Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 223

Tribunal File Number: AD-15-29 and AD-15-30

BETWEEN:

**J. C.**

Appellant

and

**Minister of Employment and Social Development**
**(formerly known as the Minister of Human Resources and Skills Development)**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Janet Lew

HEARD ON October 19, 2015

DATE OF DECISION: June 20, 2016

## REASONS AND DECISION

## IN ATTENDANCE

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|---|---|
| Representative for the Appellant | Kevin Love (counsel) |
| Representative for the Respondent | Hasan Junaid (counsel) |

## OVERVIEW

[1] This appeal relates to two applications to rescind or amend a decision rendered by a Canada Pension Plan Review Tribunal (Review Tribunal) on November 22, 2011. This case is about whether the two applications are statute-barred by operation of subsection 66(2) of the *Department of Employment and Social Development Act* (DESDA).

[2] On November 26, 2012, the Appellant filed an application with the Office of the Commissioner of Review Tribunals, to re-open the decision of the Review Tribunal, pursuant to subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013 (the "First Application"). The Appellant filed a second application on April 24, 2013 but as the Social Security Tribunal had commenced operations by then, the application was considered filed with the Social Security Tribunal, pursuant to subsection 66(2) of the DESDA (the "Second Application").

[3] On October 22, 2014, the General Division dismissed both the First and Second Applications, as it found they were statute-barred under subsection 66(2) of the DESDA, by operation of subsection 261(1) of the *Jobs, Growth and Long-term Prosperity Act* (JGLPA). The Appellant sought leave to appeal both decisions of the General Division. I granted leave to appeal on February 23, 2015, on the grounds that the General Division may have failed to observe a principle of natural justice or may have erred in law in determining that one or both applications to rescind or amend were statute-barred.

[4] Given the complexities of the legal issues involved and by request of the parties, the appeals proceeded in person. Both appeals were heard together.

## HISTORY OF PROCEEDINGS

[5] The Appellant applied for a Canada Pension Plan disability pension on February 9, 2010. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to a Review Tribunal.

[6] The Review Tribunal found that the Appellant had a severe disability, but dismissed her appeal as it did not consider her disability "prolonged" under the *Canada Pension Plan*. The decision of the Review Tribunal was communicated to the Appellant on January 5, 2012. The Appellant did not appeal this decision of the Review Tribunal.

[7] On November 26, 2012, the Appellant filed an application with the Office of Commissioner of Review Tribunals to re-open the decision of the Review Tribunal, pursuant to subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013. The Appellant filed a medical report dated August 21, 2012 from her family physician. The Appellant explained that she had not previously submitted her family physician's letter to the Review Tribunal because he could not render an opinion regarding the prolonged nature of her disability until then. It was only recently that her family physician had been able to form the opinion that treatment options had been unsuccessful and that her condition therefore was prolonged. The Appellant submits that she has attained maximal medical improvement and that her disability is in fact "long continued and of indefinite duration".

[8] As a Review Tribunal did not decide this First Application prior to April 1, 2013, it was transferred to the Social Security Tribunal, pursuant to subsection 261(1) of the JGLPA. Under that subsection, if no decision had been made before April 1, 2013, in respect of a request made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229 of the JGLPA, it is deemed to be an application made on April 1, 2013 under section 66 of the DESDA and is deemed to relate to a decision made, by the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal.

[9] On April 24, 2013, the Appellant filed her Second Application to rescind or amend, this time with the Social Security Tribunal. She included the same medical report dated August 21, 2012 from her family physician.

[10] On July 30, 2014, the Appellant provided a copy of a medical record dated October 11, 2012 from her psychiatrist. There was also a note from her medical social worker that an update would be forthcoming.

[11] On September 25, 2014, the Appellant provided a second copy of the medical record dated October 11, 2012 from her psychiatrist, and the medical report dated August 21, 2012 from her family physician. The Appellant also provided a copy of a medical record dated August 14, 2014 from her family physician and a letter dated August 25, 2014 from the medical social worker. The Appellant noted that she would be submitting additional documentation from her psychiatrist in October 2014. She asked that the Social Security Tribunal contact her if, "this information will be too late to support [her] case".

[12] On October 17, 2014, the Appellant provided a copy of a medical record dated October 16, 2014 from her psychiatrist.

[13] The General Division proceeded to hear both applications on the written record, without a hearing.

**GENERAL DIVISION DECISION**

[14] In two separate decisions, the General Division dismissed the First and Second Applications to rescind or amend the decision of the Review Tribunal, on the grounds that the applications were statute-barred under section 66 of the DESDA and therefore had not been made within the prescribed statutory time limit. The General Division did not determine whether the evidence filed in support of both applications qualified as "new material facts" that could not have been discovered at the time of the hearing with the exercise of reasonable diligence, and whether then, based on all of the evidence, the Appellant could be found disabled under the *Canada Pension Plan* on or before her minimum qualifying period.

[15] In regards to the First Application to rescind or amend, the General Division wrote:

> [22] The combined effect of [subsection 261(1) of the JGLPA and subsection 66(2) of the DESDA] is that a request under subsection 84(2) CPP that had not been heard by April 1, 2013 is treated as an application under s. 66 DESDA that was made on April 1, 2013. If it relates to a decision that was communicated to a person before April 1, 2012, it is barred by subsection 66(2) DESDA because it was not made within one year.
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> [23] The 2011 Review Tribunal decision was communicated to the Applicant on January 5, 2012. As a result, her November 26, 2012 application to rescind or amend that decision is statute-barred.

[16] The General Division cited *Austria (aka Tabingo) v. Canada (Citizenship and Immigration)*, 2014 FCA 191, and determined that Parliament could not have intended the transitional provisions to have any retrospective effect, otherwise it would have clearly stated this in the legislation.

[17] The General Division also concluded that, as the Appellant had not made the Second Application within one year after the day on which the decision of the 2011 Review Tribunal had been communicated to her, it too was statute-barred. The General Division acknowledged that the deeming provisions and the statutory bar set out in subsection 66(2) of the DESDA might seem particularly unfair, as someone such as the Appellant could never be in compliance with them. However, the General Division determined that it was bound by the DESDA and that it did not have any equitable jurisdiction to disregard the time limit set out in subsection 66(2) of the DESDA.

## LEAVE DECISION

[18] I granted leave to appeal on two grounds, whether the General Division may have:

1. failed to observe a principle of natural justice when it did not give notice to the parties that it intended to dismiss both applications on the basis of the JGLPA and DESDA, neither of which were in force and effect when the Appellant filed her First Application, and

2. erred in law in determining that both applications were statute-barred pursuant to subsections 66(2) of the DESDA and 261(1) of the JGLPA.

**ISSUES**

[19] As a preliminary matter, the parties agree that if the General Division failed to observe a principle of natural justice, i.e. failed to give notice that it intended to dismiss both applications on the basis that they were statute-barred, without inviting submissions from the parties, the Appeal Division can properly address the limitation issue.

[20] Both parties also agree that if I should determine that the General Division erred in law in determining that either or both applications to rescind or amend were statute- barred, that the appropriate disposition is that the matter be remitted to the General Division for an assessment on the merits as to whether any of the evidence filed in support of the application(s) qualifies as "new facts", as that term is defined by the DESDA, given that the General Division is the primary fact-finding body.

[21] The remaining issues before me therefore are as follows:

1. Is a standard of review analysis applicable when reviewing decisions of the General Division?
2. Did the General Division fail to observe a principle of natural justice when it did not give notice to the parties that it intended to dismiss both applications, on the basis of the JGLPA and DESDA, neither of which were in force and effect when the Appellant filed her First Application?
3. Did the General Division err in law in determining that both applications were statute-barred pursuant to subsections 66(2) of the DESDA and 261(1) of the JGLPA?

**ISSUE 1: STANDARD OF REVIEW**

**(a) Appellant's submissions**

[22] Counsel for the Appellant submits that there is no common-law standard of review analysis in a statutory appeal to an administrative tribunal, and that the Appeal Division

should simply apply the grounds of appeal set out in subsection 58(1) of the DESDA. Counsel submits that a standard of review analysis is engaged when a court is reviewing a decision made by a statutory decision-maker. He submits that a standard of review analysis recognizes that the tribunal under review generally has expertise relative to the courts and that Parliament has specifically tasked the Social Security Tribunal, and not the courts, with adjudicating certain matters. Counsel submits that these policy considerations are not engaged where Parliament has created a statutory right of appeal to a specialized tribunal (although in this case there is no statutory right of appeal as the Appellant was required to seek leave).

[23] The Appellant's counsel submits that Parliament can legislate more limited grounds for appeal, as it has with respect to factual errors in paragraph 58(1)(c) of the DESDA. Counsel submits however that, for non-factual matters, there is no reason the Appeal Division should defer to the General Division or a Review Tribunal. Counsel submits that the Appeal Division is the senior tribunal in the administrative system governing the *Canada Pension Plan.* He submits that it is a specialized tribunal with a specific statutory mandate to interpret and apply the *Canada Pension Plan.* He submits that the Appeal Division plays a critical role in ensuring that the General Division applies the law in a consistent manner, which ensures that similarly situated claimants across the country do not receive vastly different treatment under the *Canada Pension Plan.*

[24] Given these considerations, counsel submits that it is unnecessary for the Appeal Division to engage in any standard of review analysis. Notwithstanding these submissions, the Appellant agrees with the Respondent that the test to apply for the legal and jurisdictional issues raised in this appeal is whether the General Division correctly determined the issues.

### (b) Respondent's submissions

[25] Counsel submits that the Appeal Division was modeled after the former Employment Insurance Umpires and that previous jurisprudence had determined the standard by which Umpires were to consider decisions of the former Boards of Referees.

Counsel submits that, for this reason, the Appeal Division should adopt the standard of review analysis undertaken by the Umpires.

[26] Counsel submits that it is appropriate for the Appeal Division to determine the proper standard of review by conducting what he characterizes as a "modified" standard of review analysis, which considers the following:

1. the respective roles and expertise of the General Division and the Appeal Division;
2. Parliamentary intent;
3. the degree of deference to be accorded to the General Division;
4. the nature of the questions at issue; and
5. the application of the standards of correctness and reasonableness in practice.

[27] Counsel notes that the grounds of appeal under subsection 58(1) of the DESDA are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in subsection 115(2) of the *Employment Insurance Act* (since repealed). In *Canada (Attorney General) v. Merrigan*, 2004 FCA 253 at para. 9, the Federal Court of Appeal described the appeal of a decision of the Board of Referees to the Employment Insurance Umpires as a "circumscribed review", as the substance of the Umpires' jurisdiction on appeal was considered to be largely identical to that of the Federal Court of Appeal on judicial review.

[28] Counsel also notes that the powers conferred upon the Appeal Division under subsection 59(1) of the DESDA are identical in substance to those powers exercised by the Employment Insurance Umpires under the former section 117 of the *Employment Insurance Act* (since repealed).

[29] Counsel submits that these similarities in the applicable sections of the DESDA and the *Employment Insurance Act* signal Parliament's intent to replicate the nature of appeals to Umpires and Umpires' powers.

[30] Counsel argues that, based on this modified standard of review analysis as well as jurisprudence from the Supreme Court of Canada and the Federal Court of Appeal, the Appeal Division should apply a correctness standard to decisions of the General Division on questions of law, and a reasonableness standard on questions of fact and mixed questions of law and fact. He submits that the issue whether the appeal is statute-barred is a question of law and should be reviewed on a correctness standard.

[31] Counsel acknowledges that, when he prepared his submissions, the Federal Court of Appeal had yet to determine what standard of review the Appeal Division should apply when reviewing decisions of the General Division or the degree of deference the Appeal Division should accord to the General Division's decisions on questions of law, questions of fact and questions of mixed law and fact.

**(c) Standard of review**

[32] There are similarities in language between former sections of the *Employment Insurance Act* and the DESDA, which set out the grounds of appeal and the powers of the Umpire and the Appeal Division, respectively. The similarities suggest that the Appeal Division should conduct the same "circumscribed review" which the Umpires had performed. However, the Federal Court of Appeal cautions against "borrowing from the terminology and the spirit of judicial review in an administrative appeal context".

[33] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that a standard of review analysis is not appropriate when the Appeal Division is reviewing appeals of decisions rendered by the General Division. The Federal Court of Appeal endorsed this approach in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[34] As the Federal Court of Appeal pointed out in *Jean*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. Subsection 58(1) of the DESDA sets out the grounds of appeal, and subsection 59(1) of the DESDA sets out the powers of the Appeal Division.

[35] The Federal Court of Appeal recently provided some clarity to this issue. In *Canada (Minister of Citizenship and Immigration) v. Huruglica et al.,* 2016 FCA 93, the Federal Court of Appeal indicated that the determination of the role of a specialized administrative body is "purely and essentially a question of statutory interpretation" (at paragraph 46). Although the decision was in the context of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, undertaking the same exercise would require us to analyze the words of the DESDA in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the DESDA and its object. I will address the purpose and object of the DESDA, along with the applicable sections below, in my analysis on whether the General Division might have erred in determining that the new facts applications were statute-barred under the JGLPA and the DESDA.

[36] Ultimately, the Federal Court of Appeal determined in *Huruglica* that there was nothing in the wording of the IRPA, read in the context of the legislative scheme and its objectives, that support the application of a standard of reasonableness or of palpable and overriding error to any findings of fact or mixed fact and law made by the Refugee Protection Division. At paragraph 78, the Federal Court of Appeal held that, at that stage of its analysis, the role of the Refugee Appeal Division was to intervene when the RPD was wrong in law, in fact or in fact and law. This translated into an application of the correctness standard of review.

[37] After conducting its statutory analysis, the Federal Court of Appeal concluded that, with respect to findings of fact and mixed fact and law, which raised no issue of credibility of oral evidence, the RAD is to determine if the RPD decisions are correct. After carefully considering the RPD decision, the RAD is to carry out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. The Federal Court of Appeal determined that no other interpretation of the relevant statutory provisions was reasonable.

[38] Applying the principles set out by the Federal Court of Appeal, the Appeal Division in this case should restrict itself to determining whether the General Division erred in law in concluding that the appeals were statute-barred. This is the approach advocated by the Appellant's counsel.

**ISSUE 2: ERRORS**

**(a) Did the General Division fail to observe a principle of natural justice?**

[39] The Appellant's counsel submits that the General Division failed to observe a principle of natural justice or that there was a breach of procedural fairness, in that it should have provided the Appellant, who was unrepresented at the time, with an opportunity to address the limitation issue, before dismissing her appeal on that basis. Counsel submits that the Appellant could not have known the case she was required to meet, given the circumstances. She had filed the First Application before a limitation issue existed, and she could not have anticipated then that her appeal would be transferred to the General Division and that it would be deciding her appeal based on the limitation issue.

[40] Counsel for the Respondent submits that there was no breach of natural justice, as the General Division had the jurisdiction to decide the issues before it and as it was entitled to proceed on the record. The Respondent's counsel submits that "as there is no equity or common law doctrine that could supplant the clear language of the legislation, the [General Division] was correct to not require further submissions".

[41] Counsel for the Respondent submits that, in any event, if I should find that there was a breach of natural justice, the remedy does not require that the matter be remitted to the General Division, as I would be left to determining whether the applications were indeed statute-barred. Counsel submits that this ground of appeal is closely intertwined with the issue of whether the matter is statute-barred. Counsel submits that if the Appeal Division finds that there was no error in the General Division's finding that the application was statute-barred, remitting the matter to the General Division on an issue of natural justice would be moot.

[42] In *Bossé v. Canada (Attorney General)*, 2015 FC 1142 at para. 30, the Federal Court wrote that "the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected". It set out a non-exhaustive list of criteria to apply to define the content of the duty of fairness established by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. These include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[43] The Federal Court also wrote at paragraph 33 that the purpose of the DESDA, the nature of the rights concerned, the Tribunal's operational constraints, the Tribunal's specific clients, and all other relevant factors must be taken into account in order to identify the extent of the rules of procedural fairness. *Bossé* related to the procedures before the Appeal Division, and was concerned with accessibility for clients likely to appeal from a decision. In that case, the applicant claimed that he did not have the opportunity to explain to the Tribunal why leave to appeal the decision of the General Division should have been granted to him by a member of the Appeal Division. He had completed his notice of appeal on the basis of errors of fact and law, but did not know that he had to give more details about his reasons, as he was under the belief that he would be called at a later date to explain his reasons. The Federal Court cited paragraph 41(a) of the DESDA, which confers a discretionary power on the Appeal Division to request additional information before granting or refusing leave to appeal. Although the paragraph confers a discretionary power, the Federal Court held that the "applicant's rights must still be determined on the basis of fair and due process".

[44] The Federal Court also looked at the summary dismissal procedure under subsection 53(1) of the DESDA, by way of analogy. Under subsection 53(1) of the DESDA and section 22 of the *Social Security Tribunal Regulations*, the General Division is required to give notice in writing to an appellant and allow reasonable time for submissions.

[45] The Federal Court found that the member of the Appeal Division knew, when looking at the notice of appeal, that there were "major deficiencies" to the extent that the lack of additional details on the principal ground of appeal would result in the dismissal of the applicant's appeal. The Federal Court determined that the Appeal Division member should have stayed the consideration of the notice of appeal, to allow time for additional details, in accordance with the "applicant's legitimate expectations".

[46] Subsection 28(a) of the *Social Security Tribunal Regulations* enables the General Division to make the decision on the basis of the documents and submissions filed. Accordingly, counsel for the Respondent submits that there can be no breach of natural justice as the General Division had the jurisdiction to proceed on the record without providing any notice to the Appellant.

[47] While that may be so, that the General Division had the jurisdiction under the DESDA to proceed on the record, when the Appellant initially filed for First Application, she was not subject to any limitation period in regards to her application, as the limitation period did not even exist at that time. The Appellant's legitimate expectations were that her appeal would be decided on the merits of her claim. She could not have expected or known that when she filed her First Application, that it might be subject to a limitation period which had yet to arise or exist. This is distinct from the situation that existed before the Federal Court in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, where the Federal Court held that it was an error for the Appeal Division to consider the applicant's application for leave to appeal based on her legitimate expectations when she filed her application with the Pension Appeals Board.

[48] In *Belo-Alves*, the Appeal Division had determined that the applicant was entitled to have her application evaluated as a *de novo* appeal, pursuant to subsection 84(1) of the *Canada Pension Plan*, as it read immediately before April 1, 2013. The Federal Court held that there is no discretion to deviate from the DESDA and apply the former test in the circumstances, notwithstanding the fact that the applicant in that case applied for leave to appeal prior to the introduction of new legislation governing applications for leave to appeal under the *Canada Pension Plan* and might have held an expectation that her application for

leave to appeal would be evaluated in the same manner in which the Pension Appeals Board had evaluated applications for leave to appeal.

[49] Both cases deal with an applicant's "legitimate expectations". In *Belo-Alves*, the Federal Court dealt with an applicant's procedural expectations, but it did not extinguish any rights which the applicant held as he was still entitled to have his application for leave to appeal evaluated. In *Bossé*, on the other hand, the Federal Court was concerned with accessibility and ensuring "fair and due process". The Federal Court indicated that the process chosen by the Tribunal in that case seemed permitted by the provisions of the Regulations, as long as it did not cause any prejudice to the applicant and did not prevent him from explaining why the appeal had a reasonable chance of success. I find that the proceedings before me fall into this latter category, and that the "legitimate expectations", also are concerned with fair and due process. In this case, notwithstanding the fact that the General Division had the jurisdiction under the DESDA to proceed on the record without providing any notice to the Appellant, it was still overall required to determine her rights on the basis of fair and due process, given that she now might be subject to a limitation which had not previously existed.

[50] The General Division was aware that one interpretation of the DESDA and the JGLPA would result in a dismissal of the proceedings. Nonetheless, it heard the appeal "on the record", when it could have also chosen to hear the matter by videoconference, teleconference or by personal appearance of the parties, or issued written questions and answers. Yet, the General Division did not invite any submissions from the Appellant, in accordance with her "legitimate expectations". Before proceeding on the record, the General Division should have enquired whether proceeding in such a manner would fulfill and meet the requirements of fair and due process.

[51] On the underlying unique facts of this case where the legislation changed and may have imposed a limitation period where one did not exist previously, I accept the Appellant's submissions that, when proceedings are going to be dismissed on the written record when her "legitimate expectations" were that the appeal would be assessed on its merits, the General Division should under those circumstances, accord an appellant the

opportunity to know the case she is to meet and invite submissions accordingly. In this instance, the parties agree that it would be moot for me to return the matter to the General Division on this issue, as I will be determining whether the applications were indeed statute-barred.

### (b) Did the General Division err in law in determining that the new facts applications are statute-barred?

[52] Counsel for the Respondent submits that, as part of the legislative and administrative changes that occurred when the Social Security Tribunal came into being, a limitation period was imposed on new facts applications in the new subsection 66(2) of the DESDA, whereas none had existed under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013.

[53] Section 66 of the DESDA has replaced subsection 84(2) of *the Canada Pension Plan*, as it read immediately before April 1, 2013. Counsel for the Respondent submits that, unlike subsection 84(2) of the *Canada Pension Plan*, subsection 66(2) provides that a new facts application must be made within one year after a decision is communicated.

[54] Counsel for the Respondent submits that although the Appellant had brought the First Application within one year of the decision of the Review Tribunal having been communicated to her, it is statute-barred, as it is deemed to have been made more than one year after the decision of the Review Tribunal had been communicated to her, by operation of subsection 261(1) of the JGLPA. That subsection provides that where a new facts application made under subsection 84(2) of the *Canada Pension Plan* has not been decided before April l, 2013, it is deemed to be an application made on April 1, 2013, under section 66 of the DESDA.

[55] Counsel for the Appellant submits that the General Division misconstrued the purpose of the transitional provisions in the JGLPA and erroneously concluded that the Appellant's applications to re-open her Review Tribunal decision were made out of time. Counsel argues that the very purpose of the transitional provisions in the JGLPA is to transfer jurisdiction over undecided applications from the Review Tribunals, the Pension

Appeals Board, the Employment Insurance Board of Referees and the Employment Insurance Umpires (the "Legacy Tribunals") to the Social Security Tribunal, rather than to effectively terminate the applications altogether.

[56] The Appellant's counsel submits that the General Division's interpretation is inconsistent with the legislative scheme, the intention of Parliament, and the presumption against retroactive interference with vested rights. Counsel further argues that the General Division's interpretation also gives rise to absurd and unfair results, namely, that claimants who properly filed applications to re-open decisions now lose their rights simply because the Review Tribunal did not hear these appeals prior to April 1, 2013, for reasons beyond the control of the applicants.

## The First Application to Re-open

### i. Rules of statutory construction

- **Presumptions against retroactivity and interference with vested rights**

[57] The Appellant's counsel argues that when the Appellant filed her First Application, she had a right to a decision on the merits of that application. The Appellant's counsel maintains that the General Division's interpretation of subsection 66(2) of the DESDA results in the following, that it:

(a) effectively deems the First Application to have never been made;

(b) retroactively imposes a time limit that did not exist when the Appellant filed the First Application; and

(c) extinguishes the Appellant's vested right to a decision on the merits of her First Application.

[58] The Appellant's counsel submits that legislation should not be interpreted as retroactively interfering with vested rights unless Parliament clearly indicates such an

intention. In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,* [1977] I S.C.R. 271, Dickson J. (as he then was) held at page 279 for the majority of the Court:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

[59] And, at page 282:

> The rule is that a statute should not be given a construction that would impair existing rights . . . unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board,* 1933 CanLII 87 (SCC), [1933] S.C.R. 629, at p. 638.

[60] The Respondent asserts that the General Division's interpretation is consistent with *Gustavson* and with *Tabingo v. Canada (Minister of Citizenship and Immigration),* 2013 FC 377 at paras 17 to 37, affirmed at *Austria (aka Tabingo) v. Canada (Minister of Citizenship and Immigration),* 2014 FCA 191 at paras. 75 to 81; application for leave to appeal to the Supreme Court of Canada, dismissed April 30, 2015. The Respondent asserts that ultimately the General Division was correct in its interpretation of the law. The Respondent's counsel urges me to follow the Federal Court's decision *Tabingo,* where Rennie J. expressed the view that "if the plain and obvious meaning of legislation requires that it be retrospective and interfere with vested rights, it is valid, regardless of any perceived unfairness".

[61] The Respondent's counsel argues that the language in section 261 of the JGLPA and subsection 66(2) of the DESDA requires the construction given by the General Division. In other words, he claims that the language indicates that Parliament clearly intended to bar applications such as those made by the Appellant, even if it is done retrospectively.

[62] In *Austria,* the Federal Court of Appeal recognized that Parliament has the authority to enact laws that have retrospective effect, although:

> [77] . . . it is presumed that retrospective effect is not intended unless the law is so clear that it cannot reasonably be interpreted otherwise: *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue),* 1975 CanLII 4 (SCC), [1977] 1

> S.C.R. 271 at pages 279 to 283, *Imperial Tobacco Canada Ltd.*, cited above, at paragraphs 69 to 72.
>
> [78] I have already concluded, for reasons stated earlier in these reasons, that subsection 87.4(1) of the [*Immigration and Refugee Protection Act*] is sufficiently clear to terminate the appellants' applications retrospectively.

[63] It is instructive, in turn, to review the language of subsection 87.4(1) of the *Immigration and Refugee Protection Act*. It reads as follows:

> **87.4** (1) An application by a foreign national for a permanent resident visa as a member of the prescribed class of federal skilled workers that was made before February 27, 2008 is terminated if, before March 29, 2012, it has not been established by an officer, in accordance with the regulations, whether the applicant meets the selection criteria and other requirements applicable to that class. (my emphasis)

[64] As I indicated in my leave decision, the Appellant's representative at the time noted that subsection 87.4(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, used the language "terminated" to retroactively revoke vested rights. The Appellant's representative further submitted that section 87.4(1) also "clearly sets out the class of affected persons, the affected timeline and the conditions upon which termination occurs". The Appellant's representative submitted that in the case of the JGLPA, if there is a revocation of vested rights, it only emerges as a legal issue when combining two distinct statutes, neither of which on their own sets out a date of termination nor expressly notes an intent to revoke any vested right of any applicant.

[65] Subsection 261 of the JGLPA reads:

> **261.**(1) If no decision has been made before April 1, 2013, in respect of a request made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the *Department of Human Resources and Skills Development Act* and is deemed to relate to a decision made, as the case may be, by
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> (a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or

(b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

(2) An application made under section 66 of the *Department of Human Resources and Skills Development Act* after March 31, 2013 is deemed to relate to a decision made, as the case may be,

(a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or

(b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

[66] Subsection 66(2) of the DESDA reads:

> **66.**(2) An application to rescind or amend the decision must be made within one year after the day on which the decision is communicated to the appellant.

[67] If I were to accept the Respondent's submissions that I should apply a strict and literal interpretation to subsection 261(1) of the JGLPA and section 66 of the DESDA, the sections should be sufficiently clear to terminate applications made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, and they should not be open to any other interpretations. Unlike subsection 87.41(1) of the *Immigration and Refugee Protection Act*, however, neither subsection 261(1) of the JGLPA or section 66 of the DESDA expressly terminates any applications made prior to April 1, 2013. Had Parliament intended to terminate applications made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, surely it would have specifically provided for this, rather than having applications incidentally retrospectively terminated by the limitation period set out in subsection 66(2) of the DESDA. Subsection 261(1) of the JGLPA and section 66 of the DESDA do not use the express language that the "applications are terminated", or words to that effect, as had been the case in *Austria*.

[68] The appellants in *Austria* argued that when they submitted their permanent resident visa applications, they had a vested right to have their applications processed to completion and to have them considered under the statutory provisions and regulations in effect when the applications were submitted. The Federal Court of Appeal determined that there was no merit to this argument. While the appellants had the right to apply for permanent residence

visas and, when they submitted their applications, had the right to have their applications considered in accordance with the *Immigration and Refugee Protection Act*, they did not have the right to the continuance of any provisions of that Act as in effect when they submitted their applications. The Federal Court of Appeal came to this conclusion because subsection 87.4(1) of that Act was sufficiently clear to terminate the appellant's applications retrospectively, whereas in *Dikranian v. Quebec*, [2005] 3 S.C.R. 530, the Supreme Court of Canada held that certain amendments to provincial legislation were not clear enough to abrogate contractual rights of students prior to the amendments.

[69] The Supreme Court of Canada in *Dikranian* held that the presumption against interfering with vested rights is not limited to those cases in which there is ambiguity, and that the first step should be to determine Parliamentary intent. Bastarache J., writing for the majority at paragraph 36, endorsed the following statement of the law from Professor R. Sullivan, in *Sullivan v. Driedger on the Construction of Statutes* (4th ed. 2002), at page 576):

> The values embodied in the presumption against interfering with vested rights, namely avoiding unfairness and observing the rule of law, inform interpretation in every case, not just those in which the court purports to find ambiguity. The first effort of the court must be to determine what the legislature intended, and ... for this purpose it must rely on all the principles of statutory interpretation, including the presumptions.

[70] The Appellant's counsel argues that had Parliament intended the harsh and unfair result which results with a strict and literal interpretation, it could have said so clearly and directly. He contends that, instead, Parliament drafted the transitional provisions to ensure undecided appeals and applications are resolved by the Social Security Tribunal. He maintains that there is nothing in the JGLPA, the DESDA, or the *Canada Pension Plan* to rebut the presumptions against retroactivity and interference with vested rights.

- **Parliamentary intent**

[71] The Appellant's counsel submits that under the principles of statutory interpretation, the First Application is not statute-barred. The Appellant's counsel submits that, even if sections 261 of the JGLPA and 66 of the DESDA could be interpreted to act as

a statutory bar in the case of the First Application, the principles of statutory interpretation require us to look beyond a strict and literal interpretation of the statute. This was the approach articulated by Elmer Driedger in *Construction of Statutes* (2nd ed. 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.

[72] The Appellant's counsel notes that the Supreme Court of Canada endorsed this approach in *Rizzo v. Rizzo Shoes,* [1998] 1 S.C.R. 27 at para. 21.

[73] The Appellant's counsel also relies on *Dikranian* at para. 32, where the Supreme Court of Canada echoed Professor Sullivan's words and cautioned against taking a strictly literal approach to interpreting legislation. The Supreme Court held that in endeavouring to determine legislative intent, the courts are to rely on all of the principles of statutory interpretation, including any presumptions (including the presumption against interfering with vested rights).

[74] The Appellant's counsel argues that the Appeal Division should look at the entire context, scheme and object of the legislation and the intention of Parliament. The Appellant's counsel argues that, in this particular case, the entire purpose of the transitional provisions in the JGLPA was to transition undecided appeals and applications from the Legacy Tribunals to the new Social Security Tribunal, and that everything in the JGLPA is directed at ensuring the Social Security Tribunal has jurisdiction to complete the decision-making process from the Legacy Tribunals. Counsel argues that, considering the entire context of the scheme, it is clear that the deeming provision in subsection 261(1) of the JGLPA was intended to ensure the Social Security Tribunal has the necessary jurisdiction to complete the Legacy Tribunal's unfinished business by deeming undecided applications to be properly filed with the Social Security Tribunal. He argues that this is consistent with the Tribunal's own actions, when it invited further evidence from the parties, for instance. He argues that the JGLPA was not intended to change the filing date of the First Application to render it out of time and statute-barred.

[75] If we should look to the entire context, scheme and object of the legislation and the intention of Parliament, there is some merit to the submissions of the Appellant. The Respondent's counsel notes in his submissions at paragraph 28 that, at second reading of Bill C-38, which proposed the amendments to Part 5 of the *Human Resources and Skills Development Act*, as it then was, the Parliamentary Secretary to the Minister of Human Resources and Skills Development and to the Minister of Labour, indicated that the Social Security Tribunal was intended to provide a "simple, more efficient, single window for Canadians to access appeals and the appeals process ..."

[76] As well, in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, the Federal Court of Appeal determined that the creation of the Social Security Tribunal was intended to provide more efficient, simplified and streamlined appeal processes for Canada Pension Plan, Old Age Security and Employment Insurance decisions by "offering a single point of contact for submitting an appeal". The changes made were not limited to the composition and structure of the Social Security Tribunal, but also to the rules of practice.

[77] The Appellant's counsel argues that the General Division's strict interpretation is also inconsistent with the underlying aim of the *Canada Pension Plan.* The *Canada Pension Plan* was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability or the death of a wage-earning spouse or parent. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution: *Granovsky v. Canada (Minister of Employment and Immigration),* [2000] 1 S.C.R. 703. It is inconceivable that Parliament could have intended the consequences of a strict and literal interpretation, as it would undermine the underlying aims of the *Canada Pension Plan.*

[78] These considerations aside, a sound argument can be made to have a limitation period such as that in subsection 66(2) of the DESDA. A limitation period could serve the purpose of finality and it could encourage applicants to be diligent in making "new facts" applications. I do not see how terminating any applications made under subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, however would further the purposes for which the Social Security Tribunal was created, as doing so would

not in any way provide for a more efficient, simplified and streamlined process for ongoing appeals.

[79] In *Belo-Alves,* at para. 79, the Federal Court appears to have squarely addressed the issue regarding the applicability and scope of the transitional provisions of the JGLPA. The Federal Court determined that the transitional provisions under subsection 258(1) and section 262 of the JGLPA make it clear that Parliament intended that matters dealt with by the Social Security Tribunal would be subject to the new legislation. The Federal Court wrote:

> [79] In the present case, the transitional provisions of the *Jobs, Growth and Long-term Prosperity Act* provide that the provisions of the Plan repealed by that statute continue to apply to matters for which the Pension Appeals Board remains seized, that is appeals that were filed and heard before April 1, 2013; see subsection 258(1) and section 262 of the *Jobs, Growth and Long-term Prosperity Act*. These provisions make it clear that Parliament intended that matters dealt with by the [Social Security Tribunal] would be subject to the new legislation. The Pension Appeals Board remains subject to the former legislation during the transitional period.
>
> [80] I note that subsection 44(c) of the *Interpretation Act,* R.S.C. 1985 c I-21 states that where a former enactment is repealed and replaced by a new enactment, proceedings commenced under the former enactment are to be continued in conformity with the new enactment, insofar as it is possible to do so consistently with the new enactment.
>
> (My emphasis)

[80] As I noted above, the Federal Court addressed the issue of whether an applicant could rely on "legitimate expectations". In determining whether the applicant's leave application had a reasonable chance of success, the Federal Court determined whether it should be evaluated as a *de novo* appeal, pursuant to subsection 84(1) of the *Canada Pension Plan,* as it read immediately before April 1, 2013. The Federal Court held that an applicant's leave application should not be considered on the basis of her expectations when she filed her application for leave to appeal, because the Appeal Division was required to apply the test set out in section 58 of the DESDA.

[81] The application for leave to appeal in *Belo-Alves* was deemed to have been filed with the Social Security Tribunal on April 1, 2013, pursuant to section 260 of the JGLPA. The Federal Court held that subsection 58(2) of the DESDA governs appeals to the Social Security Tribunal and that, as such, the Appeal Division was required to apply the test set out in section 58 of the DESDA. The Federal Court also held that the Appeal Division member did not have discretion to deviate from that statutory regime and apply the former test, notwithstanding the fact that the applicant had applied for leave to appeal prior to the introduction of new legislation governing applications for leave to appeal under the *Canada Pension Plan.*

[82] Subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, stipulated that:

> 84 (2) *Rescission or amendment of decision* - The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

[83] Section 66 of the DESDA significantly restricts the scope of subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, as it adds a time limitation within which applications must be made and also restricts the number of applications which a person may make.

[84] The Federal Court was dealing with only subsection 258(1) and section 262 of the JGLPA in *Belo-Alves* when it determined that the provisions made it clear that Parliament intended that matters dealt with by the Social Security Tribunal would be subject to the new legislation. The Federal Court did not consider section 261 of the JGLPA and subsection 66(2) of the DESDA, so there may be some question whether, when it wrote that, “These provisions make it clear that Parliament intended that matters dealt with by the [Social Security Tribunal] would be subject to the new legislation”, it could have also been contemplating section 261 of the JGLPA and subsection 66(2) of the DESDA.

[85] In *Belo-Alves,* the Federal Court did not address whether applications made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, were also intended to be subject *in toto* to the new legislation, and in particular, to

subsection 66(2) of the DESDA. Given the move away from strict and literal statutory interpretation, the rules and principles of statutory construction, and taking into account the context and Parliament's intent, as set out in *Atkinson*, that the appeal processes be more efficient, simplified and streamlined, it appears that the Federal Court in *Belo-Alves* could not have intended that subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, also be subject to subsection 66(2) of the DESDA if this should result in terminating applications which had been properly made otherwise, short of express legislative intention to that effect.

[86] Under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, an applicant conceivably could have made an unlimited number of applications. Subsection 66(3) of the DESDA stipulates that each person who is the subject of a decision may make only one application to rescind or amend that decision. It is reasonable for an applicant who is the subject of a decision that had been rendered prior to April 1, 2013, to be subject to the provisions of subsection 66(3) of the DESDA and be limited to making only one application to rescind or amend that decision after April 1, 2013. After all, there would be no justification to having two classes of applicants: those who can make an unlimited number of applications to rescind or amend, by virtue of being the subject of a decision that had been rendered prior to April 1, 2013, and those who are limited to making only one application, by virtue of being the subject of a decision that was rendered after April 1, 2013. (It is debatable whether, having made an application before April 1, 2013, an applicant can thereby make another application after April 1, 2013, but that is an issue which I need not address.)

[87] It is less reasonable that subsection 66(2) of the DESDA should apply to an applicant to whom a decision was communicated prior to April 1, 2013, as effectively it would result in terminating all such applications, even if they had been properly made prior to April 1, 2013. There is no particular logic or reason why an applicant who, having properly brought an application to re-open a decision prior to April 1, 2013, should have his or her application terminated. In the Appellant's case, she had filed her First Application on November 26, 2012, which was in fact made well within one year after the decision of the Canada Pension Plan Review Tribunal had been communicated to her. There were no

statutory requirements in place at the time that made it necessary to make an application within one year after the decision had been communicated to her.

[88] Under subsection 66(2) of the DESDA alone, the Appellant's application to re-open would have been saved, as she made it within one year after the day on which the decision had been communicated to her, but possibly for the fact that subsection 261(1) of the JGLPA deemed the application to have been made on April 1, 2013 under section 66 of the DESDA. This seemingly lends itself to an unjust result, that an applicant who had otherwise complied with the provisions of the *Canada Pension Plan*, should have his or her application terminated for seemingly arbitrary reasons, without any apparent justification, other than for the fact that a new statutory scheme came into being.

- **The "Golden Rule" and avoiding absurd results**

[89] The golden rule has been described as follows:

> The "golden rule" directs that "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead so some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther." (*Statute Interpretation in a Nutshell,* John Willis)

[90] In this regard, the Appellant's counsel argues that any statutory interpretation should avoid absurd results, even if it results in modifying the ordinary language of the statute. However, this would result in giving the statute "exceptional construction". Counsel suggests that the Supreme Court of Canada endorsed this approach, where interpretation otherwise would lead to an absurd result. He relies on *Paul v. the Queen,* [1982] 1 S.C.R. 621 at pages 662 to 663. In *Paul,* the Appellant had pled guilty on three different occasions before the same judge. The issue before the Supreme Court of Canada was determining what was meant by the words "before the same court at the same sittings". With respect, it seems that the Supreme Court of Canada did not advocate resorting to exceptional circumstances, where it would result in defeating Parliament's will, as this would "be going further than what is required to suppress the "absurdity" and usurping Parliament's privileges".

Nonetheless, it is clear that the Supreme Court of Canada intended that absurd results should be avoided, even if it results in little or no meaning to the statute, when it wrote:

> I am not unmindful of the stress I am suggesting we put on Parliament's words and the fact that little or no meaning is being given to the words "at the same sittings"; but I am encouraged in this endeavour when considering the absurd results we are led into by the alternative.

[91] What is considered an "absurd result"? As the Appellant's counsel points out, in *Rizzo Shoes,* Iacobucci J. offered this, at para. 27:

> It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88). (My emphasis)

[92] In *Butler v. Southam Inc.* 2001 NSCA 121 (CanLII), the Nova Scotia Court of Appeal considered what was equitable. Cromwell J.A. (as he then was) had this to say, at para. 139:

> [139] In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case.

[93] As I have indicated above, the limitation period set out in subsection 66(2) of the DESDA could serve the purpose of finality and it could encourage applicants to be diligent in making "new facts" applications. If either or both are the purposes underlying subsection 66(2), the loss of an applicant's claim is disproportionate to the purposes and in that regard, a strict and literal interpretation leads to an inequitable result.

[94] The Appellant's counsel argues that a strict and literal interpretation lends itself to an absurd result, as it is unreasonable, if not altogether inequitable, that an applicant, who

had otherwise complied with the provisions of the *Canada Pension Plan*, should have his or her application terminated for reasons that appear entirely arbitrary and beyond his or her control.

[95] The Appellant's counsel argues that the absurdity of this interpretation is best illustrated by applying it to other provisions of the JGLPA and the DESDA. He contends that the same strict interpretation would lead to the absurd consequence that the vast majority of transitional files inherited from the Legacy Tribunals by the General Division would be out of time, through no fault of applicants. This would be so as section 257 of the JGLPA deems any appeals filed with the Review Tribunal before April 1, 2013 to be appeals filed with the General Division and as paragraph 52(1)(b) of the DESDA requires any appeals of a decision to be brought to the General Division within 90 days after the day on which the decision had been communicated to the appellant, subject to any extensions of time granted by the General Division. The Appellant's counsel points out that every appeal properly filed with respect to a Review Tribunal decision made before January 1, 2013 would be deemed to have been filed with the General Division on April 1, 2013, past the 90-day appeal deadline. The Appellant's counsel submits that it is absurd that Parliament could have intended that the vast majority of transitional files from the Legacy Tribunals be past the 90-day appeal deadline, when its focus was to ensure the smooth and proper transition of appeals to the Social Security Tribunal.

[96] I am unaware of any appeals filed <u>on time</u> with the Review Tribunal before April 1, 2013 to have been deemed filed with the General Division on April 1, 2013, past the 90-day appeal deadline. There has been no explanation offered by the Respondent why section 257 of the JGLPA and paragraph 52(1)(b) of the DESDA should not be subjected to a strict and literal interpretation, while subsection 261(1) of the JGLPA and paragraph 66(2) of the DESDA should be. It would be inconsistent to have, on the one hand, a strict and literal interpretation pertain to certain provisions of the JGLPA and the DESDA, while on the other hand, having a broader and more liberal interpretation pertain to other provisions of the JGLPA and the DESDA. In the overall scheme and for consistency's sake, I cannot envision that Parliament could have intended such a result. I find the Appellant's arguments in this regard to be highly persuasive.

- **Ambiguity in benefits-conferring legislation to be interpreted in the claimant's favour**

[97] The Appellant's counsel submits that, to the extent that there is any ambiguity or gaps in the legislation, or where there is more than one reasonable interpretation of the legislation, any uncertainties should be resolved in the Appellant's favour. He submits that there is authority for this, in *Villani v. Canada (Attorney General),* 200l FCA 248 at paragraph 27, where the Federal Court of Appeal determined that benefits-conferring legislation such as the *Canada Pension Plan* ought to be interpreted "in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant". The Appellant's counsel argues that the legislation at issue in the present case should therefore be interpreted to preserve the rights that the Appellant possessed at the time the decision of the Review Tribunal was made.

[98] The Respondent acknowledges the principle that any ambiguity in benefits-conferring legislation should be interpreted in a claimant's favour is well-established, but submits that "it cannot be used as a licence to amend the law that Parliament has made" (*Wilson v. Atomic Energy of Canada Limited,* 2015 FCA 17 at para. 86). In also relying upon *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at paras. 49 to 50, the Respondent's counsel further argues that "… a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament." The Respondent's position is that section 66 of the DESDA and section 261 of the JGLPA are clear that any pending new facts applications relating to decisions communicated before April 1, 2012 are now statute-barred.

[99] When read separately, neither subsection 261 of the JGLPA nor subsection 66(2) of the DESDA impose a limitation on applications made within one year of the decision having been made, including those made prior to April 1, 2013. For instance, if subsection 66(2) of the DESDA is applied to the First Application, it would not be considered "out of time", as it was made well within one year after the day on which the decision of the Review Tribunal had been communicated to the Appellant.

[100] However, subsection 66 must necessarily be read together with subsection 261 of the JGLPA, otherwise the Appeal Division would not have any jurisdiction to consider any requests made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013. It is only after considering the two sections' potential cumulative effect as it relates to decisions communicated to a person before April 1, 2012, that the ambiguity becomes apparent and questions arise as to whether benefits conferring legislation is to be interpreted in a strict and literal manner, such that the First Application becomes statute-barred.

[101] The authorities cited by the Respondent's counsel are factually distinguishable. In *Wilson*, the Federal Court of Appeal examined Part III of the *Canada Labour Code*, RT.S.C. 1985, c. L-2 and held that the pro-benefits principle shed no light on just what benefits Parliament had actually given employees under that Part, and that it could not be used to drive Parliament's language in the Code higher than what "genuine interpretation … an examination of its text, context and purpose – can bear". In *Bell Canada*, the Supreme Court of Canada held that the Canadian Radio-television and Telecommunications Commission was required to exercise its authority "with a view to implementing the Canadian telecommunications policy objectives".

[102] *Wilson* and *Bell Canada* suggest that subsections 66(2) of the DESDA and 261(1) of the JGLPA should be interpreted in a manner consistent with Parliament's policy objectives. In the absence of any expression of Parliament's intentions, this requires an examination of the text of the legislation and its context and purpose. As I have indicated above, during the second reading of Bill C-38, which proposed amendments to Part 5 of the *Human Resources and Skills Development Act*, as it then was, the Parliamentary Secretary to the Minister of Human Resources and Skills Development and to the Minister of Labour, indicated that the Social Security Tribunal was intended to provide a "simple, more efficient, single window for Canadians to access appeals and the appeals process ..."

[103] To the extent that there is any ambiguity, the legislation ought to be read with a view to determining whether it meets the stated objectives, that it provides a "simple, more efficient, single window … to access appeals and the appeals process". The strict and literal

interpretation of subsections 261(1) of the JGLPA and 66(2) of the DESDA made by the General Division does not lend itself to this stated objective.

### ii. Second deeming provision

[104] These considerations lead me to the final point raised by the Appellant's counsel. He argues that the Appellant's First Application is not out of time under subsection 66(2) of the DESDA because subsection 261(1) of the JGLPA contains another deeming provision, that a decision of the Review Tribunal "is deemed to relate to a decision made … by the General Division".

[105] The Appellant's counsel argues that, as the General Division did not exist prior to April 1, 2013, it cannot be deemed to have rendered any decisions prior to April 1, 2013. Counsel argues that the earliest that the General Division could have rendered a decision was on April 1, 2013, when it came into being and, as such, the decision of the Review Tribunal must have been deemed to have been made by the General Division on April 1, 2013. The First Application therefore was not made out of time as it is deemed to have been made on and relate to a decision made by the General Division on April 1, 2013.

[106] The wording of the first deeming provision under the section reads, "deemed to be an application", whereas the wording of the second deeming provision reads "deemed to relate to a decision made …" (my emphasis), rather than "deemed to be a decision made …". I do not know what significance, if any, the wording "relate to a decision" was intended to impart. What is clear is that the section confers jurisdiction upon the General Division or the Appeal Division, as the case may be, to address applications or requests of any decisions that had been rendered by the Review Tribunal or the Pension Appeals Board, as the case may be.

[107] Had Parliament intended that any Review Tribunals' decisions be deemed to have been made by the General Division, and had it intended also that any requests to re- open, rescind or amend such decisions be subject to a one-year limitation period commencing on April 1, 2013, it could have expressly provided for this. In other words, the section could have been written that not only is the request to re-open deemed to be an application made

on April 1, 2013, but that the decision too is deemed to have been a decision made on April 1, 2013.

[108] Despite some reservations that the section does not expressly state that deemed decisions are also deemed to have been made on April 1, 2013, there is some logic to having the decisions effectively deemed to have been made on April 1, 2013. While the Appellant's counsel is correct to point out that the General Division did not exist prior to April 1, 2013, and therefore could not have rendered any decisions before then, the result of having decisions deemed made on April 1, 2013 is to put all appellants on a more equal footing, as all appellants would thereby be subject to a limitation period, commencing at the earliest on April 1, 2013. This approach would also preserve appellants' claims, rather than extinguish them altogether.

[109] One could also say that the section creates some ambiguity, as it is unclear whether it was intended that the General Division step into the shoes of the Review Tribunal and have been deemed to have made the decision on the date rendered by the Review Tribunal, or it was intended that the decision to have been made on the date that the General Division came into being. As the Appellant's counsel argues, where there is any ambiguity or gaps, or where there is more than one reasonable interpretation, any uncertainties should be resolved in the Appellant's favour. There is support for this interpretation too in the rule against avoiding absurd results.

[110] Subsection 261(1) of the JGLPA section invites an interpretation in the Appellant's favour, as it would further the legislation's stated objectives. It would be much more efficient, simplified and streamlined for all decisions rendered by a Review Tribunal prior to April 1, 2013, to have been deemed made on April 1, 2013, for the purposes of applications made under subsection 84(2) of the *Canada Pension Plan*.

**The Second Application to Re-open**

[111] The Appellant filed her Second Application on April 24, 2013, fifteen months after the decision of the Review Tribunal had been communicated to her on January 5, 2012. The Respondent submits that this Second Application is statute-barred under subsection 66(2) of

the DESDA, as it was made more than one year after the day on which the decision of the Review Tribunal had been communicated to her. The Respondent's counsel argues that the Second Application is deemed made and was in fact made more than one year after the original decision had been communicated to her, and that it is therefore now statute-barred.

[112] The Appellant's counsel submits that the General Division failed to consider subsection 261(2) of the JGLPA when it assessed the Second Application. The subsection deems a decision of the Review Tribunal to have been made by the General Division. The Appellant's counsel argues that the General Division cannot possibly be deemed to have made or communicated a decision before it even existed, so can only be deemed to have made the decision once it came into being, on April 1, 2013. That being so, he argues that the Second Application, made on April 23, 2013, was well within the one year time-limit prescribed by subsection 66(2) of the DESDA.

[113] The Appellant's counsel argues that although this interpretation is evident from an ordinary reading of the legislation in light of the legislative scheme, object, and context, it is also consistent with the presumption that Parliament does not intend to retroactively extinguish people's rights or to draft absurd and unfair legislation. He argues that when the Review Tribunal issued its decision, the Appellant had a right to apply to re-open that decision at any time. The General Division member's interpretation would have the effect of retroactively extinguishing that right by imposing a deadline that never existed when the Review Tribunal decision was issued. The Appellant's counsel argues that any ambiguity or uncertainty ought to be resolved in favour of the Appellant.

[114] This mirrors the submissions above regarding the second deeming provision under subsection 261(1) of the JGLPA. From this, I do not take it that the Appellant means to say that an appellant who seeks to appeal a decision of a Review Tribunal is never subject to any limitation period. Otherwise, the appellant, and others similarly placed, would be in a class which would be treated more favourably than those who have brought or bring applications on or after April 1, 2013. I do not see any evidence that Parliament intended this class of appellants to enjoy grandfathered rights. Rather, I understand from the Appellant's counsel that the one-year time limit under subsection 66(2) of the DESDA should commence

running as of April 1, 2013. If this were not the case, the Appellant would be subjected to a limitation period that did not exist when the decision of the Review Tribunal was communicated to her in January 2012, and would be treated unequally vis-à-vis those appellants who bring rescind or amend applications after April 1, 2013. For the reasons which I have discussed previously, I am in agreement with the Appellant's arguments on this point that there is a second deeming provision, that the limitation period commences as of April 1, 2013.

**ISSUE 3: REMEDY**

[115] Both parties agree that, if I should find that the First or Second Applications were not statute-barred under the JGLPA and the DESDA, I should return them to the General Division for an assessment on the merits, given that the General Division, which had declined to make any findings on the evidence, is the primary fact-finding body. I agree that this is the appropriate disposition, given my determination.

**CONCLUSION**

[116] As I have determined that neither the First nor Second Applications were statute-barred, the appeal is allowed and the matter referred to a different member of the General Division for an assessment on the merits.

*Janet Lew*
Member, Appeal Division