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

Citation: *R. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 277

Tribunal File Number: AD-14-471

BETWEEN:

R. M.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

HEARD ON October 16, 2015

DATE OF DECISION: July 21, 2016

Canada

REASONS AND DECISION

IN ATTENDANCE

Appellant	R. M.
Representative for the Appellant	Lesley Tough (counsel)
Representative for the Respondent	Hasan Junaid (counsel) and Julia Betts (articling student)

INTRODUCTION

[1] At its core, this case is about whether an application made on October 26, 2006 to re-open the decision of the Canada Pension Plan Review Tribunal of August 26, 2003 pursuant to subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, is now statute-barred by operation of subsection 66(2) of the *Department of Employment and Social Development Act* (DESDA) and subsection 261(1) of the *Jobs, Growth and Long-term Prosperity Act* (JGLPA). If not, does the evidence filed in support of the application to re-open constitute a new material fact as defined by subsection 66(2) of the DESDA?

[2] This is an appeal of the decision of the General Division dated May 20, 2014. The General Division dismissed the Appellant's application to re-open the decision of the Review Tribunal, rendered on August 26, 2003, on the basis that it was statute-barred as it had not been made within one year after the 2003 Review Tribunal decision had been communicated to her. The General Division also determined that the application would have failed, even if the application had not been statute-barred, as none of the evidence submitted constituted a new material fact that could not have been discovered by due diligence at the time of the 2003 Review Tribunal hearing.

[3] The Appellant sought leave to appeal to the Appeal Division. Leave to appeal was granted on February 9, 2015, on the grounds that the General Division might have erred in law in determining that the application to rescind or amend was statute-barred.

[4] Given the complexities of the legal issues involved and by request of the parties, the appeal proceeded via videoconference.

ISSUES

[5] The issues before me are as follows:

1. Is a standard of review analysis applicable when reviewing decisions of the General Division?

2. Did the General Division err in law in determining that the application to rescind or amend is statute-barred, pursuant to subsections 66(2) of the DESDA and 261(1) of the JGLPA?

3. If the application to rescind or amend is not statute-barred, did the General Division err in determining that the evidence in support of the "new facts" application - and in particular, two medical reports of a psychiatrist - did not constitute "new facts" as defined by paragraph 66(1)(b) of the DESDA?

HISTORY OF PROCEEDINGS

[6] The Appellant applied for a Canada Pension Plan disability pension on April 11, 2002. The Respondent denied the application initially and subsequently on reconsideration, the latter by letter dated October 30, 2002.

[7] The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals on November 30, 2002. A Canada Pension Plan Review Tribunal conducted a hearing on July 9, 2003. The Review Tribunal did not find the Appellant to be disabled by the end of her minimum qualifying period of December 31, 2001. The Review Tribunal dismissed the appeal, on the basis that:

> … it is premature to say the Appellant is permanently disabled. There were no attempts at either retraining or any job applications. The Appellant is very young in age and her fibromyalgia does not seem to be advanced.

[8] The Appellant did not seek leave to appeal the decision of the Review Tribunal to the Pension Appeals Board.

[9] On January 11, 2005, the Appellant made a second application for a Canada Pension Plan disability pension. The Respondent denied this second application initially and upon reconsideration, as it considered the application to be *res judicata.* The Appellant appealed the second reconsideration to the Office of the Commissioner of Review Tribunals. On August 22, 2007, the Office of the Commissioner of Review Tribunals advised the parties that the file had been closed.

[10] On October 26, 2006, the Appellant filed an application to re-open the decision of the Review Tribunal under subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, on October 26, 2006. Initially, she filed four documents in support of her application:

1. December 5, 2005 – letter prepared by Susanna Scott to the Review Tribunal
2. June 29, 2005 – letter prepared by Dr. Ramgoolam
3. July 9, 2005 – letter prepared by Dr. McGinn and
4. March 20, 2006 – letter prepared by the Appellant setting out a chronology for the years 1998 to 2006 (GT1-252 to GT1-253).

[11] On August 23, 2011, counsel for the Appellant filed a medical report dated August 11, 2011 of Dr. Thomas Thompson, a psychiatrist-psychoanalyst (GT1-244 to GT1-246 / GT1-255 to GT1-257). Counsel explained that the Appellant had never been referred to a psychiatrist prior to counsel's involvement and therefore did not have psychiatric evidence available to her.

[12] Counsel for the Appellant subsequently filed a second medical report of Dr. Thompson, dated December 24, 2012 (GT1-247).

[13] On April 1, 2013, the application was transferred to the Social Security Tribunal.

[14] On May 20, 2014, the General Division dismissed the appeal, relying on subsection 261(1) of the JGLPA and subsection 66(2) of the DESDA. On August 25, 2014, counsel for the Appellant filed an application requesting leave to appeal with the Appeal Division. I granted leave to appeal on February 9, 2015. Both parties filed written submissions. The hearing for the appeal of the decision of the General Division proceeded before the Appeal Division on October 16, 2015. The two psychiatrist's reports are central to this appeal.

REVIEW TRIBUNAL DECISION

[15] The decision of the Review Tribunal consists of four pages (GT1-330 to GT1-333). The Review Tribunal did not fully set out the evidence before it, although indicated that there were three exhibits, including a medical report dated May 20, 2003 of Dr. C. Bourque, and an article on post-traumatic stress disorder, dated July 9, 2003. The analysis also indicated that the Review Tribunal considered medical opinions from Drs. A. Arneja and Lesiuk. The Review Tribunal's analysis was as follows:

> In her evidence she indicated her main disabling condition was chronic regional myofascial pain syndrome with fibromyalgia which she claims makes her disabled within the meaning of the Canada Pension Plan legislation. Human Resources Development Canada's position is that while she may not be able to do her former job of housekeeping she should still be able to do some other type of work. There was no evidence for the Tribunal that she explored or sought alternate employment. Her Workers Compensation Board claim was denied.
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> She indicated to the Tribunal that her biggest problems were her lower back and neck as well as other disabling issues. She also complained of poor sleep and poor memory.
>
> She is not engaged in any progressive exercise program and therefore it may be premature to say she is permanently disabled. There is no evidence that exercise is harmful in these conditions and in fact in most cases forms the basis of treatment for a condition of this type. It is noted in the material that an exercise program is recommended by both Dr. A. Arneja and Dr. Lesiuk.
>
> Dr. Lesiuk on Page 67 in his report of October 7, 2002 says that notwithstanding her condition he would not expect her ailments to result in any significant impairment to employment. Dr. Arneja on Page 75 said that she was encouraged to return to gainful employment.

> Notwithstanding the capable presentation of her counsel in quoting the relevant decisions to be considered nevertheless the Tribunal feels it is premature to say the Appellant is permanently disabled. There were no attempts at either retraining or any job applications. The Appellant is very young in age and her fibromyalgia does not seem to be advanced.

[16] The Review Tribunal denied the appeal and confirmed the Respondent's decision.

GENERAL DIVISION DECISION

[17] The General Division found that the application to re-open the decision of the Canada Pension Plan Review Tribunal was statute-barred, under subsection 261(1) of the JGLPA and subsection 66(2) of the DESDA. The General Division wrote:

> [36] The intent of subsection 261(1) [of the *Jobs, Growth and Long-Term Prosperity* Act] is clear. The plain and obvious meaning of its language is to provide a transition for subsection 84(2) applications that had not been heard by a Review Tribunal by April I, 2013. It does so by deeming them to have been made under section 66 of the DESDA, and to relate to a decision made by a Tribunal. It further provides a date - April I. 20 13 - on which they are deemed to have been made.
>
> [37] Subsection 66(2) of the DESDA states that:
>
>> (2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.
>
> No exception is made tor applications that were deemed to have been made on April 1, 2013, but that were in fact made earlier.
>
> [38] The Tribunal disagrees with the Applicant's argument that the legislation was intended solely to provide a new 30-day period for filing submissions and documents in connection with applications made under subsection 84(2). The fact that the deadline of April 1, 2013 is applicable to one provision does not make it inapplicable or ambiguous with respect to a different provision.
>
> [39] It is clear that, under subsection 261(1) JGLPA, a request under subsection 84(2) CPP that had not been heard by April 1, 2013 becomes, for all intents and purposes, an application under s. 66 DESDA that was made on April I. 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.

> [40] The 2003 Review Tribunal decision was communicated to the Applicant on August 26, 2003. As a result, her application to rescind or amend that decision is statute-barred.
>
> [41] As harsh as these provisions may seem to those who filed s. 84(2) applications in good faith and intended to proceed with them, there is no other way to interpret them, and the Tribunal must abide by them.

[18] The General Division also considered whether any of the evidence submitted by the Appellant was a new material fact that could not have been discovered by due diligence at the time of the 2003 Review Tribunal hearing. It found that subsection 66(1)(b) of the DESDA codified the previous test under subsection 84(2) of the *Canada Pension Plan* for what constitutes "new facts" and that the jurisprudence that developed around the interpretation of subsection 84(2) of the *Canada Pension Plan* also applied to the interpretation of subsection 66(1) of the DESDA. To meet the requirements under subsection 66(1), the General Division held that an applicant had to show the following:

(a) the evidence that is presented as a new material fact is relevant to the Applicant's condition at her minimum qualifying period;

(b) the information existed at the time of the original Review Tribunal hearing, or that it reveals a condition that was not known or well- understood at the time;

(c) had the new information been available at the time of the original Review Tribunal hearing, it might reasonably be expected to have affected the outcome of the proceedings; and

(d) the information could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[19] The General Division distinguished *Canada (Attorney General) v. MacRae*, 2008 FCA 82 and *Kent v. Canada (Attorney General)*, 2004 FCA 420, upon which the Appellant relied, as the General Division found that the evidence contained in Dr. Thompson's reports did not reveal a condition that was not known or well-understood at the time the Appellant was suffering from the particular disorders that were identified by Dr. Thompson. It also

found that there was recognition among the Appellant's treating physicians that there was likely a psychological component to her pain and there were psychological barriers to her recovery.

[20] The General Division also distinguished *Ezerzer v. Canada (MHRD)*, 2006 FC 812, another decision upon which the Appellant relied, by pointing out that there was no evidentiary basis to support Dr. Thompson's conclusions that the symptoms he observed in 2010, and upon which he based his diagnosis, also existed at the Appellant's minimum qualifying period.

[21] The General Division found that none of the evidence submitted by the Appellant in support of her "new facts" application met the requirements under subsection 66(1) of the DESDA.

[22] The General Division dismissed the application to rescind or amend on the grounds that: (1) it was statute-barred as it had not been made within one year after the 2003 Review Tribunal decision had been communicated to the Appellant; and (2) even if the application had not been statute-barred, none of the evidence submitted constituted new material that could not have been discovered by due diligence at the time of the 2003 Review Tribunal hearing.

LEAVE DECISION

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

(a) erred in law in determining that the application was statute-barred under subsection 66(2) of the DESDA; and

(b) erred in fact and in law in its interpretation and application of the jurisprudence on the "new facts" issues.

ISSUE 1: STANDARD OF REVIEW

[24] The Respondent provided extensive written submissions on this issue. His counsel notes that the language of subsection 58(1) of the DESDA mirrors the language set out in subsection 115(2) of the *Employment Insurance Act* (since repealed). Given that the language set out in subsection 58(2) of the DESDA was taken from subsection 115(2) of the *Employment Insurance Act* (since repealed) and given the body of jurisprudence before it, it seemed reasonable, he suggests, for the Appeal Division to apply the same standard of review analysis undertaken by umpires.

[25] Counsel for both parties agree that the issue of whether the appeal is statute- barred is a question of law and should be reviewed on a correctness standard, and that the issue of whether the documents filed in support of the "new facts" application constitutes new facts involves questions of mixed fact and law and should therefore be reviewed on a reasonableness standard. When applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome. The reasonableness standard is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] Counsel differ on the degree of deference which should be given to the General Division, as the primary trier of fact, on its findings of facts. The Appellant's counsel argues that there is little rationale to afford much, if any, deference to the General Division, as the appeal herein is to an equally specialized administrative tribunal.
Appeals before the Appeal Division are not heard on a *de novo* basis, unlike those which had been before the Pension Appeals Board. In this particular case, there was no in- person hearing before the General Division, as the appeal proceeded on the record, based on the written submissions of the parties. She argues that there is no justification to fetter the Appeal Division's consideration of the facts and the law.

[27] The Federal Court of Appeal has since pronounced on this issue. 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.

[28] The Federal Court of Appeal suggests that, whereas the review and superintending powers of "federal boards" is provided for by section 18.1 of the *Federal Courts Act* and subsection 28(1) of the *Federal Courts Act,* there are no similar provisions in the DESDA conferring a review and superintending power upon the Appeal Division.

[29] Notwithstanding the fact that the courts have traditionally held that umpires should conduct a standard of review analysis (although the *Employment Insurance Act* also did not confer any review and superintending powers upon umpires) and despite the fact that the language in subsection 58(1) of the DESDA was taken from subsection 115(2) of the *Employment Insurance Act (*since repealed), the Federal Court of Appeal cautions against "borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and that an "administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or … "federal boards".

[30] As the Federal Court of Appeal has pointed out in *Jean*, the mandate of the Appeal Division is conferred to it by sections 55 to 68 of the DESDA, where it hears appeals pursuant to subsection 58(1) of the DESDA. That provision sets out the grounds of appeal and subsection 59(1) of the DESDA sets out the powers of the Appeal Division. The only grounds of appeal under subsection 58(1) are as follows:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[31] The Federal Court of Appeal recently provided some clarity to this issue. In *Canada (Citizenship and Immigration) v. Huruglica,* 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 (IRPA), undertaking the same exercise would require an analysis of 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.

[32] 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 supports 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 (RPD). At paragraph 78, the Federal Court of Appeal held, at that stage of its analysis, that ''the role of the RAD [Refugee Appeal Division] is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard of review''.

[33] 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 review RPD decisions applying the correctness standard. 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.

[34] Despite the compelling nature of the submissions before me on the issue of the standard of review, and the jurisprudence as it relates to subsection 115(2) of the

*Employment Insurance Act (*since repealed), I "must refrain from borrowing from the terminology and the spirit of judicial review in an administrative appeal context" and restrict myself to determining whether the General Division, in the proceedings before me, erred in law on the issue of whether the "new facts " application is statute-barred, and if so, to then determine whether the evidence constituted "new facts" as that term is defined by subsection 66(2) of the DESDA. This approach would be consistent with the principles set out by the Federal Court of Appeal in *Jean* and *Huruglica.*

ISSUE 2: IS THE 2006 APPLICATION STATUTE-BARRED?

[35] As a Canada Pension Plan Review Tribunal had not decided the application to re-open prior to April 1, 2013, it was transferred to the Social Security Tribunal, pursuant to subsection 261(1) of the JGLPA.

[36] The Respondent's counsel submits that, when read with the transitional provisions under subsection 261(1) of the JGLPA, the application to re-open became statute-barred once subsection 66(2) of the DESDA came into force and effect on April 1, 2013. Subsection 261(1) of the JGLPA provides that 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.

[37] Counsel for the Respondent asserts that, unlike subsection 84(2) of the *Canada Pension Plan*, subsection 66(2) of the DESDA provides that a new facts application must be made within one year after a decision is communicated. The effect of subsection 261(1) of the JGLPA and section 66 of the DESDA is that any pending new facts applications relating to decisions communicated before April 1, 2012 are now statute- barred.

[38] The decision of the Review Tribunal was communicated to the Appellant on August 26, 2003. Her application to re-open was received by the Office of the Commissioner of Review Tribunals on October 26, 2006. This was well past the one- year

limitation period under subsection 66(2) of the DESDA. Counsel for the Respondent submits that, accordingly, the Appellant's new facts application is now statute-barred and must be dismissed as it is deemed made and was in fact made more than one year after the original decision of the Review Tribunal had been communicated to her.

[39] Counsel for the Appellant argues, on the other hand, that the interpretation by the General Division is contrary to the rules of statutory interpretation, to any notions of reasonableness and fairness and to section 43 of the *Interpretation Act*, R.S.C. 1985, c. I- 21. She further argues that the interpretation also offends the presumptions against retroactivity and absurdity. It is her contention that the *Interpretation Act* and the presumptions suggest that any legislative changes should be interpreted in such a manner that does not penalize claimants such as the Appellant, and that rather, they should be interpreted "to extend the new periods for filing submissions and documents in both appeals and in applications to amend or rescind to both existing and new litigants after April 1, 2013". She argues that this should be particularly so where a claimant had taken all steps prior to April 1, 2013 to have her application to re-open heard.

[40] Effectively, the Appellant advocates that all applications made under subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, be subject to a limitation period commencing on April 1, 2013, as this would place all applicants on the same footing, as they would each be subject to a one-year limitation period. This way, the Appellant would be in no worse a position than a claimant whose right to seek a rescission or amendment arose after the legislative changes came into effect.

a. Statutory interpretation

[41] Counsel for the Appellant submits that, under the rules of statutory interpretation, legislation must be clear and unambiguous in depriving an individual of any pre-existing rights. In this regard, counsel argues that the facts in *Tabingo v. Canada (Citizenship and Immigration),* 2013 FC 377 (affirmed in *Austria (aka Tabingo) v. Canada (Citizenship and Immigration),* 2014 FCA 191) are distinguishable from those in this case. In *Tabingo,* Parliament's intent was to eliminate a backlog of immigration applications by terminating

certain dated applications that had not yet been adjudicated, following several Ministerial instructions which had the intention of decreasing the quotas and backlogs. The impugned subsection reads:

> *Immigration and Refugee Protection Act,* SC 2001, c. 27, section 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.

[42] In *Tabingo*, the Federal Court found that the termination of existing applications was clearly the purpose of subsection 87.4(1) of the IRPA. Counsel for the Appellant argues that subsection 66(2) of the DESDA is distinguishable from subsection 87.4(1) of the IRPA, as it does not expressly terminate any vested interests. Whereas the underlying purpose of subsection 87.4(1) of the IRPA was to eliminate a backlog of immigration applications, she argues that the intention behind subsection 66(2) of the DESDA was to streamline and expedite the processing of appeals by imposing dates or deadlines by which to file documents and submissions, and to provide a new limitation date for applications to rescind or amend. She also argues that it was not intended to deprive existing appellants of their rights.

[43] The Appellant maintains that the overriding concern is fairness to the parties. It would be unfair to interpret the legislation retroactively and in such a manner that it would extinguish her substantive, as opposed to procedural, rights to have her application adjudicated. She further maintains that such a result would be contrary to the presumption against absurdity.

[44] Substantive rights are defined by *Sullivan and Driedger on the Construction of Statutes,* at pages 699 and 700:

> The existence and content of any right to bring an action, to bring an appeal or to seek judicial review, as well as the existence and content of defences and excuses, are considered substantive rather than procedural.

. . .

> However, when the effect of applying the new provision is either to extinguish an action that was still viable when the provision came into force, or to revive an action that was barred, more than time is at stake. In such a case, the provision affects the substantive rights of the parties and cannot be considered purely procedural.

[45] The Appellant's counsel notes that, in following the presumption against absurdity, courts may reject an interpretation in favour of a plausible alternative that avoids the absurd, i.e. consequences which are judged to be contrary to accepted norms of justice or reasonableness, and are presumed to have been unintended: *Sullivan and Driedger*, at page 299.

[46] The Appellant's counsel suggests that one should presume that the legislature does not intend to enact absurd consequences and that there are compelling reasons to apply the presumption against absurdity. In *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 27, Iacobucci J. wrote that, "It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". In *Morgentaler v. The Queen,* [1976] 1 S.C.R. 616 at page 676, Dickson J. wrote, "We must give the sections a reasonable construction and try to make sense and not nonsense, of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities". In *R. v.* McIntosh*,* [1995] 1 S.C.R. 686 at paragraph 81 McLachlin, J. (as she then was), in a dissenting opinion, wrote, "While I agree with the Chief Justice that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament". Finally, in *Ontario v. Canadian Pacific Ltd.,* [1995] 2 S.C.R. 1031 at paragraph 65, Gonthier J. wrote, on behalf of the majority, "Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results".

[47] The Appellant's counsel argues that not only should absurd consequences be avoided, but one should also presume that the legislature "[did] not intend to abolish, limit

or otherwise interfere with the rights of subjects": *Sullivan and Driedger*, at page 476. The Appellant's counsel argues that Parliament could not have intended to effectively abolish the claims of those who had not been subject to a statutory bar, while allowing new claimants - subject to a one-year limitation period - to be able to pursue applications to rescind or amend, as this would create two streams of claimants and result in inconsistent and unequal treatment between them. She asserts that the *Interpretation Act* applies in any event to save the Appellant's application to re-open.

b. Interpretation Act

[48] Counsel for the Appellant submits that the Appellant accrued a right to have her appeal adjudicated when she filed an application to re-open under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before April 1, 2013, well before subsection 66(2) of the DESDA came into force and effect. She also argues that, pursuant to section 43 of the *Interpretation Act,* where an enactment, such as subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, is repealed, the repeal does not affect any existing, acquired, accrued or accruing right or privilege, including the Appellant's right to have her appeal adjudicated.

[49] Section 43 of the *Interpretation Act* states:

> **Effect of repeal**
>
> **43** Where an enactment is repealed in whole or in part, the repeal does not
>
> revive any enactment or anything not in force or existing at the time when the repeal takes effect,
>
> **(b)** affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,
>
> **(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,**
>
> **(d)** affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or
>
> **(e)** affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

> and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

(My emphasis)

[50] Counsel for the Appellant argues that the facts of this appeal are similar to those in *Scott v. College of Physicians and Surgeons*, 1992 CanLII 2751 (SK CA), where Scott, whose name had been struck from the register of medical professionals for non-payment of fees, applied in October 1989 to have his name reinstated. The register rejected the application on the basis that it was out of time in light of an amendment to the *Medical Profession Act* which had come into effect only days before Scott's application. With the amendment, doctors were now required to apply for reinstatement within a year of being struck off the register, otherwise, they would be treated as first-time applicants. The Saskatchewan Court of Appeal applied the provisions of the Saskatchewan *Interpretation Act*, which is identical to section 43 of the *Interpretation Act* of Canada, and determined whether Scott's position had been "sufficiently advanced to bring it within the saving provisions of s. 23(1)(c) of *The Interpretation Act*, R.S.S. 1978, c. I-11", that where an enactment is repealed, the repeal does not affect any "right, privilege, obligation or liability acquired, accrued, accruing, or incurred".

[51] The Court of Appeal found that the principle of noninterference with acquired or accrued rights is well-established and in this case, the new one-year limitation period therefore did not eliminate Scott's right to reinstatement under the former rules. At page 17, it wrote:

> Left with no definition, the courts have established two criteria or factors which will help to determine whether a right is acquired, accrued or accruing. First, one must establish a tangible or particular legal right, the right cannot be abstract, it must be more than a possibility, more than a mere expectation; and, second, establish that the right was sufficiently exercised or solidified before the repeal of the enactment to justify its protection.

[52] In other words, the Court of Appeal found that the amendment to the *Medical Profession Act* did not apply retroactively to Scott, pursuant to the *Interpretation Act*.

c. Conclusions on the issue of the statutory bar

[53] 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. As counsel for the Appellant argues, unlike subsection 87.41(1) of the *Immigration and Refugee Protection Act,* 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. Neither subsection 261(1) of the JGLPA nor section 66 of the DESDA expressly stipulate that "applications to re-open are terminated", or words to that effect, as had been the case in *Austria.*

[54] In *Dikranian v. Quebec,* [2005] 3 S.C.R. 530, the Supreme Court of Canada held that the first step should be to determine Parliamentary intent, and for this purpose, it must rely on all of the principles of statutory interpretation, including the presumptions, such as the presumption against retroactivity, the presumption against interference with vested rights and the presumption against absurdity. The Appellant's counsel submits that here, Parliament intended only procedural changes by imposing new deadlines that did not formerly exist, rather than terminating any existing applications or appeals. To some extent, the Respondent agrees that the creation of the Social Security Tribunal was intended to streamline the process. The Respondent's counsel notes that at 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..."

[55] 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".

[56] Though the Appellant's counsel did not allude to it, a strict interpretation of subsection 261(1) and subsection 66(2) of the DESDA would also be inconsistent with the underlying aim of the *Canada Pension Plan.* In *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, the Supreme Court affirmed that:

> 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 for which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution.

[57] 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.*

[58] It is less reasonable, if not absurd, that subsection 66(2) of the DESDA should apply to applicants to whom decisions were communicated prior to April 1, 2013, as effectively this 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. The Appellant filed her application to re-open on October 26, 2006. Although that was made more than 2.5 years after the decision of the Review Tribunal had been communicated to her, there were no statutory requirements in place at that time. If subsection 66(2) of the DESDA should strictly apply, this seemingly leads 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.

[59] At the same time, I find that the factual circumstances of this appeal are similar to those in *Scott,* and that section 43 of the *Interpretation Act* applies. The effect of the repeal

of subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, is that it does not affect the Appellant's right to have her application to re- open adjudicated. This is notwithstanding the fact that subsection 66(2) of the DESDA came into effect before her application could be considered, albeit more than six years after she made her application to re-open.

ISSUE 3: MATERIAL FACT

[60] Having found that the application to re-open made under subsection 84(2) of the *Canada Pension Plan,* as it read immediately before April 1, 2013, is not statute-barred by operation of subsections 261(1) of the JGLPA and 66(2) of the DESDA, I must determine whether the General Division erred when it found that the evidence filed in support of the Appellant's application did not constitute "new facts" as defined by paragraph 66(1)(b) of the DESDA.

[61] I must scrupulously guard against conducting a reassessment of the evidence, as the jurisdiction of the Appeal Division is limited to determining whether the General Division might have erred in law or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. This appeal does not involve a reassessment to determine whether the additional evidence constitutes "new facts" under the DESDA. Rather, I must determine whether, as the Appellant alleges, the General Division erred in law or based its decision on an erroneous finding of fact. The General Division listed the requirements which the Appellant had to meet under paragraph 66(1)(b) of the DESDA. The parties agree that the Appellant had to establish (1) that the evidence existed at the time of the original hearing but must not have been "discoverable", i.e. that it reveals a condition that was not known or well understood at the time, and (2) that it must reasonably be expected to affect the result of the prior hearing.

[62] The Appellant's counsel submits that the General Division based its decision on two erroneous findings of fact. The two erroneous findings were that:

(a) there was considerable evidence of psychological barriers before the Review Tribunal; and

(b) the symptoms upon which Dr. Thompson based his diagnoses were not documented prior to the minimum qualifying period.

[63] The Appellant's counsel further submits that the General Division erred in law in determining that Dr. Thompson's two medical reports dated August 11, 2011 and December 24, 2012 did not constitute new material facts that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. She argues that the General Division erred in law in giving too narrow an interpretation to paragraph 66(1)(b) of the DESDA, contrary to *Kent.*

[64] The Appellant's counsel argues that the General Division further erred in law when it failed to consider that the reinterpretation of symptoms by an expert after the Review Tribunal rendered its decision may nonetheless be admissible as "new facts": *MacRae*.

[65] The Respondent's counsel on the other hand argues that the new facts provision is an exceptional recourse: *Canada (Attorney General) v. Jagpal*, 2008 FCA 38 at paragraph 27. The Federal Court indicated that "the provision ought to be interpreted in a manner which ensures procedural fairness to the parties who were either bound by, or entitled to rely upon, the final decision now under a new attack". The provision represents an exception to the finality principle which characterizes judicial and quasi- judicial decisions. The Respondent's counsel maintains that a "broad and liberal" approach to discoverability would "contrary to the intended purpose of new facts". In particular, it would allow an applicant whose appeal rights have long been exhausted or abandoned to present after-acquired evidence to re-open a decision that Parliament clearly intended to be final and binding.

a. Erroneous findings of fact

[66] The first of the alleged erroneous findings of fact is that the General Division found that there was considerable evidence of psychological barriers before the Review Tribunal, and secondly, that the symptoms upon which Dr. Thompson based his diagnoses were not documented prior to the minimum qualifying period.

[67] The General Division did not expressly state that there was "considerable evidence" of psychological barriers before the Review Tribunal, although the member found that

several of the physicians who examined the Appellant from 1999 to 2002 identified mental health issues in the Appellant's overall condition (paragraph 50) and that there was recognition among her treating physicians that there was likely a psychological component to her pain, and psychological barriers to her recovery (paragraph 51). At paragraph 50, the General Division identified some of the evidence that was before the Review Tribunal. Given that there was an evidentiary basis for its findings, it cannot be said that the General Division made an erroneous finding of fact, on this point, without regard for the evidence before it.

[68] With respect to the second finding, the Appellant's counsel submits that the General Division erred, as in fact the most important symptoms upon which Dr. Thompson based his three psychiatric diagnoses are clearly documented in the medical records which were before the Review Tribunal:

(a) pain of a diffuse nature – this was reported by Dr. Ramgoolam (GT1-376 to GT1-377 and GT1-407 to GT1-410), and Dr. Lesiuk, physiatrist (GT1- 416 to GT1-429);

(b) anxiety – this was reported by Dr. Arneja, physiatrist, and possibly Dr. Ramgoolam, who counsel alleges detected "that anxiety manifested in some way" (AD6-18; GT1-376 to GT1-377 and GT1-407 to GT1-410). Dr. Arneja also recommended that the Appellant be assessed by a psychologist and that she possibly undergo behavioural pain management (GT1-435 to GT1-437);

(c) insomnia – sometime in 2000, the Appellant was placed on Cyclobenzaprine, a sleeping aid (GT1-436 to GT1-437). In October 2002, although reportedly not on any medication then, she complained of what Dr. Lesiuk described as "ongoing sleep dysfunction" (GT1-428);

(d) poor memory and concentration; and

(e) profound fatigue – Dr. Ramgoolam indicated that the Appellant's chronic sinusitis caused fatigue, amongst other things (GT1-408).

[69] The Appellant complained of poor memory or poor concentration in the questionnaire accompanying her application for a disability pension (GT1-283 to GT1- 289). The Appellant's counsel also notes that the Review Tribunal acknowledged the Appellant's complaints of poor sleep and poor memory (GT1-332). The Appellant's counsel also notes that although Dr. Bourque, a neurologist, did not itemize the Appellant's complaints, he wrote that, "She … complains of a variety of somatic complaints, which can be folded under the diagnosis of fibromyalgia" (GT1-335).

[70] The Appellant's counsel argues that the Tribunal should not be quick to find that some of the symptoms (such as numbness and tingling, shortness of breath, difficulty with her memory and tiring easily) could not have existed until 2010, if they had not been fully documented. She argues that physicians often document only what they consider to be the most important symptoms, or will record symptoms only in the "most vague terms". The Appellant's counsel argues that the symptoms documented by Dr. Thompson were all present, prior to the end of the minimum qualifying period.

[71] Dr. Thompson first saw the Appellant on December 27, 2010. He indicated that his diagnosis was based on "a number of symptoms". He proceeded to list some of them, and also indicated that some of the symptoms were due to the physical pain which the Appellant described. Although he traced the cause of the Appellant's psychopathology to a 1998 work accident, he did not indicate whether he had reviewed the medical reports of other medical practitioners. Indeed, he does not appear to have reviewed the Appellant's medical history with her, to the extent of determining what symptoms she might have exhibited at or around the end of her minimum qualifying period.

[72] At paragraph 56, the General Division wrote that there was no evidence to support Dr. Thompson's conclusions that the symptoms he observed in 2010, and upon which he based his diagnosis, also existed at the Appellant's minimum qualifying period. It is clear from paragraph 54 of its decision, however, that the General Division focused on a very specific set of symptoms. The General Division wrote that none of the physicians who the Appellant consulted from 1998, when she was injured, to the 2003 Review Tribunal hearing, had observed anything like the symptoms that Dr. Thompson observed in 2010 and later.

The General Division then proceeded to list these specific symptoms as being insomnia with nightmares, crying spells, daily panic attacks with nausea, faintness, tightness and dyspnea, low energy, very poor concentration and tinnitus. There is no suggestion by the Appellant's counsel that the Appellant's medical practitioners had in fact documented these specific symptoms prior to the end of her minimum qualifying point. On this point too, it cannot be said that the General Division made an erroneous finding of fact.

[73] Essentially, the Appellant's position is that her documented symptoms early on were sufficient to form the diagnosis made by Dr. Thompson, particularly when she states that "obviously there were symptoms reported that would have supported that diagnosis" and that most of the "missing symptoms" referred to by the General Division were in fact symptoms of panic or anxiety attacks. That is a different issue altogether. Dr. Thompson indicated that his diagnosis was based on a number of symptoms. While certainly the Appellant exhibited several symptoms prior to the end of her minimum qualifying period, it was the combination of those symptoms, together with the other symptoms which she exhibited or complained of to Dr. Thompson, which led to the diagnosis. The fact that the Appellant exhibited several symptoms prior to the end of her minimum qualifying period may not have been sufficient to lead to the diagnosis made by Dr. Thompson. While medical practitioners may not fully document the array of complaints which patients might make, generally one can expect that if the symptoms are significant or sufficiently severe, that they would, at some point, be explored or at least mentioned in the records. I am not prepared to accept, as the Appellant's counsel urges, to find that the Appellant's physicians simply overlooked documenting many of the symptoms which Dr. Thompson set out in his report of August 8, 2011. Even so, if these symptoms had been present when she was seen by the Review Tribunal, their presence alone would not have necessarily signaled or reflected the severity of the disability at that particular time. After all, the Appellant indicated that she had observed her symptoms progress over the past year. It may be that her symptoms have continued to progress.

b. Errors of Law

[74] The Appellant's counsel alleges that although the General Division noted the Appellant's symptoms, it either misinterpreted them or did not appreciate their overall significance or contribution towards the severity of the Appellant's disability. Counsel submits that in the case of mental illness, symptoms may easily be misinterpreted by non-specialist witnesses or missed altogether. The Appellant's counsel argues that the Appellant's mental health issues were not fully investigated nor interpreted until 2010, when she saw Dr. Thompson. It is only after Dr. Thompson's assessment and diagnosis in 2010 that the Appellant's symptoms which she had previously reported could be properly interpreted. Counsel also argues that these conditions, i.e. major depressive disorder, major depression, panic disorder and chronic pain disorder, were not known at the time of her hearing before the Review Tribunal, but that they are critical towards establishing the severity of the Appellant's disability.

[75] The Appellant's counsel claims that without the proper diagnosis and some understanding of their impact on the Appellant, the Review Tribunal lacked any basis upon which it could find that the Appellant suffered from various mental illnesses and that she was severely disabled. She notes that, indeed, the Review Tribunal did not place enough weight on the symptoms to even mention them in its decision. The Appellant's counsel submits that the Review Tribunal could not have been alive to the Appellant's underlying mental health issues, although they clearly existed at the time. The Appellant's counsel maintains that the Review Tribunal did not consider any psychiatric illness, despite the fact that the Respondent had inquired about whether a psychiatric referral had been made, and despite the Appellant's complaints and documented symptoms.

[76] In this way, the Appellant's counsel argues that the General Division erred in giving too narrow an interpretation to *Kent* and *MacRae*. She submits that the General Division should have broadly and generously approached the determination of due diligence and materiality, where it involved the Appellant's mental health issues. In *Kent,* the Federal Court of Appeal wrote at paragraphs 35 and 36:

> [35] In the context of an application to reconsider a decision relating to entitlement to benefits under the *Canada Pension Plan*, the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality.
>
> ...
>
> [36] . . . However, there are some disability claims, such as those based on physical and mental conditions that are not well understood by medical practitioners, that must be assessed against the background of an evolving understanding of a claimant's condition, treatment and prognosis. It is especially important in such cases to ensure that the new facts rule is not applied in an unduly rigid manner, depriving a claimant of a fair assessment of the claim on the merits.
>
> (My emphasis)

[77] In *MacRae*, the Federal Court of Appeal noted that although the claimant showed distinct signs of an anxiety disorder immediately after his accident, it only became apparent later that more attention should have been paid to his mental health, rather than focusing on his back problem instead. The Federal Court of Appeal wrote that Mr. MacRae could not be faulted for his physicians' failure to diagnose the impact of the accident on his mental health at the time.

[78] In citing *MacRae,* the General Division held that if the proposed "new facts" simply reiterated what was already known or had been diagnosed, it could not be said that it would have affected the outcome of the previous hearing and it would not be considered material. The General Division found that, unlike *Kent* and *MacRae,* the evidence contained in Dr. Thompson's reports "[did] not reveal a condition that was not known or well-understood [sic] at the Appellant's [minimum qualifying period]". The General Division determined that although there was no definitive medical diagnosis, the Appellant's treating physicians recognized that there was likely a psychological component to the Appellant's pain and psychological barriers to her recovery (paragraph 51).

[79] The General Division found that the diagnoses made by Dr. Thompson did not describe or present an “evolving understanding” of the condition that existed at the Appellant’s minimum qualifying period. The General Division determined that Dr. Thompson should have indicated what he knew of the Appellant’s experiences or of any medical intervention between 1998 and when he first saw the Appellant in late 2010 that might have formed the basis for his opinion (paragraph 53). The General Division found that none of the physicians which the Appellant consulted (from the time of her injury in 1998 until the hearing before the Review Tribunal in 2003) observed “anything like the symptoms” described by Dr. Thompson. In particular, the General Division noted that apart from fatigue, the Appellant did not describe having insomnia with nightmares, crying spells, daily panic attacks with nausea, faintness, tightness and dyspnea, low energy, very poor concentration and tinnitus (paragraph 54).

[80] Subsequent jurisprudence from the federal courts provides further guidance as to how *Kent* and *MacRae* should be applied.

[81] In *Gaudet v. Canada (Attorney General),* 2010 FCA 59, the Federal Court of Appeal found that a different diagnosis of the medical condition, ‘‘would not bring an applicant closer to a disability pension in the absence of persuasive evidence that she was disabled within the meaning of the [*Canada Pension Plan*] as of the [minimum qualifying period] date’’. The Federal Court of Appeal found that the symptoms had been “well canvassed and fully investigated”.

[82] The approach taken by the Federal Court in *Taker v. Canada (Attorney General),* 2011 FC 561, in following *Kent* and *MacRae*, is that ‘‘medical reports that post-date the original hearing may be considered “new facts” where they add something to the material that was initially presented, regarding the condition that existed at the time of the hearing’’. In *Taker,* the Court determined that none of the reports that post-dated the decision added anything to the conditions that were thoroughly considered in the original decision. The applicant had submitted more evidence only on the same condition. The Court found that the applicant in that case had not demonstrated ‘‘that any of the new evidence added insight into why she could not work, as suggested by the initial finding’’.

[83] The Federal Court of Appeal considered both *Kent* and *MacRae* in *Walker v. Canada (Attorney General),* 2011 FCA 189. It held that the reasons of the Pension Appeals Board revealed a consideration as to whether the diagnosis of sleep apnea could have impacted the earlier decision with respect to the level of disability prior to the date of the minimum qualifying period. The Federal Court of Appeal determined that the conclusion that Mr. Walker's recent diagnosis of sleep apnea did not constitute "new facts" was reasonable. In that case, the initial claim for benefits was centered on Mr. Walker's back and muscle problems, but the Court found that it could not be said that the inability to consider a diagnosis of sleep apnea prevented him from presenting a complete account of his disability at the time of the application. The Court was also quick to point out the Pension Appeals Board's findings that, "it is not the diagnosis of sleep apnea that is material, but rather the impact of the lack of restorative sleep on the applicant's capacity to work".

[84] On the one hand, I should look to see whether the General Division determined if any of the new evidence added any insights, but at the same time, I should look to see if the General Division turned its mind to whether the absence of a diagnosis of major depression, major depressive disorder, panic disorder and chronic pain disorder prevented the Appellant from presenting a complete account of her disability at the time of the application and hearing before the Review Tribunal. If not, then the General Division failed to properly apply *Kent* and *MacRae.* The General Division was not persuaded that the new evidence added any insights. In fact, it questioned whether the Appellant had many of the symptoms which she reported to Dr. Thompson. Significantly, the General Division found that, "While [the Appellant] could not be expected to understand their cause, she would at least have been able to state in 2003 and earlier that she was suffering from crying spells, nausea, fainting, panic attacks and dyspnea if in fact she had been". In other words, irrespective of the precise diagnosis, the Appellant nonetheless would not have been prevented from presenting a complete account of her disability to her health practitioners.

[85] The Appellant's counsel further argues that the General Division erred in failing to follow *MacRae,* as it failed to consider that the reinterpretation of symptoms by an expert may be admissible as "new facts". The Federal Court of Appeal noted that courts have considered medical reports written after the original hearing of the application to be

admissible where, for example, the condition which they attest to exists at the time of the original hearing but could not have been diagnosed or known to the applicant through the exercise of due diligence by the applicant. The Federal Court of Appeal also noted that, however, in cases where medical reports reiterate what is already known or has been diagnosed, the reports will not be considered as evidencing “new facts”.

[86] In *MacRae,* the following facts emerged:

i. Mr. MacRae’s mental illness was known to him at the time of the original hearing before the Review Tribunal in 1997 and his mental health was not in issue before the original Review Tribunal, as the claim was only based on a back injury and related physical disabilities, and

ii. Mr. MacRae was only diagnosed with a mental condition in 2004, although a psychiatrist noted that the condition existed as of 1994. The focus was on Mr. MacRae’s back injury and the mental illness “provoked by the injury was effectively ignored”.

[87] The Attorney General had argued that one of the medical letters did not meet the discoverability test as the symptoms that the physician reported after the Review Tribunal hearing had existed prior to its decision and were thus discoverable. The Federal Court of Appeal rejected this submission, as the evidence was clear that, although Mr. MacRae showed distinct signs of an anxiety disorder immediately after his accident, at the time, his physician focused on his back problem. The Federal Court of Appeal was unprepared to hold Mr. MacRae at fault for his physician’s failure to diagnose the impact of the accident on his mental health at the time.

[88] The factual circumstances differ here. Unlike *MacRae,* and despite her counsel’s oral submissions that the Appellant was unaware that she had a mental illness, the Appellant’s health practitioners had identified, to some degree, a component of mental illness underlying her disabilities. Two practitioners had recommended that she be seen for assessment and treatment by a psychologist. The General Division noted that in the medical reports dated April 9, 2002 and July 29, 2002, which were before the

Review Tribunal, the family physician diagnosed the Appellant with post-traumatic stress disorder and psychosomatic disorder. A physiatrist also recommended that she be seen by a psychologist for assessment and behavioral pain management (GT1-437). Another physiatrist diagnosed her with abnormal illness behavior, pain behavior and pain limiting behavior, amongst other things. He suggested that she would benefit from a rehabilitation psychologist's treatment if she was able to develop a therapeutic relationship (GT1-428). Despite the diagnoses and recommendations, the Appellant did not pursue any assessments, until her counsel arranged for a psychiatric assessment with Dr. Thompson. The General Division also noted that the Appellant had stated in November 2002 that she had fatigue, forgetfulness, mild depression and extreme anger, in addition to her pain and headaches. The General Division considered *MacRae* but ultimately distinguished it on the facts before it.

CONCLUSION

[89] The Appellant's application of October 26, 2006 to re-open the decision of the Canada Pension Plan Review Tribunal of August 26, 2003, is not statute-barred by operation of subsections 261(1) of the JGLPA and 66(2) of the DESDA. However, I am not persuaded that the General Division erred in finding that the evidence filed in support of the application does not constitute "new facts" as defined by paragraph 66(1)(b) of the DESDA. Accordingly, the appeal is dismissed.

Janet Lew
Member, Appeal Division