Docket: 2012-200(OAS)

BETWEEN:

SHARON KATZ,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT,

Respondent.

Appeal heard on common evidence with the appeal of *The Estate of the Late Zeno Wionzek (2012-203(OAS))* on June 20, 2012 and Judgment rendered orally on June 22, 2012 at Ottawa, Canada

By: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Stephanie Coté

JUDGMENT

The appeals under the *Old Age Security* Act with respect to the payment period July 2008 to June 2009, are dismissed, without costs.

Signed at Ottawa, Canada this 27th day of June 2012.

"Diane Campbell"

Campbell J.

Docket: 2012-203(OAS)

BETWEEN:

THE ESTATE OF THE LATE ZENO WIONZEK,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT,

Respondent.

Appeal heard on common evidence with the appeal of *Sharon Katz (2011-200(OAS))* on June 22, 2012 and Judgment rendered orally on June 22, 2012 at Ottawa, Canada

By: The Honourable Justice Diane Campbell

Appearances:

Agent for the Appellant:	Sharon Katz
Counsel for the Respondent:	Stephanie Coté

JUDGMENT

The appeals under the *Old Age Security* Act with respect to the payment period July 2008 to June 2009, are dismissed, without costs.

Signed at Ottawa, Canada this 27th day of June 2012.

"Diane Campbell"

Campbell J.

Citation: 2012 TCC 232
Date: 20120627
Docket: 2012-200(OAS)

BETWEEN:

SHARON KATZ,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT,

Respondent.

Docket: 2012-203(OAS)

AND BETWEEN:

THE ESTATE OF THE LATE ZENO WIONZEK,

Appellant,

and

THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] These appeals were heard together on common evidence. The Appellants, Ms. Katz and the Estate of her late husband, are appealing the decision of The Minister of Human Resources and Skills Development Canada (the "Minister") regarding the

calculation of their Guaranteed Income Supplements ("GIS"), in respect to the estate, and the Allowance, in respect to Ms. Katz. The legislation, which is applicable and under which the GIS and Allowance are payable, is the *Old Age Security Act* (the "OAS"). This *Act* provides financial assistance to seniors and low income Canadians. The GIS payments are calculated on the taxpayers' income in a "base calendar year", which is defined as the last calendar year ending before the current payment period. When an individual's income suddenly reduces, section 14 provides exceptions to the general rule that GIS will be calculated on a prior year's income. Section 14 is therefore meant to address situations where an individual ceases to hold an office or employment or ceases to operate a business or where the income loss is due to termination or reduction in "pension income", a term defined in section 14 of the *Regulations*. Both Respondent counsel and Ms. Katz agree that RRIF income is "pension income" pursuant to the definition in *Regulation* 14.

[2] Subsections 14(4) and 14(6) apply where the loss of income is due to a loss of or reduction in pension income. These are the provisions under which the Appellants are seeking the adjustments. Where relief is granted under section 14, adjustments to income are calculated pursuant to section 18.

[3] The Appellants are seeking adjustments in respect to their entitlement to the GIS and Allowance pursuant to subsection 14(4) and 14(6). The Minister denied those adjustments because the Appellants did not suffer a loss of RRIF income. The reduction in their pension income was not mandatory but was brought about due to their discretionary withdrawals.

[4] These appeals have a lengthy history, peppered throughout by the many mistakes made by the Minister's office. The Minister's decision that is being appealed is dated June 23, 2010. According to the evidence of Ms. Katz, the Minister requested further information on June 9, 2010 and provided them with 90 days to respond. However, the Minister's decision was rendered prior to the termination of that 90 day period on June 23, 2010, just one of the many errors of the Minister sprinkled throughout these appeals. There are two payment periods that are relevant and common to these appeals: July, 2007 to June, 2008 and July, 2008 to June, 2009. The June 23, 2010 decision denied the Appellants the adjustments for the period July, 2008 to June, 2009.

[5] The Appellants initially applied for the GIS and Allowance in February, 2008. On the relevant application form, an applicant could indicate whether there was a reduction in pension income between January 1, 2006 and December 31, 2008. Mr. Wionzek indicated that his maximum pension income for 2008 would be

$2,529.76, which was a combination of RRSP and RRIF amounts. He did not state what the balance would be in each of these accounts. On March 4, 2008 the Minister requested more details.

[6] On March 10, 2008, Mr. Wionzek replied and indicated, among other things, that the sum of $20,422.82 had been withdrawn from the RRIF in 2007, that less than $2,600.00 remained in the RRSP and RRIF accounts and that the Appellants' 2008 income was not predictable. The Appellants' application was subsequently approved, although they received no information on how the GIS was calculated.

[7] When a new payment period commenced in July, 2009, the payments that both Appellants were receiving increased substantially. Realizing the Minister had not granted an "option" for the 2008 - 2009 payment period, the Appellants, on October 19, 2009, requested a review of the amounts they were entitled to receive. This request was for the entire period that the Appellants received the GIS and Allowance: January, 2008 to June, 2009. Although the word "option" is not used either in the *Act* or the *Regulations*, the Minister considers an "option" to be a recalculation of estimated income based on a loss of either pension income or a source of employment income under section 14 of the *Act*.

[8] On November 12, 2009, a Benefit Officer verbally granted an option to the Appellants for the payment period of July, 2007 to June, 2008, commencing January, 2008 and ending June, 2008, but denied the option for the payment period July, 2008 to June, 2009. On January 14, 2010, Mr. Wionzek requested a written review of this verbal decision, claiming that an option should also be granted for the payment period July, 2008 to June, 2009. It was not until Ms. Katz followed up with the "Office of Client Satisfaction" in June, 2010 that an analysis of the January, 2010 decision was completed.

[9] On June 9, 2010, the Minister confirmed the granting of the option for the payment period January, 2008 to June, 2008. Mr. Wionzek received a payment of $1,472.00 while Ms. Katz received $4,021.86. However, the Minister refused to consider the period commencing July, 2008 to June, 2009 due to the recent implementation of a new policy. This June 9, 2010 letter advised the Appellants that if they wished the Minister to reconsider the decision, they had 90 days to request a review. Well in advance of the 90 day period elapsing, the Minister, on June 23, 2010, again confirmed the decision to not adjust the 2008 - 2009 amounts because the Appellants had not submitted a "Statement of Estimated Income" for the 2008 – 2009 period. This June 23, 2010 letter also detailed the Minister's error respecting the

calculation of the entitlement for the January to June, 2008 period and the forgiveness of the resulting overpayment.

[10] That paragraph dealing with the Minister's error stated the following:

> According to the information in your file, your entitlement for the period of January to June 2008 was erroneously calculated based on an estimate of your spouse's 2008 income (combined with your actual 2006 income for the base calendar year).
>
> As your spouse did not complete or submit a signed 2008 Statement of Estimated Income (ISP3041) for the reported reduction in RRIF income, the adjustment of your entitlement was erroneously made without his or your consent or knowledge. Although you did receive a higher benefit for this period, the adjustment rate was paid to you in error. Since your spouse did not request an option at that time, and since you had no knowledge of the matter in which your benefit was calculated, the resulting overpayment for allowing the option will be forgiven.

[11] During the hearing, Ms. Katz referenced many of the errors committed by the Minister's office. Her frustration and exasperation were evident but understandably so. By the end of June, 2010, the Minister had committed the following errors commencing in 2008:

(1) Not promptly informing the Appellants that their GIS and Allowance amounts were not based on their 2008 estimated income due to a lack of documentation;

(2) No written decision from the Minister documenting the November 12, 2009 decision;

(3) No response to their January 14, 2010 letter until Ms. Katz followed up with the Minister in June, 2010;

(4) Shifting explanations regarding the reasons why the option was denied. First it was because the law changed as of July, 2008 (Bill C-36, now S.C. 2007, c. 11 which amended subsection 14(6) and limited it to only pension or employment income. However, these changes are not applicable to these appeals). Then the Minister's explanation stated that it was because there was no statement of income. And then the explanation offered was because a new policy denied RRIF income as pension income.

I am confident that in dealing with these varied approaches by Service Canada, the Appellants at times felt as if they were either walking through a field of land mines or trying to keep their heads above quicksand.

[12] Feeling they had no other avenue, the Appellants appealed the decision of June 23, 2010 in September, 2010 to the office of the Commissioner of Review Tribunals, which referred the matter to this Court under subsection 28(2) because the appeals deal with a determination of income.

The Appellants Argument

[13] Ms. Katz was an impressive and capable witness who displayed a remarkable handle on a complex piece of legislation both through her documentation and her testimony. She is seeking, on her own behalf as well as her late husband's estate, an adjustment to the GIS and Allowance amounts paid in the period, July, 2008 to June, 2009.

[14] She is requesting that these adjustments be based on their 2008 income, rather than their 2007 income. She claims that they submitted a statement of estimated income as required by subsection 14(4) and that they have suffered a loss of pension income due to the reduction in the RRIF. In addition, they are seeking a decision from this Court that would strike down the Minister's policy regarding the minimum annual withdrawal that is required in an RRIF, as being inconsistent with the legislation. Finally, the Appellants seek a directive from this Court that the Minister's withholding of policy information that should be otherwise available to taxpayers, violates natural justice principles.

The Respondent's Argument

[15] Respondent counsel in her submissions submitted that the issue of determination of entitlement to these benefit amounts is a very narrow one based upon the answers to two questions: did the Appellants suffer a loss of pension income and if so, when did the loss occur. The Respondent relied upon the decision of this Court in *Ward v. Minister of Human Resources and Social Development*, [2008] T.C.J. No. 21, in submitting that the Appellants did not "suffer" the loss since their withdrawals in 2007 were discretionary and not mandatory. In particular, the Respondent argued that without documentation, especially bank statements, this Court will be unable to verify if there was in fact a loss of pension income. Despite Respondent's requests, Ms. Katz over a four year period has not produced those bank

statements which would substantiate the RRIF value. Counsel also indicated to the Court that if Ms. Katz had produced documentary evidence to establish that the RRIF balance was reduced to zero, then the Minister would have consented to judgment.

Analysis

[16] During the hearing, Respondent counsel, to her credit, offered Ms. Katz a further opportunity to produce the bank statements in an effort to settle. Ms. Katz refused to produce those documents and, although invited by counsel to do so, I refused to order the Appellant, who had assumed carriage of her appeal before this Court, to produce those documents. It must be remembered that Respondent counsel was not undertaking to settle upon the production of those documents but to settle only if those documents, when produced, contained the essential information upon which the Minister could consent.

[17] It must also be remembered that the Appellants have the onus or burden of proof in these appeals and not the Minister. In addition, the jurisdiction of this Court in respect to appeals under the *OAS* is established in subsections 12(1) of the *Tax Court of Canada Act* and 28(2) of the *OAS Act*. The majority of the Appellants' requests to this Court are beyond its jurisdiction. Those requests include correction of administrative errors; ordering Service Canada to pay certain amounts, including interest; ordering Service Canada to disclose its policies that govern how the Minister makes decisions; a declaration that Service Canada's actions violate the principles of natural justice; and a directive that the new rules respecting GIS and Allowance will not apply to the Appellants. In respect to this last request, it remains unclear which "rules" the Appellants are referencing because the Minister has shifted the "rules" many times throughout the history of these appeals to deny the Appellants the remedy they seek.

[18] The Appellant, Ms. Katz, references in her materials to the Court, "issues in law which may have to be referred to the Federal Court of Canada". In making that statement, Ms. Katz may have recognized that many of those issues which she placed before me where in fact beyond my jurisdiction.

[19] I must agree with Respondent counsel in her assessment of the issues before me and, that is, the very narrow questions of whether there is a loss of pension income that the Appellants "suffered" and, if so, when did the loss occur.

[20] The Respondent argued that without appropriate documentation, the Appellants have failed to establish that a loss in fact occurred, when it occurred and that such a loss, if it occurred, was not at their discretion.

[21] From the evidence adduced, I believe some type of loss did occur but without those banking documents, the Appellant has failed to establish the existence of a loss of pension income, when it occurred, the amount of the loss and whether the pension withdrawals were discretionary or not. Exhibits R-4 and R-5, which were spreadsheets from the Appellants returns for taxation years 2008 and 2009, show an entry of $1,445.00 on line 115 referenced as “other pension income” on Mr. Wionzek’s 2008 return but there is no such entry on line 115 of his 2009 return. Respondent counsel suspected that this omission of an entry on line 115 in the 2009 return meant a loss of pension income; however, it was only supposition.

[22] Since the Appellants did not produce documentation relating to the RRIF, despite offers both prior to and during the hearing, I am unable to conclude that loss of pension income occurred, which is a prerequisite to engaging sections 14(4) and 14(6) of the *Act* for an adjustment to the GIS and Allowance. I would note also that if the statements had been produced, I would have been prepared to ignore the requirement respecting the Minister’s prescribed forms pursuant to section 35 of the *Act*.

[23] Respondent counsel relied upon the decision in *Ward* in respect to whether the Appellants “suffered” a loss. Hershfield, J. in discussing whether a loss was “suffered” concluded that where an individual controlled the ability to suffer the loss:

> [16] Clearly then, the subject provision contemplates something other than forecasted pension reductions control over which is entirely in the discretion of the annuitant. The annuitant is required to "suffer" a loss. The loss must be a "fait accompli". The forecast of a loss over which the annuitant has control to suffer, or not, is not a loss suffered. … (Paragraph 16)

The Appellants’ position regarding the *Ward* decision is that it is incorrectly decided on both the facts and the law but in any event the Appellants did in fact suffer a loss, regardless of whether or not it was a “fait accompli”. The Appellants proposed a dictionary definition of the word “suffer”. However, Ms. Katz did not address the potential abuse arguments raised by Hershfield, J. in *Ward* respecting individuals who artifically increase their RRIF’s to obtain an increased benefit. Although “suffer’ is not defined in the *Act*, the term, as it is used in the provision, must mean that the loss happens without any action on an individual’s part respecting the minimum

withdrawal amount per year. In other words, a choice respecting whether a loss will occur or not occur, is not within the ambit of this provision because choice implies some form of control over the occurrence or non-occurrence of the loss.

[24] The Respondent also submitted that the elimination of a RRIF and the consequent "loss" altogether of RRIF payments could trigger an "option" as it would be beyond the taxpayer's control and therefore not discretionary. Again because of a lack of proper documentation, there is no evidence, in these appeals, of the value of the RRIF, or if the December, 2007 withdrawal depleted the RRIF.

[25] The Appellants submitted that the two decisions of *Mattina v. Minister of Human Resources Development* [2006] T.C.J. No. 302 and of *Henriques v. Minister of Human Resources Development* [2006] T.C.J. No. 397 were relevant to these appeals. However, both can be easily distinguished based on the different investment entities utilized in the cases. In both these decisions, access to the funds was not controlled by the pensioners but instead they were defined payments from a managed investment entity. A RRIF is a different investment animal because it retains the element of control by the pensioner. These decisions would be applicable to the present appeals only if RRIF payments could be classified as pension payments under subregulation 14(f) and thus control would be irrelevant. It is apparent, however, that Hershfield, J. was aware of these cases as he referenced them but did not rely on them.

[26] Finally, I want to address the two payment periods, January 2008 to June 2008 and July, 2008 to June, 2009. The Appellants put only the second period, July 2008 to June, 2009 before this Court. The Respondent argued that both periods are in issue for two reasons:

(1) The Appellants requested a reconsideration of the entire two periods that is the period of time they received the GIS and;

(2) The drop in pension income in early 2008 would affect the 2007-2008 period.

As previously noted, the Minister has already issued its decision for the 2007-2008 period (January 2008 - June 2008) and although the Minister admits that decision was in error, the Appellants liability for the overpayment has been forgiven. This was clearly evidenced in the June 23, 2010 decision issued by the Minister. Since the Appellants did not request a reconsideration of the 2007 – 2008 period, I must conclude that the Minister cannot put this payment period into issue. If I allowed this

period to go forward, I would in effect, be permitting the Minister to appeal its own decision. In an income tax context, the Minister of National Revenue would not be permitted to appeal its own assessment and I see no reason not to extend this principle to the matter before me to preclude the Minister from challenging the 2007 – 2008 period.

[27] In conclusion, I am dismissing the Appellants' appeals in respect to the July, 2008 to June, 2009 payment period because without the pertinent RRIF documentation, the Appellants are unable to meet their burden which was to establish the occurrence of a loss of pension income, the timing of that loss and whether it was occasioned by discretionary or mandatory withdrawals. Consequently, the Appellants cannot establish that they in fact "suffered" a loss in accordance with the decision in *Ward*.

[28] The Minister will not be permitted to alter its decision respecting the first payment period, 2007 – 2008 and its request for a reconsideration of its decision affecting January 2008 to June, 2008 is denied. Although made in error, the Minister is simply "stuck" with its own bad judgment call.

[29] Lastly, although I have no jurisdiction to declare certain Service Canada policies and practices as unsatisfactory and/or illegal, I am in no way condoning the wholly unacceptable and reprehensible tactics employed by Service Canada in their dealings with these senior Appellants. The behaviour was highhanded and anything but commendable. Taxpayers, particularly seniors, deserve better from government departments in this country.

[30] The appeals respecting the payment period, July, 2008 to June, 2009 are dismissed, without costs.

Signed at Ottawa, Canada this 27th day of June 2012.

"Diane Campbell"

Campbell J.

CITATION:	2012 TCC 232
COURT FILE NOS.:	2012-200(OAS) 2012-203(OAS)
STYLE OF CAUSE:	SHARON KATZ v. THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT and THE ESTATE OF THE LATE ZENO WIONZEK v. THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	June 20, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice D. Campbell
DATE OF JUDGMENT:	June 27, 2012

APPEARANCES:

Agent for the Appellant:	Sharon Katz
Counsel for the Respondent:	Stephanie Coté

COUNSEL OF RECORD:

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