

BETWEEN:

GEORGE D. MOSKAL,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND
SOCIAL DEVELOPMENT,

Respondent.

Reference heard on November 18, 2009 at Victoria, British Columbia

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Connie L. Mah

JUDGMENT

With respect to a decision made by The Minister of Human Resources and Social Development under the *Old Age Security Act*, it is determined that for the purposes of calculating the guaranteed income supplement payable to the appellant for the period from July 2008 to June 2009: (1) income should be determined in accordance with paragraph 14(6)(a) of the *Act*, (2) carrying charges in the amount of \$265 should be allowed as a deduction in computing income, (3) life insurance proceeds received in 2007 should be included in computing income, and (4) SOCAN royalties received in 2008 should be included in computing income.

The appeal is accordingly allowed in part. Each party shall bear their own costs.

Signed at Toronto, Ontario this 7th day of January 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 5
Date: 20100107
Docket: 2009-1264(OAS)

BETWEEN:

GEORGE D. MOSKAL,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND
SOCIAL DEVELOPMENT,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The appellant, George Moskal, has appealed in respect of his entitlement to a guaranteed income supplement (GIS), which is provided for under Part II of the *Old Age Security Act* (the “*OAS Act*”). The GIS is intended to provide additional financial assistance to old age security pension recipients with modest incomes. The period at issue is from July 2008 to June 2009 (the “Payment Period”).

[2] Mr. Moskal filed an appeal with a review tribunal (“Review Tribunal”) pursuant to subsection 28(1) of the *OAS Act* after receiving a number of inconsistent statements as to his entitlement from government officials.

[3] After the hearing, I reviewed the history of the relevant legislation to try to understand the reason for the difficulty in determining the GIS. As it turns out, new legislation came into force on the very first day of the Payment Period. This may have led to some of the confusion. Unfortunately for Mr. Moskal, he would have succeeded in his appeal in its entirety if the old legislation had continued to apply.

[4] According to the reply, the Minister’s determination that is under appeal is that Mr. Moskal is entitled to receive monthly GIS for the Payment Period as

follows: \$1.62 for the months of July, August and September of 2008 and \$10.90 for the remaining months in the Payment Period.

[5] Under subsection 28(2), the Review Tribunal is required to refer questions of income and sources of income to the Tax Court of Canada. A reference to this Court was made with respect to Mr. Moskal's appeal. The Review Tribunal informed the Court that Mr. Moskal's appeal related to a determination of income under s. 2 of the *OAS Act*, and that the appeal was being referred on that ground.

[6] The legislative provisions that are relevant to this appeal are reproduced in an appendix.

Preliminary matters

[7] There are a couple of preliminary matters.

[8] The first concerns a similar appeal filed by Mr. Moskal's spouse, which was not included in the reference. At the opening of the hearing, counsel for the respondent explained that Mrs. Moskal's appeal was at an earlier procedural stage and therefore a reference to this Court was therefore premature. Counsel also stated that, to the extent that the issues were common in both appeals, the decision in this appeal would be applied in determining Mrs. Moskal's GIS entitlement.

[9] The second concerns a minor concession by the respondent. In the reply, the respondent conceded that the calculation of income failed to take into account a deduction for carrying charges in the amount of \$265.

Issue

[10] The question to be decided is whether income received by Mr. Moskal in 2007 or 2008 should be used for the purposes of computing the GIS for the Payment Period.

[11] Mr. Moskal was led to believe that his GIS for the Payment Period would be determined using either his 2007 income or his estimated 2008 income, at his option. Mr. Moskal preferred to use 2008 income as it was significantly lower and would entitle him to greater GIS benefits.

[12] The respondent acknowledges that there are two possible methods, at the appellant's option. However, the respondent submits that the option to use 2008

estimated income applies only to certain types of income. Other sources of income must be determined using 2007 income, if it is submitted.

Applicable test for determination of income

[13] The starting point for the calculation of the GIS is section 12 of the *OAS Act*. It provides that the GIS is to be computed based on income for a “base calendar year,” which is defined in section 10 as follows:

“base calendar year” means the last calendar year ending before the current payment period.

[14] In Mr. Moskal’s case, the base calendar year for the Payment Period is the 2007 calendar year. Subject to any overriding provisions, then, the GIS for the Payment Period should be calculated using 2007 income.

[15] Special rules are provided in section 14 of the *OAS Act* for situations in which a person suffers a loss or reduction in income. This provision is reproduced in its entirety in the appendix.

[16] The respondent acknowledges that Mr. Moskal is entitled to relief under this provision. Counsel submits that the appropriate relief is provided by paragraph 14(6)(a) because Mr. Moskal’s pension income was reduced in 2007 as a result of a cessation of employment insurance benefits in that year.

[17] Paragraph 14(6)(a) sets out a formula for the computation of income. For the Payment Period, it requires 2007 income to be used for certain types of income and 2008 income to be used for other types.

[18] The respondent suggests that paragraph 14(6)(a) permits an alternative method for computing income for purposes of section 12. On its face, paragraph 14(6)(a) does not clearly override the requirement to use income for the base calendar year, but the respondent’s position is favourable to Mr. Moskal and therefore I will accept it.

[19] At the hearing neither party mentioned the other special rules in section 14, and generally the evidence was not detailed enough for me to determine whether any of these rules apply. Based on the limited evidence before me, I have no reason to believe that any other part of section 14 would provide a better result to Mr. Moskal than that provided by paragraph 14(6)(a).

[20] Accordingly, I would conclude that for purposes of determining the GIS for the Payment Period, income should be determined in accordance with the formula set out in paragraph 14(6)(a). For ease of reference, the relevant parts are reproduced below.

(6) If, in the circumstances described in paragraph (a) or (b), a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), suffers a loss of income due to a termination of or reduction in pension income, the person may, not later than the end of the payment period that is immediately after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner,

(a) if the loss is suffered in the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of

(i) any pension income received by the person in that calendar year,

(ii) the income from any office or employment or any business for that calendar year, and

(iii) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income; [..] (Emphasis added)

[21] As mentioned above, the relevant legislation was amended effective on the first day of the Payment Period. Although it is not directly relevant to the appeal, the former provision is reproduced below.

(6) Where, in the circumstances described in paragraphs (a) and (b), a person who is an applicant, or who is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), suffers a loss of income due to termination or reduction of pension income, the person may, not later than the end of the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner,

(a) where the loss is suffered in the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, in which case the person's income for that calendar year is deemed to be the person's income for the base calendar year; [...] (Emphasis added.)

[22] It is unfortunate for Mr. Moskal that the above provision does not apply to the Payment Period because it would permit him to compute income based on the 2008 calendar year.

Specific income sources

[23] In applying the relevant formula in s. 14(6)(a) to the Payment Period, the applicable year in respect of different types of income are:

- (a) pension income, as defined, is to be determined for 2008,
- (b) income from an office, employment or business is to be determined for 2008, and
- (c) other types of income are to be determined for 2007.

[24] After this test was explained to Mr. Moskal at the hearing, he submitted that his appeal should succeed in any event because he was seeking to use 2008 income for pension and business income.

[25] The respondent disagrees. It is the position of the respondent that the types of income that are in dispute are income from property and not pension or business income. This income should be computed for 2007, it is submitted.

[26] Two items of income are in dispute: (1) a lump sum received under a life insurance policy in 2007, and (2) music royalties which were greater in 2007 than 2008.

[27] The life insurance receipt is an amount of \$15,804.59 that was received in 2007 from Desjardins Financial Security Life Assurance Company ("Desjardins"). This amount was a lump sum paid on the maturity of a life insurance policy.

[28] Mr. Moskal suggests that the Desjardins payment constitutes 2007 pension income which should be excluded from the income computation.

[29] The items of income that qualify as “pension income” for purposes of this test are set out in section 14 of the Regulations to the *OAS Act*. The regulation is reproduced in the appendix.

[30] Although the term “pension income,” as defined by the regulation, is broader than its ordinary meaning, the definition is not broad enough to apply to the Desjardins payment in my view.

[31] Mr. Moskal submits that the payment should qualify as pension income because he intended to use the lump sum amount as a source of retirement income.

[32] The problem that I have with this argument is that the expanded definition of “pension income” does not encompass all types of retirement income. I agree with counsel for the respondent that the Desjardins payment is not pension income, as defined.

[33] I conclude, then, that the lump sum amount received from Desjardins in 2007 should be included in computing income for purposes of the GIS computation.

[34] The second item in dispute is an amount of \$11,704.51 that consists of music royalties received by Mr. Moskal from SOCAN. The source of the royalties was music produced by Mr. Moskal and others in connection with a successful television series, *Body Moves* (an exercise program). This source of income dropped significantly in 2008 and it is to Mr. Moskal’s advantage to use the 2008 amount.

[35] Mr. Moskal suggests that the royalties are business income and therefore the 2008 royalties should be used. I agree with this.

[36] The royalties for the *Body Moves* music, which was produced prior to 2007, was the only compensation that Mr. Moskal received for his participation in this project. Mr. Moskal explained in his testimony that the producer of the series could not afford to pay the musicians and therefore they agreed to produce the music solely in return for royalties that would be paid by television stations which broadcast the series.

[37] The royalties clearly constitute business income in my view. The production of this music was not an activity in the nature of a hobby for Mr. Moskal.

[38] Counsel for the respondent submits that the royalties are not business income because the business activity had ceased when the royalties were received.

[39] I disagree with this submission. A source of income does not change over time. It is the work and effort that Mr. Moskal put into earning the income that characterizes the source of the royalties as business income.

Conclusion

[40] In summary, I conclude as follows:

- (a) for the purpose of determining the GIS for the Payment Period, income should be determined in accordance with paragraph 14(6)(a) of the *OAS Act*;
- (b) carrying charges in the amount of \$265 should be allowed as a deduction in computing income,
- (c) the lump sum insurance proceeds received in 2007 should be included in computing income, and
- (d) the SOCAN royalties received in 2008 should be included in computing income.

[41] The appeal will be allowed on this basis. Each party should bear their own costs.

Signed at Toronto, Ontario this 7th day of January 2010.

“J. M. Woods”

Woods J.

Appendix

Old Age Security Act

Excerpt from section 2

“income” of a person for a calendar year means the person’s income for the year, computed in accordance with the *Income Tax Act*, except that

[...]

Section 14

14. (1) Every person by whom an application for a supplement in respect of a current payment period is made shall, in the application, make a statement of the person's income for the base calendar year.

(1.01) The Minister may waive the requirement to make a statement of income under subsection (1) if that information has been made available to the Minister under this Act and, in that case, the statement is deemed to have been made for the purposes of this Part.

(1.1) Where the requirement for an application for payment of a supplement for any month has been waived under subsection 11(4), the Minister may, on the basis of the information available to the Minister,

(a) estimate the applicant's income for the base calendar year; and

(b) in the case of an applicant who is a person described in subsection 15(2), estimate the income of the applicant's spouse or common-law partner for the base calendar year.

(1.2) Where a person's income for a base calendar year has been estimated under subsection (1.1), the Minister may require that the person make a statement to the Minister of their income for any month in that year.

(2) If in a current payment period a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), ceases to hold an office or employment or ceases to carry on a business, that person may, not later than the end of the second payment period after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner, file a statement of the person's estimated income for the calendar year in which the person ceased to hold that office or employment or ceased to carry on that business, which income shall be calculated as the total of

(a) any pension income received by the person in that part of that calendar year that is after the month in which the person ceases to hold that office or employment or to carry on that business, divided by the number of months in that part of that calendar year and multiplied by 12,

(b) the income from any office or employment or any business for that calendar year other than income from the office, employment or business that has ceased, and

(c) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income.

(3) Despite subsection (2), if in the last month of a calendar year that ends in the current payment period a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), ceases to hold an office or employment or ceases to carry on a business, the person may, not later than the end of the second payment period after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner, file a statement of the person's estimated income for the calendar year that is immediately after the month in which the person ceased to hold that office or employment or ceased to carry on that business, which income shall be calculated as the total of

(a) any pension income received by the person in that calendar year,

(b) the income from any office or employment or any business for that calendar year other than income from the office, employment or business that has ceased, and

(c) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income.

(4) If in a current payment period a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), suffers a loss of income due to termination of or reduction in pension income, the person may, not later than the end of the second payment period after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner, file a statement of the person's estimated income for the calendar year in which the loss is suffered, which income shall be calculated as the total of

(a) any pension income received by the person in that part of that calendar year that is after the month immediately before the month in which the loss is suffered, divided by the number of months in that part of that calendar year and multiplied by 12,

(b) the income from any office or employment or any business for that calendar year, and

(c) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income.

(5) If, in the circumstances described in paragraphs (a) and (b), a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), ceases to hold an office or employment or ceases to carry on a business, the person may, not later than the end of the payment period that is immediately after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner,

(a) if the person ceases to hold that office or employment or to carry on that business in the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of

(i) any pension income received by the person in that calendar year,

(ii) the income from any office or employment or any business for that calendar year, other than income from the office, employment or business that has ceased, and

(iii) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income; and

(b) if the person ceases to hold that office or employment or to carry on that business in a month that is before the payment period and after the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of

(i) any pension income received by the person in that part of that calendar year that is after the month in which the person ceases to hold that office or employment or to carry on that business, divided by the number of months in that part of that calendar year and multiplied by 12,

(ii) the income from any office or employment or any business for that calendar year, other than income from the office, employment or business that has ceased, and

(iii) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income.

(6) If, in the circumstances described in paragraph (a) or (b), a person who is an applicant, or is an applicant's spouse or common-law partner who has filed a statement as described in paragraph 15(2)(a), suffers a loss of income due to a termination of or reduction in pension income, the person may, not later than the end of the payment period that is immediately after the current payment period, in addition to making the statement of income required by subsection (1) in the case of the applicant or in addition to filing a statement as described in paragraph 15(2)(a) in the case of the applicant's spouse or common-law partner,

(a) if the loss is suffered in the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of

(i) any pension income received by the person in that calendar year,

(ii) the income from any office or employment or any business for that calendar year, and

(iii) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income; and

(b) if the loss is suffered in a month that is before the payment period and after the last calendar year ending before the payment period, file a statement of the person's estimated income for the calendar year ending in the current payment period, which income shall be calculated as the total of

(i) any pension income received by the person in that part of that calendar year that is after the month immediately before the month in which the loss is suffered, divided by the number of months in that part of that calendar year and multiplied by 12,

(ii) the income from any office or employment or any business for that calendar year, and

(iii) the person's income for the base calendar year calculated as though, for that year, the person had no income from any office or employment or any business and no pension income.

(7) Where under subsection (2), (3) or (4) a statement of estimated income is filed by an applicant or an applicant's spouse or common-law partner, no supplement calculated on the basis of that statement may be paid to the applicant for any month in the current payment period before

(a) the month immediately following the month shown in the statement as the month in which the applicant or the applicant's spouse or common-law partner, as the case may be, ceased to hold the office or employment or ceased to carry on the business, or

(b) the month shown in the statement as the month in which the applicant or the applicant's spouse or common-law partner, as the case may be, suffered the loss of income due to termination or reduction of pension income,

whichever is applicable.

Section 28

28. (1) A person who makes a request under subsection 27.1(1) and who is dissatisfied with the decision of the Minister in respect of the request, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal under subsection 82(1) of the *Canada Pension Plan*.

(2) Where, on an appeal to a Review Tribunal, it is a ground of the appeal that the decision made by the Minister as to the income or income from a particular source or sources of an applicant or beneficiary or of the spouse or common-law partner of the applicant or beneficiary was incorrectly made, the appeal on that ground shall, in accordance with the regulations, be referred for decision to the Tax Court of Canada, whose decision, subject only to variation by that Court in accordance with any decision on an appeal under the *Tax Court of Canada Act* relevant to the appeal to the Review Tribunal, is final and binding for all purposes of the appeal to the Review Tribunal except in accordance with the *Federal Courts Act*.

Regulation section 14

14. For the purposes of section 14 of the Act, "pension income" means the aggregate of amounts received as

(a) annuity payments;

(b) alimony and maintenance payments;

(c) employment insurance benefits;

(d) disability benefits deriving from a private insurance plan;

(e) any benefit, other than a death benefit, under the *Canada Pension Plan* or a provincial pension plan as defined in the *Canada Pension Plan*;

(f) superannuation or pension payments, other than a benefit received pursuant to the Act or any similar payment received pursuant to a law of a provincial legislature;

(g) compensation under a federal or provincial employee's or worker's compensation law in respect of an injury, disability or death;

(h) income assistance benefits under an agreement referred to in subsection 33(1) of the *Department of Human Resources Development Act* by reason of a permanent reduction in the work force as described in that subsection; and

(i) income assistance benefits under the Plant Workers' Adjustment Program, the Fisheries Early Retirement Program or the Northern Cod Adjustment and Recovery Program by reason of a permanent reduction in the work force.

CITATION: 2010 TCC 5

COURT FILE NO.: 2009-1264(OAS)

STYLE OF CAUSE: GEORGE D. MOSKAL and THE
MINISTER OF HUMAN RESOURCES
AND SOCIAL DEVELOPMENT

PLACE OF HEARING: Victoria, British Columbia

DATE OF HEARING: November 18, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: January 7, 2010

APPEARANCES:

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Counsel for the Respondent: Connie L. Mah

COUNSEL OF RECORD:

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