact that Mr. Stachowski's appeal to the tribunal was very clear that he was relying on s. 21(3). Even the submissions of the Minister to the Review Tribunal referred only to s. 21(3).
- [19] It appears that only s. 21(3) could possibly be applicable to Mr. Stachowski. This is because, at the time of his marriage, Mr. Stachowski was not a Canadian resident and was outside Canada. The Respondent acknowledges that the Review Tribunal referred to the wrong provision in its decision but submits that the error is immaterial given that the Review Tribunal clearly put its mind to the correct test for deemed residency. Specifically, the Review Tribunal asked itself whether the OAS Regulations required Mr. Stachowski to have a prior attachment to Canada before the deeming provisions of the Regulations applied to him.
- [20] Is it possible that the Review Tribunal's error in identifying s. 21(5) rather than 21(3) was merely an administrative oversight? As noted by the Supreme Court of Canada in *British Columbia(Milk Board)v. Grisnich*, [1995] 2 S.C.R. 895 at paragraph 20, "Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it". However, this is not simply a case where the tribunal's analysis could apply if one were to replace s. 21(5) with s. 21(3) where it appears in the decision. The decision of the Review Tribunal turns on the interpretation of the words of the relevant provisions of the Regulations. In its reasons, the Review Tribunal finds support for its decision in the language of s. 21(4) which includes the words "any interval of absence" and that of s. 21(5) which refers to "The absences from Canada referred to in paragraph (4)(c) of a person residing in Canada". In contrast, s. 21(3) of the Regulations sits outside the framework of s. 21(4) and (5). This provision does not refer to any "interval of absence"; it is fundamentally different from s. 21(5). The conclusion that I must draw is that the Review Tribunal misapprehended the evidence and directed its mind to the wrong question. Thus, I do not agree with the Respondent's submission that the Review Tribunal put its mind to the correct test. This is not a case contemplated by the Supreme Court of Canada in *Grisnich*.

[21] The Review Tribunal was obliged to consider and interpret the correct provision of its home legislation. It failed to do so. On this basis and regardless of the applicable standard of review, the application should succeed and the matter be referred back to the Review Tribunal for reconsideration of this question. This is not to say that the Review Tribunal could not conclude that s. 21(3) requires an initial period of actual residence in Canada. It may be open to the Review Tribunal, after considering the proper interpretation of s. 21(3) on sound principles of statutory interpretation, to reach the same conclusion.

Issue #2: Was Mr. Stachowski precluded from being deemed resident in Canada because of his participation in the German mandatory pension scheme? [22] Mr. Stachowski's second ground of appeal to the Review Tribunal was his position that s. 21(5.3) of the Regulations was not applicable to him. That is, Mr. Stachowski does not agree that the periods of time that he participated in the German Social Benefit Plan should be excluded from the operation of s. 21(5).

Review Tribunal Decision [23] On this issue, the Review concluded that the Minister "correctly applied the provisions of Section 21(5.3) of the Regulations in that the periods of time the Appellant participated in the German Social Benefit Plan are excluded from the operation of Section 21(5)." The reasons for this result are as follows:

Again, the overall concept of the legislation requires residency and Section 21(4) exempts certain periods of absence to continue the person's qualifying residency. The Appellant submitted that Section 21(5.3) is ambiguous and that it does not clearly override or set a priority with respect to the applications of Section 21(4) and (5). We disagree in that the Sections have to be read in their entirety and notice taken of the curative aspects of Section 21(5.3) following the decision in Barnes. Accordingly Section 21(5.3) which is specific is to be read as overriding the general provisions which come before it, in that it specifically excludes a certain class of persons from the operations of Sections 21(4) and (5). Any other reading would render the operation of the Section nugatory and this is not in keeping with the purpose of the legislation. It is clear that the purpose of the legislation is to ensure that persons are not disadvantaged by the fact that they have only partial periods of residence in two countries and conversely to ensure that persons are not entitled to double benefits as a result of having residences in two countries. The Appellant stated that the German plan is a contributory plan and therefore only akin to the Canada Pension Plan legislation and should not be considered in conjunction with the Old Age Security legislation. With the greatest of respect, we disagree that it clearly is the policy of both Canada Pension Plan and Old Age Security Act to integrate the plans under both pieces of Canadian legislation with the single regimes of contributory legislation and other jurisdictions including particularly Germany in this case.

[24] Unlike the situation with the first issue in this application, the Review Tribunal appears to have understood and addressed the correct questions. I must determine whether the tribunal erred in concluding that the periods of time Mr. Stachowski contributed to the German pension plan are excluded from the calculation of eligibility for OAS benefits.

Statutory Scheme [25] For purposes of this issue, there are four directly relevant legislative provisions. The full text of the relevant legislation is set out in Appendix A.

The starting point is s. 40 of the OAS Act. This provision applies where, under the law of a country other than Canada, provision is made for the payment of old age, or other benefits. In these circumstances, the Minister may enter into an agreement with the another country for the making of reciprocal arrangements relating to the administration or operation of the foreign law and the OAS Act. Section 40 also specifically sets out that any such agreement may provide for the increase or decrease in the amount of benefits payable under the foreign law or the OAS Act.

Section 41 provides that, from the day it comes into force, any such agreement "has the force of law in Canada" so long as the agreement remains in force.

By Agreement dated November 14, 1985 (in force April 1, 1988), Canada entered into an agreement entitled "SOCIAL SECURITY, Agreement between CANADA and the FEDERAL REPUBLIC OF GERMANY" (the "Canada/Germany Agreement"). Of particular relevance to the question in this application, Article 11(b) provides that, for the purposes of the OAS Act, if a person is subject to the German legislation regarding mandatory pension coverage during any period of residence in Canada, that period shall not be considered as a period of residence in Canada.

The OAS Regulations also address this issue providing in s. 21(5.3) that, where, "by virtue of an agreement entered into under subsection 40(1)", a person is subject to the legislation of a foreign country, the person will "be deemed not to be resident in Canada".

[26] The full text of the relevant provisions is set out in Appendix A.

Mr. Stachowski's Situation [27] In spite of able representations by counsel for Mr. Stachowski, I can see no other possible interpretation of these provisions than that adopted by the Review Tribunal.

[28] For purposes of this question, I have assumed, without deciding, that the first issue is resolved in favour of Mr. Stachowski. That is, the period of time he was abroad, from 1968, when he married, to 1991, when he was landed in Canada, was "residence and presence in Canada" as contemplated by the OAS Act and the OAS Regulations.

[29] Between 1968 and 1988, Mr. Stachowski contributed to the German Social Benefit Plan. I accept (and there is no evidence to the contrary) that this plan is mandatory.

[30] Mr. Stachowski argues that he was subject to the German legislation by virtue of his German citizenship and residence in Germany, and not by virtue of the Canada/Germany Agreement and that s. 21(5.3) of the Regulations only applies where a person qualifies for benefits in a country which they would not otherwise have qualified for but for the Canada/Germany Agreement. Mr. Stachowski submits that the provision cannot operate where a person is entitled to benefits independent of the Canada/Germany Agreement. In this case, he argues that he is eligible for benefits pursuant to s. 21(3) of the Regulations.

- [31] In essence, Mr. Stachowski argues that, since he has been deemed resident pursuant to s. 21(3) of the Regulations, he cannot be "undeemed" by another provision of the Regulations. I do not agree with this interpretation.
- [32] The principal difficulty with the interpretation urged on me by Mr. Stachowski is that it ignores all other legislative provisions where this issue is addressed. As noted above, the words of a statute are to be read in their entire context. Here, that context involves not only the words of s. 21(5.3) of the Regulations, but the words of the enabling statute and, in this case, the Canada/Germany Agreement.
- [33] Guidance on how to undertake this task was provided by the Federal Court of Appeal in *Ontario Hydro v. Canada* (C.A.), [1997] 3 F.C. 565. In that case, the Court was considering the interpretation of certain provisions of the National Energy Board Cost Recovery Regulations, SOR/91-7. As noted by Justice Décaré, at paragraph 11:

Normally, in cases such as this one, the Court will examine the provisions of the enabling statute first in order to ascertain precisely what it is that Parliament has allowed to be regulated. It will then turn to the regulation. There being a presumption that the regulation has been passed in accordance with the provisions of the enabling statute and that there is coherence between the terms used in the statute and those used in the regulation, the Court will endeavour to interpret the regulation in such a way as to keep it within the confines permitted by the enabling statute. Should that prove impossible, the regulation or part of it will be declared ultra vires. Reconciliation is therefore the rule, and it will be achieved in most cases. [emphasis added]

- [34] In the situation before me, I begin with the provisions of the OAS Act. The authority of the Minister to enter into the Canada/Germany Agreement arises from the operation of s. 40. Section 41 gives the Governor in Council the ability, by order, to declare the Agreement in force. This was done (Proclamation Declaring the Agreement on Social Security Between Canada and the Federal Republic of Germany in Force April 1, 1988, SI/88-127, C. Gaz. 1988.II). With the Proclamation, the Canada/Germany Agreement, including Article 11(b), has the force of law in Canada (OAS Act, s. 41(1)). The power of the Governor in Council to make regulations for the purpose of giving effect to the Agreement is set out in s. 40(2). This was done as evidenced by s. 21(5.3) of the Regulations. As taught by *Ontario Hydro*, s. 21(5.3) must be interpreted such that there is "coherence" between this provision and Article 11(b) of the Canada/Germany Agreement.
- [35] Article 11(b) is, in my view, plainly applicable to Mr. Stachowski. Until 1988, Mr. Stachowski was subject to German legislation regarding mandatory pension coverage, as contemplated by Article 11(b) of the Canada/Germany Agreement. Accordingly, the period from 1968 to 1988 "shall not be considered as a period of residence in Canada".
- [36] The interpretation promoted by Mr. Stachowski causes an incongruous collision between Article 11(b) of the Agreement and s. 21(5.3) of the Regulations. If I apply the logic of Mr. Stachowski's submissions, I am obliged to "read down" Article 11(b) such that it does not apply if the person's residency is "deemed residency" and not actual residency. Those words

are not in Article 11(b); they should not be read into s. 21(5.3) of the Regulations. It does not matter whether Mr. Stachowski's residence is established by physical presence (s. 21(1)) or by the operation of other provisions in s. 21 of the OAS Regulations. In either case, Article 11(b) applies such that the period from 1968 to 1988 cannot be considered to be residence.

- [37] Section 21 of the Regulations contains a number of different deeming provisions. To the extent there appears to be a conflict between any two of them, the principles of statutory interpretation teach us that we should look to the whole legislative scheme for help. In this case, assuming that s. 21(3) deems Mr. Stachowski to be resident, s. 21(5.3), in the submission of Mr. Stachowski, appears to say the opposite. If so, the result would be a conflict between two provisions of the Regulations. However, I am of the opinion that these provisions can be read harmoniously, in a way that achieves the objectives of the Act and the Agreement, which as I discuss below is partly to avoid the conferment of double benefits.
- [38] As noted by Mr. Stachowski, he was subject to the German legislation by virtue of his German citizenship and residence in Germany, and not by virtue of the Canada/Germany Agreement. The words "by virtue of an agreement" in s. 21(5.3) appear to be misplaced. It is nonsensical to describe a person as being subject to the legislation of a country by virtue of a bi-lateral agreement. Obviously, Mr. Stachowski is subject to the German legislation by virtue of his citizenship and residency over the years pursuant to the applicable legislation of that country. But this odd drafting of the Regulation does not, in my view, mean that Mr. Stachowski's interpretation should be adopted; rather, it makes it even more important that the context of the entire legislative scheme be examined.
- [39] I turn to the purpose of these statutory provisions. The arrangements made by Canada and Germany are, in part, designed to avoid the situation where a senior citizen claims benefits under both Canadian and German laws. If I interpret the Regulations in the manner suggested by Mr. Stachowski, he will receive pension benefits from both countries related to the period of 1968 to 1988. This cannot be the intended result of the legislative scheme. I have reviewed the House of Commons debates concerning amendments to the Act which brought in s. 40 and the reciprocal OAS agreement scheme. During one such debate, it was expressed by the Hon. Marc Lalonde, Minister of National Health and Welfare that:

[t]he central purpose of reciprocal international agreements is to protect migrants who spend portions of their working lives in more than one country. Such people cannot always meet the minimum eligibility requirements of the mandatory social security programs to which they have contributed.

[...]

International agreement also provide for the removal of duplicate coverage [House of Commons Debates, (February 9, 1977) at 2835 (Hon. Marc Lalonde)].

The Hon. Mr. Lincoln Alexander also stated that

Another point is that by simple agreement we will remove duplicate social security coverage.

[...]

Let me emphasize that in the absence of reciprocal agreement immigrants will continue to be deprived of benefits earned in their former countries of residence [Ibid. at 2842 (Hon. Lincoln M. Alexander)].

Upon my reading of the debates, and particularly in light of the portions excerpted above, it is my understanding that the reciprocal OAS agreement scheme was implemented to ensure that foreign nationals who immigrate to Canada, often late in their lives, receive some form of adequate old age security, rather than be deprived of security related to a period of time during which they may have paid into a foreign OAS system. I also comprehend that this system was intended to prevent "duplicate social security coverage."

- [40] Sections 21(3) and 21(5.3) of the Regulations, in conjunction with Article (11)(b) of the Agreement, work together to achieve both purposes outlined in the House of Commons debates. If Article 11(b) and s. 21(5.3) are read to apply to all residents, including "deemed residents" such as Mr. Stachowski, then duplicate coverage is avoided. On the other hand, in the absence of an OAS agreement between Canada and the former country of residence of the claimant, s. 21(5.3) would not activate and that claimant would be entitled to Canadian OAS benefits calculated from over a longer period. In both situations, a senior citizen receives benefits, relating to a given period of residence, from at least one country and only one country.
- [41] It could be said that s. 21(5.3) of the Regulations and Article 11(b) of the Agreement appear redundant, and in light of the maxim of statutory interpretation that Parliament is presumed not to be redundant, the interpretation proffered above runs afoul of that rule. To that argument, I say that s. 21(5.3) is only redundant in the specific context of the Canada/Germany Agreement. There may very well be OAS agreements which do not include a provision like Article 11(b), which would then be "caught" by s. 21(5.3) to block duplicate benefits. The drafter of s. 21(5.3) could not have anticipated the content of every international agreement that Canada would later enter into with foreign countries, and s. 21(5.3) acts as a safety net in that regard.
- [42] In conclusion, the interpretation that best fits the context as a whole is that the period during which Mr. Stachowski paid into the mandatory German Social Benefit Plan cannot be considered residency for purposes of calculating his OAS benefits entitlement. This is so whether Mr. Stachowski is deemed resident pursuant to s. 21(3) or is physically present in Canada.
- [43] In summary, Mr. Stachowski was subject to the German legislation regarding mandatory pension coverage during the period of time between 1968 and 1988 when he alleges that he was resident in Canada pursuant to the provisions of the Regulations. Accordingly, pursuant to Article 11 of the Canada/Germany Agreement and s. 21(5.3) of the Regulations, this period

of time cannot be considered to be a period of residency for OAS purposes. The Review Tribunal was correct in its interpretation of the legislative scheme and its conclusion on this issue.

Conclusion [44] In conclusion, the Review Tribunal erred due to its failure to consider the applicability of s. 21(3) of the Regulations to Mr. Stachowski's situation. However, the Review Tribunal correctly determined that Mr. Stachowski is deemed not to be resident in Canada for the period from 1968 to 1988 because of his contributions to the German mandatory pension scheme.

[45] Accordingly, the matter should be remitted to a differently constituted panel of the Review Tribunal. Because Mr. Stachowski was not successful on the second issue, the Review Tribunal need only address the question of the correct interpretation of s. 21(3) of the Regulations and its applicability to the calculation of Mr. Stachowski's OAS pension benefits. In effect, the only period of time that needs to be considered by the Review Tribunal is the period from when Mr. Stachowski's contributions to the German pension scheme ceased in 1988 to the date when he landed in Canada in 1991.

[46] As Mr. Stachowski's success was only partial, in my discretion, there will be no award of costs.

ORDER

This court orders that:

1. The Decision of the Review Tribunal that "in order to obtain qualifying deemed residence the spouse of the missionary must have an initial period of actual residence in Canada as required by the Act and Regulations in order to trigger the benefit of section 21(5)(c)" is quashed and this matter remitted to a different panel of the Review Tribunal for reconsideration.
2. The application for judicial review is dismissed with respect to the others matters before the Review Tribunal.
3. There is no order as to costs.

"Judith A. Snider"

Judge

APPENDIX "A"

to the

Reasons for Order and Order dated October 26, 2005

In

MR. LEONHARD STACHOWSKI

and

THE ATTORNEY GENERAL OF CANADA

T-1944-04

Old Age Security Act,

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.
- (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.

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

...

- 4. (1) A person who was not a pensioner on July 1, 1977 is eligible for a pension under this Part only if
 - (a) on the day preceding the day on which that person's application is approved that person is a Canadian citizen or, if not, is legally resident in Canada; or
 - (b) on the day preceding the day that person ceased to reside in Canada that person was a Canadian citizen or, if not, was legally resident in Canada.
- (2) The Governor in Council may make regulations respecting the meaning of legal residence for the purposes of subsection (1).

...

- 40. (1) Where, under any law of a country other than Canada, provision is made for the payment of old age or other benefits including survivors' or disability benefits, the Minister may, on behalf of the Government of Canada, on such terms and conditions as may be approved by the Governor in Council, enter into an agreement with the government of that country for the making of reciprocal arrangements relating to the administration or operation of that law and of this Act, including, without restricting the generality of the foregoing, arrangements relating to
 - (a) the exchange of such information obtained under that law or this Act as may be necessary to give effect to any such arrangements;
 - (b) the administration of benefits payable under this Act to persons resident in that country, the extension of benefits under that law or this Act to persons employed in or resident in that country and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in that country;
 - (c) the administration of benefits payable under that law to persons resident in Canada, the extension of benefits under that law or this Act to persons employed in or resident in Canada and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in Canada;

- (d) the totalization of periods of residence and periods of contribution in that country and periods of residence in Canada; and
 - (e) the payment by that country and Canada respectively, where applicable as a result of totalization, of prorated benefits based on periods of residence and periods of contribution in that country and periods of residence in Canada.
- (2) For the purpose of giving effect to any agreement entered into under subsection (1), the Governor in Council may make such regulations respecting the manner in which this Act shall apply to any case or class of cases affected by the agreement, and for adapting this Act thereto, as appear to the Governor in Council to be necessary for that purpose, and any regulations so made may provide therein for the making of any financial adjustments required under the agreement and for the crediting or charging of the amount of any such adjustments to the Consolidated Revenue Fund.

...

41. (1) The Governor in Council may, by order, declare any agreement entered into under section 40 to be in force and, when any such order comes into force, the agreement to which it relates has the force of law in Canada during such period as by the terms of the agreement it remains in force.

...

Old Age Security Regulations

21. (1) For the purposes of the Act and these Regulations,
- (a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and
 - (b) a person is present in Canada when he is physically present in any part of Canada.
- ...
- (3) For the purposes of the Act and these Regulations, where a person becomes the spouse or common-law partner of a person residing in Canada while the person residing in Canada is absent from Canada in any of the circumstances specified in paragraph (5)(a) or (b), the period outside Canada of the spouse after their marriage or of the common-law partner after becoming such a partner is considered a period of residence and presence in Canada, if
- (a) the spouse or common-law partner returns to Canada either before or within six months after the return of the person residing in Canada or within six months after that person's death if that person dies while so absent from Canada; or
 - (b) the spouse or common-law partner attains, during that period outside Canada, an age at which the spouse or common-law partner is eligible to be paid a pension under the Act.

(4) Any interval of absence from Canada of a person resident in Canada that is

- (a) of a temporary nature and does not exceed one year,
- (b) for the purpose of attending a school or university, or
- (c) specified in subsection (5)

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

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

- (a) while that person was employed out of Canada
 - (i) by the United Nations or one of its specialized agencies,
 - (ii) by the North Atlantic Treaty Organization,
 - (iii) by the Commonwealth Secretariat,
 - (iv) by the Organization of Economic Cooperation and Development,
 - (v) by l'Agence de coopération culturelle et technique, or
 - (vi) by a Canadian firm or corporation as a representative or member thereof,

if during his employment out of Canada he

- (vii) had in Canada a permanent place of abode to which he intended to return, or
- (viii) maintained in Canada a self-contained domestic establishment,

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

- (b) while that person was employed or engaged out of Canada
 - (i) by the Government of Canada or of the government or a municipal corporation of any province,
 - (ii) in the performance of services in another country under a development or assistance program that is sponsored or operated in that country by the Government of Canada or of a province or by a non-profit Canadian agency,
 - (iii) as a member of the Canadian Forces, pursuant to and in connection with the requirements of his duties,
 - (iv) in work for Canada connected with the prosecution of any war,
 - (v) as a member of the armed forces of any ally of Canada during any war,

- (vi) as a missionary with any religious group or organization,
 - (vii) as a worker in lumbering, harvesting, fishing or other seasonal employment,
 - (viii) as a transport worker on trains, aircraft, ships or buses running between Canada and points outside Canada or other similar employment, or
 - (ix) as an employee, a member or an officer of an international charitable organization,
- if he returned to Canada within six months of the end of his employment or engagement out of Canada or he attained, while employed or engaged out of Canada, an age at which he was eligible to be paid a pension under the Act;
- (c) while that person was accompanying their spouse or common-law partner who was absent from Canada in any of the circumstances specified in paragraph (a) or (b) or for the purpose of attending school or university, if that person
 - (i) returned to Canada either before or within six months after the return of their spouse or common-law partner or within six months after the death of their spouse or common-law partner, if their spouse or common-law partner died while so absent from Canada, or
 - (ii) while so absent from Canada, attained an age at which he was eligible to be paid a pension under the Act;
 - (d) while that person was awaiting transportation to Canada during or immediately after World War II, if he
 - (i) was unable to return to Canada owing to the dislocation of transportation facilities, and
 - (ii) returned to Canada when transportation became available;
 - (e) while that person was accompanying his spouse who was resident in Canada and awaiting transportation to Canada during or immediately after World War II, if that person
 - (i) was unable to return to Canada owing to the dislocation of transportation facilities, and
 - (ii) returned to Canada when transportation became available; or
 - (f) while that person was a dependent person and was accompanying and residing outside Canada with the person on whom he was dependent, if the person on whom he was dependent resided in Canada and was absent from Canada in any of the circumstances specified in paragraph (a) or (b) and if the dependent person
 - (i) returned to Canada before or within six months after the return of the person on whom he was dependent or within six months after that person's death, if that person died while so absent from Canada, or
 - (ii) while so absent from Canada, attained an age at which he was eligible to be paid a pension under the Act.

...

(5.3) Where, by virtue of an agreement entered into under subsection 40(1) of the Act, a person is subject to the legislation of a country other than Canada, that person shall, for the purposes of the Act and these Regulations, be deemed not to be resident in Canada.

Social Security, Agreement between Canada and the Federal Republic of Germany, dated November 14, 1985

Article 11

For the purposes of the Old Age Security Act of Canada:

- (b) if a person, other than a member of the crew of a seagoing ship, is subject to the German legislation regarding mandatory pension coverage during any period of residence in the territory of Canada, that period shall not be considered as a period of residence in Canada for that person or for his spouse or dependants who reside with him and who are not subject to the Canada Pension Plan or to the comprehensive pension plan of a province of Canada by reason of employment or self-employment.

Loi sur la sécurité de la vieillesse,

- 3. (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes :

- a) celles qui avaient la qualité de pensionné au 1er juillet 1977;

- b) celles qui, à la fois :

- (i) sans être pensionnées au 1er juillet 1977, avaient alors au moins vingt-cinq ans et résidaient au Canada ou y avaient déjà résidé après l'âge de dix-huit ans, ou encore étaient titulaires d'un visa d'immigrant valide,

- (ii) ont au moins soixante-cinq ans,

- (iii) ont résidé au Canada pendant les dix ans précédant la date d'agrément de leur demande, ou ont, après l'âge de dix-huit ans, été présentes au Canada, avant ces dix ans, pendant au moins le triple des périodes d'absence du Canada au cours de ces dix ans tout en résidant au Canada pendant au moins l'année qui précède la date d'agrément de leur demande;

- c) celles qui, à la fois :

- (i) n'avaient pas la qualité de pensionné au 1er juillet 1977,

- (ii) ont au moins soixante-cinq ans,

- (iii) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins quarante ans avant la date d'agrément de leur demande.

- (2) Sous réserve des autres dispositions de la présente loi et de ses règlements, une pension partielle est payable aux personnes qui ne peuvent bénéficier de la pleine pension et qui, à la fois :
- a) ont au moins soixante-cinq ans;
 - b) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins dix ans mais moins de quarante ans avant la date d'agrément de leur demande et, si la période totale de résidence est inférieure à vingt ans, résidaient au Canada le jour précédant la date d'agrément de leur demande.
- (3) Pour un mois donné, le montant de la pension partielle correspond aux $n/40$ de la pension complète, n étant le nombre total -- arrondi conformément au paragraphe (4) -- d'années de résidence au Canada depuis le dix-huitième anniversaire de naissance jusqu'à la date d'agrément de la demande.
- (4) Le nombre total d'années de résidence au Canada est arrondi au chiffre inférieur.
- ...
4. (1) Sauf en ce qui concerne les personnes qui avaient la qualité de pensionné au 1er juillet 1977, il faut, pour bénéficier de la pension :
- a) soit avoir le statut de citoyen canadien ou de résident légal du Canada la veille de l'agrément de la demande;
 - b) soit avoir eu ce statut la veille du jour où a cessé la résidence au Canada.
- (2) Le gouverneur en conseil peut, pour l'application du paragraphe (1), définir par règlement « résident légal » .
- ...
40. (1) Le ministre peut, pour le compte du gouvernement du Canada et aux conditions agréées par le gouverneur en conseil, conclure avec le gouvernement de tout pays étranger dont la législation prévoit le versement de prestations notamment aux vieillards et invalides ou de pensions de réversion, un accord prévoyant la signature d'arrangements réciproques relatifs à l'application de cette législation et de la présente loi notamment en ce qui concerne :
- a) l'échange des renseignements recueillis dans le cadre des lois en cause et nécessaires à la mise en oeuvre de l'accord;
 - b) la gestion des prestations payables aux termes de la présente loi à des personnes résidant dans ce pays, l'octroi de prestations payables en vertu de l'une ou l'autre de ces lois à des personnes employées ou résidant dans ce pays ainsi que la modification du montant des prestations;

- c) la gestion des prestations payables en vertu de la législation de ce pays à des personnes résidant au Canada, l'octroi de prestations payables en vertu de l'une ou l'autre de ces lois à des personnes employées ou résidant au Canada ainsi que la modification du montant des prestations;
 - d) la totalisation des périodes de résidence et de cotisation dans ce pays et des périodes de résidence au Canada;
 - e) le partage des prestations à payer en fonction, le cas échéant, de la totalisation des périodes de résidence et de cotisation dans ce pays et des périodes de résidence au Canada.
- (2) Pour donner effet à tout accord conclu aux termes du paragraphe (1), le gouverneur en conseil peut prendre les règlements qu'il juge nécessaires, d'une part, quant à la manière dont les dispositions de la présente loi doivent s'appliquer à tout cas ou toute catégorie de cas visés par l'accord et, d'autre part, en vue de les y adapter; ces règlements peuvent prévoir notamment les ajustements financiers exigés par l'accord et leur imputation au Trésor.
- ...
41. (1) Le gouverneur en conseil peut, par décret, mettre en vigueur l'accord conclu en vertu de l'article 40; à l'entrée en vigueur du décret, l'accord a force de loi au Canada pour la période qui y est stipulée.
- ...

Règlement sur la sécurité de la vieillesse

21. (1) Aux fins de la Loi et du présent règlement,
- a) une personne réside au Canada si elle établit sa demeure et vit ordinairement dans une région du Canada; et
 - b) une personne est présente au Canada lorsqu'elle se trouve physiquement dans une région du Canada.
- ...
- (3) Pour l'application de la Loi et du présent règlement, dans le cas où quelqu'un devient l'époux ou le conjoint de fait d'une personne qui réside au Canada alors que cette dernière en est absente dans n'importe laquelle des circonstances décrites aux alinéas (5)a) ou b), la période passée hors du Canada par l'époux après le mariage ou par le conjoint de fait après qu'il l'est devenu compte comme période de résidence et de présence au Canada si :
- a) l'époux ou le conjoint de fait revient au Canada avant le retour de la personne résidant au Canada ou dans un délai de six mois après soit le retour de cette dernière, soit la mort de la personne si celle-ci meurt au cours de son absence du Canada;

b) l'époux ou le conjoint de fait atteint, pendant la période passée hors du Canada, un âge qui le rend admissible à une pension en vertu de la Loi.

(4) Lorsqu'une personne qui réside au Canada s'absente du Canada et que son absence

a) est temporaire et ne dépasse pas un an,

b) a pour motif la fréquentation d'une école ou d'une université, ou

c) compte parmi les absences mentionnées au paragraphe (5),

cette absence est réputée n'avoir pas interrompu la résidence ou la présence de cette personne au Canada.

(5) Les absences du Canada dont il est question à l'alinéa (4)c) dans le cas d'un résident du Canada sont des absences qui se produisent dans les circonstances suivantes :

a) lorsque ledit résident était employé hors du Canada

(i) par l'Organisation des Nations Unies ou l'une de ses institutions spécialisées,

(ii) par l'Organisation du traité de l'Atlantique Nord,

(iii) par le Secrétariat du Commonwealth,

(iv) par l'Organisation de Coopération et de Développement économiques,

(v) par l'Agence de coopération culturelle et technique, ou

(vi) par une entreprise ou corporation canadienne en qualité de membre ou de représentant,

si, au cours de sa période d'emploi hors du Canada, ce résident

(vii) a conservé au Canada une demeure permanente à laquelle il avait l'intention de revenir, ou

(viii) a gardé au Canada un établissement domestique autonome,

et il est revenu au Canada dans un délai de six mois après la fin de sa période d'emploi hors du Canada ou, au cours de sa période d'emploi hors du Canada, il a atteint un âge qui le rendait admissible à une pension en vertu de la Loi;

b) lorsque ledit résident était engagé ou employé hors du Canada

(i) par le gouvernement du Canada ou par le gouvernement ou une corporation municipale de n'importe quelle province,

(ii) en service dans un pays étranger dans le cadre d'un programme de développement ou d'assistance que commande ou dirige dans ce pays le gouvernement du Canada ou d'une province, ou une agence canadienne à but non lucratif,

(iii) à titre de membre des Forces canadiennes, à cause et du fait des exigences de ses fonctions,

(iv) à titre de personne occupée pour le compte du Canada à un travail relatif à la poursuite d'une guerre,

(v) à titre de membre des forces armées d'un pays allié du Canada pendant n'importe quelle guerre,

(vi) à titre de missionnaire membre d'un groupe ou d'un organisme religieux,

(vii) à titre de travailleur employé à la coupe du bois, à la moisson, à la pêche ou à une autre occupation saisonnière,

(viii) à titre d'employé des transports à bord d'un train, d'un avion, d'un navire, d'un autocar en service entre le Canada et des endroits à l'étranger ou dans le cadre d'un autre emploi semblable, ou

(ix) à titre d'employé, de membre ou de fonctionnaire d'une organisation internationale de bienfaisance,

si cette personne revient au Canada dans un délai de six mois après la fin de sa période d'emploi ou d'engagement hors du Canada, ou si elle a atteint, au cours de sa période d'emploi ou d'engagement hors du Canada, un âge la rendant admissible à une pension en vertu de la Loi;

c) lorsque cette personne accompagnait son époux ou son conjoint de fait dont l'absence du Canada est motivée par l'une des circonstances prévues aux alinéas a) ou b) ou a pour motif la fréquentation d'une école ou d'une université, si elle :

(i) est revenue au Canada avant le retour de son époux ou de son conjoint de fait ou dans un délai de six mois après soit le retour de cet époux ou de ce conjoint de fait, soit la mort de son époux ou de son conjoint de fait, si son époux ou son conjoint de fait est mort durant son absence du Canada,

(ii) a atteint, durant son absence du Canada, un âge la rendant admissible à une pension en vertu de la Loi;

d) alors que cette personne attendait d'être transportée au Canada durant la Seconde guerre mondiale ou immédiatement après, si cette personne

(i) n'a pas pu revenir au Canada à cause de la désorganisation des moyens de transport, et

(ii) est revenue au Canada quand elle a pu trouver un moyen de transport;

e) alors que cette personne accompagnait son conjoint qui était résident du Canada et attendait d'être transportée au Canada au cours de la Seconde guerre mondiale ou immédiatement après, si cette personne

(i) n'a pas pu revenir au Canada à cause de la désorganisation des moyens de transport, et

(ii) est revenue au Canada quand elle a pu trouver un moyen de transport; ou

- f) alors que cette personne était une personne à charge, qu'elle accompagnait la personne de qui elle dépendait et qu'elle résidait hors du Canada, si la personne de qui elle dépendait résidait au Canada et dont l'absence du Canada était motivée par l'une des circonstances prévues à l'alinéa a) ou b) et si la personne dépendante
- (i) est revenue au Canada avant le retour de la personne de qui elle dépendait ou dans un délai de six mois après son retour, ou dans un délai de six mois après la mort de cette personne, si cette personne est morte durant son absence du Canada, ou
- (ii) alors qu'elle a atteint, durant son absence du Canada, un âge la rendant admissible à une pension en vertu de la Loi.

...

(5.3) Lorsque, aux termes d'un accord conclu en vertu du paragraphe 40(1) de la Loi, une personne est assujettie aux lois d'un pays étranger, elle est réputée, pour l'application de la Loi et du présent règlement, ne pas être un résident du Canada.

Sécurité sociale, Accord entre le Canada et la République fédérale d'Allemagne, daté le 14 novembre 1985

Article 11

Aux fins de la Loi du Canada sur la sécurité de la vieillesse:

- (b) si une personne, autre qu'un membre de l'équipage d'un navire de mer, est assujettie à la législation allemande relative à la participation obligatoire à un régime de pension pendant toute période de résidence sur le territoire du Canada, ladite période n'est pas considérée comme une période de résidence au Canada relativement à cette personne, à son conjoint ou aux personnes à sa charge qui résident avec elle et qui ne sont pas assujettis au Régime de pensions du Canada ou au régime général de pensions d'une province du Canada en raison d'un emploi ou d'un emploi autonome.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE: MR. LEONHARD STACHOWSKI v.

THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 7, 2005

REASONS FOR ORDER

AND ORDER: Snider J.

DATED: October 26, 2005

APPEARANCES:

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SOLICITORS OF RECORD:

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