

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190613**

**Docket: A-9-18**

**Citation: 2019 FCA 180**

**CORAM: WEBB J.A.  
NEAR J.A.  
LASKIN J.A.**

**BETWEEN:**

**THE ESTATE OF KAM SING LEUNG**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on February 13, 2019.

Judgment delivered at Ottawa, Ontario, on June 13, 2019.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**NEAR J.A.  
LASKIN J.A.**

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**THE ESTATE OF KAM SING LEUNG**

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**Respondent**

**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] This is an application for judicial review of the decision of the Social Security Tribunal - Appeal Division (Appeal Division) dated November 17, 2017 (2017 SSTADIS 654). The Appeal Division dismissed the Estate's appeal from a decision of the Social Security Tribunal - General Division (General Division). The General Division determined that the earliest date on which Kam Sing Leung lacked the capacity to form or express an intention to apply for the guaranteed income supplement (GIS) under the *Old Age Security Act*, R.S.C. 1985, c. O-9 (OAS) was

April 2012. The Estate had submitted that the actual date on which she lacked such capacity was earlier.

[2] For the reasons that follow, I would dismiss this application for judicial review.

I. Background

[3] Kam Sing Leung was born in China. Her date of birth, for the purposes of the OAS, was found to be August 18, 1926. She immigrated to Canada in 1974 and lived here until she passed away in June 2015.

[4] She had been receiving GIS benefits prior to July 2009. However, she stopped receiving these benefits because her income tax return for 2008 was not filed.

[5] In September 2012, Sek-Yiu Leung (Ms. Leung's nephew), acting under a power of attorney, applied for GIS benefits on her behalf that covered the period from 2009 to 2013. Since paragraph 11(7)(a) of the OAS provides that GIS benefits cannot be paid for any month before 11 months preceding an application, the payment of her GIS benefits was approved effective October 2011.

[6] Sek-Yiu Leung asked for a reconsideration of this decision. By letter dated June 4, 2013, the Minister of Employment and Social Development agreed to use a deemed date of receipt of the application of April 2012. April 2012 was the deemed application date because this was the earliest date that the Minister accepted as the date that Ms. Leung lacked the capacity to form or

express the intention to apply for the GIS. The finding of the relevant incapacity as of April 2012 was based on the report of Dr. Cheung dated April 9, 2012. In this report, Dr. Cheung stated that:

In summary, this is an 88 year old lady who has had approximately 3 years of cognitive changes, likely with BPSD - behavioral and psychiatric manifestations of dementia.

[7] Therefore, the benefits were payable as of May 2011 (11 months before the deemed application date).

[8] On December 10, 2013, Sek-Yiu Leung requested that the Minister reconsider this decision. By letter dated August 21, 2014, the Minister confirmed that the incapacity of Ms. Leung began in April 2012.

[9] This reconsideration decision was appealed to the General Division in November 2014. Following the passing of Ms. Leung in June 2015, the Estate continued with the appeal. The argument of the Estate was that Ms. Leung was incapacitated as of an earlier date.

[10] The position of the Estate was that it is difficult, if not impossible, to accurately determine a date as of which a person suffering from dementia is incapacitated for the purposes of the OAS. Sek-Yiu Leung submitted that when the diagnosis of dementia was made in 2012, he reflected on prior events and concluded that Ms. Leung lacked capacity as of an earlier date. He submitted that she lacked capacity as of 2008.

[11] The incidents upon which Sek-Yiu Leung is relying to establish the earlier date of incapacity are outlined in a letter from him to CCAC (which presumably stands for Community Care Access Centre) dated May 8, 2012, a copy of which was submitted to the General Division.

These incidents and certain other related events can be summarized as follows:

- March 2008 – Ms. Leung, while in Hong Kong, was diagnosed with acute colon cancer and had surgery. She returned to Canada in May 2008.
- June 2008 – Ms. Leung expelled Stella (Sek-Yiu Leung’s wife) from the house following a dispute related to recycling certain items.
- June / July 2008 – Sek-Yiu Leung and Stella returned to Hong Kong.
- October 2008 – Sek-Yiu Leung and Stella returned to Canada. Their son was born in Toronto and they then left Canada with their newborn son.
- April 2009 – Sek-Yiu Leung came to Canada to assist Ms. Leung with her annual checkup at the oncology department of the Credit Valley Hospital and to assess her living situation.
- July 2009 – Sek-Yiu Leung, Stella and their son (Anson) returned to Canada after he had convinced his wife that Ms. Leung had changed. They all moved into a 4 bedroom house in January 2010.
- May 2010 – While on a walk with Anson in the local neighbourhood, Ms. Leung got lost.
- August 2010 – Sometime around midnight, following a dinner celebrating a birthday, Ms. Leung went to the bedroom of Sek-Yiu Leung and Stella and screamed about some lost jewellery. The jewellery was later found in the guest bathroom. Ms. Leung admitted that she was losing her memory.
- March 2011 – Sek-Yiu Leung gave Ms. Leung \$1,000 before he left for a business trip to Hong Kong / China. Ms. Leung told Stella that the money was gone but it was found later in stacks of recycled newspapers. Ms. Leung again admitted that she was losing her memory.
- January 2012 – Following a family outing to a restaurant and a grocery store, Ms. Leung, when they arrived back home, stated that her jewellery was missing and accused Sek Liu Leung and Stella of taking it. Ms. Leung pushed Stella away, left the house and went to a neighbour’s house. The neighbours came to ask Sek-Yiu Leung to bring Ms. Leung back. A few days later Ms. Leung slipped on the front steps.

- February 2012 – Sek-Yiu Leung, Stella and their son travelled to Hong Kong because his mother was gravely ill. Sek-Yiu Leung’s mother passed away while they were in Hong Kong. They stayed a total of six weeks in Hong Kong. While they were away, they had a family friend check in on Ms. Leung every 2 or 3 days.

[12] The General Division reviewed the evidence that was presented to it which also included the Declaration of Incapacity – Physician’s Report prepared by Dr. Wu and dated January 23, 2013. This report stated that Ms. Leung’s incapacity began September 29, 2011 and that the medical condition that caused the incapacity was dementia. However, no explanation was provided for choosing the date of September 29, 2011 as the date of incapacity.

[13] The General Division concluded that there was insufficient evidence to establish that Ms. Leung was incapacitated at any earlier time than April 2012.

[14] The Appeal Division dismissed the appeal from the decision of the General Division noting in particular that Ms. Leung had signed a power of attorney on July 3, 2008, she managed to look after herself while Sek-Yiu Leung and Stella were in Hong Kong for 6 weeks in February and March of 2012 and that the medical evidence was of little assistance in determining a precise date as of which Ms. Leung was incapacitated.

## II. Issues and Standard of Review

[15] The Estate has raised a number of issues in its memorandum of fact and law. Essentially the issues all relate to the conclusions drawn from the evidence that was presented and whether the Appeal Division erred in dismissing the appeal.

[16] The standard of review for the decision made by the Appeal Division is reasonableness (*Cameron v. Canada (Attorney General)*, 2018 FCA 100, at para. 3). This decision can only be set aside if it is unreasonable.

### III. Analysis

[17] Subsection 28.1(1) of the OAS provides that an application will be considered to be received as of a date that is earlier than the date it is actually received if the person was incapable of forming or expressing the intention to make the application:

**28.1(1)** Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person was incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

**28.1(1)** Dans le cas où il est convaincu, sur preuve présentée par une personne ou quiconque de sa part, qu'à la date à laquelle une demande de prestation a été faite, la personne n'avait pas la capacité de former ou d'exprimer l'intention de faire une demande de prestation, le ministre peut réputer la demande faite au cours du mois précédant le premier mois au cours duquel le versement de la prestation en question aurait pu commencer ou, s'il est postérieur, le mois au cours duquel, selon le ministre, la dernière période pertinente d'incapacité de la personne a commencé.

[18] Sek-Yiu Leung submitted that Kam Sing Leung was incapacitated as of 2008. The incidents upon which Sek-Yiu Leung is relying to establish an earlier date of incapacity are set out in paragraph 11. These isolated incidents occurred sporadically with intervals of several months in between. Subsection 28.1(3) of the OAS provides that:

**28.1(3)** For the purposes of subsections (1) and (2), a period of incapacity must be a continuous period, except as otherwise prescribed.

**28.1(3)** Pour l'application des paragraphes (1) et (2), une période d'incapacité est continue, sous réserve des règlements.

[19] Therefore, for the purposes of subsection 28.1(1) of the OAS, “the month that the Minister considers the person’s last relevant period of incapacity to have commenced” must be the month in which a continuous period of incapacity has commenced. It is far from clear whether Ms. Leung was incapacitated during each and every one of the alleged incidents related to her behaviour that occurred from 2008 to early 2012. In any event, there is nothing to indicate that during the period of time between the various isolated incidents that are described by Sek-Yiu Leung, Ms. Leung was incapacitated. Of particular note is that she was able to look after herself, on her own, for a period of 6 weeks while Sek-Yiu Leung and Stella were in Hong Kong in February and March of 2012. As Sek-Yiu Leung noted, a friend only checked in on her every 2 or 3 days and there is no indication that in doing so the friend discovered any particular problem with how Ms. Leung was looking after herself.

[20] This Court in *Canada (Attorney General) v. Danielson*, 2008 FCA 78, stated, at paragraph 7, that “the activities of a claimant during that period may be relevant to cast light on his or her continuous incapacity to form or express the requisite intention and ought to be considered”. Therefore, it was appropriate for the Appeal Division to consider the activities of Ms. Leung prior to April 2012 to determine if the General Division erred in determining that she did not meet the test for incapacity for the purposes of section 28.1 of the OAS, prior to April 2012.



[21] Sek-Yiu Leung submitted that the incidents were “continuous” because they continued to occur. However, the language of subsection 28.1(3) of the OAS is that the period of incapacity must be a continuous period, not that isolated incidents of incapacity continue to occur.

[22] As acknowledged by the Appeal Division, dementia is a progressive disease and it is not easy to ascertain an exact date on which a person suffering from this disease commences to be incapacitated for a continuous period. Based on the record in this case, there is no basis to find that the decision of the Appeal Division to dismiss the Estate’s appeal was unreasonable.

[23] The Crown is not seeking costs in this matter. I would therefore dismiss the application for judicial review, without costs.

"Wyman W. Webb"

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J.A.

“I agree  
D. G. Near J.A.”

“I agree  
J.B. Laskin J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A DECISION OF THE APPEAL DIVISION OF THE  
SOCIAL SECURITY TRIBUNAL OF CANADA DATED NOVEMBER 17, 2017  
(TRIBUNAL FILE NUMBER: AD-16-1301)**

**DOCKET:** A-9-18

**STYLE OF CAUSE:** THE ESTATE OF KAM SING  
LEUNG v. ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 13, 2019

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** NEAR J.A.  
LASKIN J.A.

**DATED:** JUNE 13, 2019

**APPEARANCES:**

Sek-Yiu Thomas Leung FOR THE APPLICANT

John Unrau FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nathalie G. Drouin FOR THE RESPONDENT  
Deputy Attorney General of Canada