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

Citation: *Minister of Employment and Social Development v. P. F.,* 2017 SSTADIS 476

Tribunal File Number: AD-16-1042

BETWEEN:

Minister of Employment and Social Development

Appellant

and

P. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Nancy Brooks

DATE OF DECISION: September 13, 2017

REASONS AND DECISION

[1] In an endorsement conveyed to the Respondent by letter dated March 6, 2016, a member of the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent had filed his appeal to the General Division within the applicable time limits.

[2] The Appellant sought leave to appeal that decision and leave was granted on July 7, 2017.[1]

[3] Pursuant to s. 58(5) of the *Department of Employment and Social Development Act* (DESDA), the application for leave to appeal became the Notice of Appeal. In accordance with s. 42 of the *Social Security Tribunal Regulations* (Regulations), the Appellant filed additional submissions on August 18, 2017. In its submissions, the Appellant stated it is content to have this appeal determined on the basis of the written record. Though given an opportunity to do so, the Respondent did not file any submissions on the appeal; however, he stated in a letter to the Tribunal dated July 26, 2017 that he would prefer the appeal to proceed in writing or, alternatively, by teleconference.

[4] I have determined that no further hearing is required and this appeal shall proceed on the record pursuant to s. 43(*a*) of the Regulations for the following reasons:

a) There are no gaps in the file or need for clarification;

b) Both parties have had the opportunity to file submissions on the appeal; and

c) A hearing on the record is consistent with the Tribunal's obligation to proceed as informally and quickly as circumstances, fairness and natural justice permit, set out in s. 3(1) of the Regulations.

BACKGROUND

[5] The Respondent first applied for disability benefits on May 11, 2010. His application was refused initially and upon reconsideration. The reconsideration decision was communicated to the Respondent by letter dated July 27, 2011,[2] informing him that his application for

[1] 2017 SSTADIS 321.
[2] GD1-4 to GD1-5.

disability benefits was refused based on the conclusion that, although he may have been unable to do his usual work, he should still have been able to do some type of work. The letter also advised the Respondent:

> **If you disagree with our decision**
>
> You have the right to appeal this decision to the Office of the Commissioner of Review Tribunals. If you decide to appeal, you must write to them within 90 days of the date you receive this letter. [bold text in original]

[6] Almost two years later, the Respondent wrote to Service Canada on July 22, 2013, stating:

> Please find enclosed my completed application for CPP Disability Benefits. This application is essentially identical to my previous application submitted in May 2010. The original application was denied initially and upon reconsideration. The appeal period for that reconsideration has expired. My insurer (RBC Life Insurance Company) is now requesting that I pursue my application through to the appeal process.
>
> Please advise if Service Canada will permit the original reconsideration to be appealed or if it will accept this claim a second time for consideration.[3] [underlining added]

[7] It is unknown whether Service Canada accepted the second application for disability benefits[4] that was enclosed with the Respondent's letter. In any event, it is not relevant to this appeal.

[8] Service Canada forwarded the July 22, 2013 letter to the Tribunal by fax on October 7, 2013, where it was date-stamped as received on October 8, 2013.[5]

[9] The July 22, 2013 letter was treated as a Notice of Appeal. Mandatory information that was missing from the Notice of Appeal was subsequently provided by the Respondent on July 10, 2015, [6] at which time the appeal was considered perfected. On December 22, 2015, the Tribunal wrote to the Respondent that the appeal had been filed more than 90 days after the

[3] GD1-2.
[4] GD5-15 to GD5-18.
[5] GD1-1.
[6] GD1A-1.

date the reconsideration decision had been communicated to him and he was invited to provide a written explanation for the delay.

[10] On January 21, 2016, the Respondent wrote to the Tribunal to provide his submissions in support of his request for an extension of time to file his appeal. The Respondent stated *inter alia*: "This appeal was not filed more than 90 days after the reconsideration decision was communicated to me. I did not learn that the reconsideration had been rendered until April 2014."[7] I note that this last sentence is inconsistent with statements made in his July 22, 2013 Notice of Appeal, from which it is apparent he knew about the reconsideration decision before April 2014.

[11] The General Division's decision on the request for an extension of time was sent to the parties as an endorsement contained in a letter from Tribunal staff dated March 7, 2016,[8] which stated:

> Following the letter sent to you on December 22, 2015, a Member of the Social Security Tribunal of Canada has reviewed your Notice of Appeal and determined that it **was** filed within the applicable time limits for the following reasons:
>
> The Tribunal was able to determine that the Appellant submitted a letter to Service Canada dated July 22, 2013 requesting an appeal. This letter was sent to the Social Security Tribunal on October 7, 2013. The Appellant's phone number was missing from the file and this information was not included in his file until April 22, 2014. Due to the fact that the appeal was over two years old the SST indicated to the Appellant that it was closing the file. The Appellant requested an extension of time for filing the appeal pursuant to section 25 of the *Social Security Tribunal Regulations*. The Appellant had not had any communication from the Service Canada and when he phoned Service Canada in April 2014 he was told that the file had been forwarded to the SST. When he reached the Tribunal he was told that the SST did not have any of his documentation. It was at this time that Service Canada sent the file to the SST. It was the Appellant's belief that he had sent the appeal request inside of the 90 day time limit.

[7] GD6-2.
[8] AD1-292 to AD1-293.

> The Tribunal finds that there is clearly an issue with communications between the Appellant, Service Canada and the SST. It also finds that the Appellant had a clear intent to appeal the decision and to deny his appeal would breach the Appellant's right to natural justice. [bold text in original]

[12] The Appellant appeals this decision.

ROLE OF THE APPEAL DIVISION

[13] Pursuant to s. 58(1) of the DESDA, the only grounds of appeal to the Appeal Division are that:

> 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.

[14] Subsection 59(1) of the DESDA provides that the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate, or confirm, rescind or vary the General Division's decision in whole or in part.

[15] In *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 at paras. 46-48, the Federal Court of Appeal held that neither the standards of review analysis applied by courts when they conduct judicial review of decisions made by administrative decision-makers (as discussed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190) nor the principles engaged by an appellate court's review of a lower court decision (as discussed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) apply to appeals within a multilevel administrative framework. Rather, "the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context" (at para. 46).

[16] Thus, when the Parliament has designed a multilevel administrative framework, the scope of the appeal tribunal's review of the lower tribunal's decision is to be determined by the language in the governing statute. Although *Huruglica* dealt with a decision of the Refugee Appeal Division of the Immigration and Refugee Board, the Court's reasoning applies equally to other multilevel administrative frameworks, such as the Social Security Tribunal.

[17] Turning to the role of the Appeal Division on an appeal of a decision of the General Division, the DESDA provides for appeals only on the grounds set out in s. 58(1). The Federal Court confirmed in *Marcia v. Canada (Attorney General)*, 2016 FC 1367, that an appeal to the Appeal Division does not constitute a hearing *de novo*, therefore, the Appeal Division must base its decision on the decision rendered by, and the record that was before, the General Division.

[18] Given the unqualified wording of ss. 58(1)(*a*) and (*b*) of the DESDA, no deference is owed to the General Division on questions of natural justice, jurisdiction, or errors of law.

[19] The wording of s. 58(1)(*c*), combined with the fact that the appeal is based on the same evidence that was presented at the General Division level, suggests that the Appeal Division owes a degree of deference to the findings of fact of the General Division: in addition to the impugned finding of fact being material ("based its decision on") and incorrect ("erroneous"), it must also have been made in a perverse or capricious manner or without regard for the evidence for the appeal to succeed. In *Hussein v. Canada (Attorney General)*, 2016 FC 1417 at para. 44, the Federal Court held that "the weighing and assessment of evidence lies at the heart of the SST-GD's [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference."

[20] Paragraph 58(1)(*c*) directs the Appeal Division to intervene if 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". As suggested by *Huruglica*, those words must be given their own interpretation: the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record: see *R. H. v. Minister of Employment and Social Development*, 2017 SSTADIS 58. Avoiding a standard of review analysis, I conclude that, based on the wording of s. 58(1)(*c*), the Appeal Division is empowered to intervene where a finding of fact made by the

General Division is outside the range of acceptable and rational outcomes given the evidence before it.

RELEVANT LEGISLATION

[21] Division 6 of Part 4 of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 (JGLPA) amended the *Department of Human Resources and Skills Development Act*, S.C. 2005, c. 34 (DHRSDA). Division 6 of Part 4 of the JGLPA, consisting of ss. 223 to 281, established the Tribunal, implemented amendments to the *Canada Pension Plan* (CPP), *Old Age Security Act* and the *Employment Insurance Act*, set out transitional provisions and made consequential changes to other acts.

[22] Subject to certain carve-outs specified in s. 281 of the JGLPA, the JGLPA came into force on the date of Royal Assent, June 29, 2012.

[23] Section 224 of the JGLPA, in force on June 29, 2012, established the Tribunal. Section 52 of the DHRSDA came into force on the same date,[9] and created an absolute time limitation of one year after a decision was communicated to an applicant within which appeals of a Ministerial reconsideration decision could be brought to the General Division.

[24] The DHRSDA has since been renamed the DESDA. The relevant provisions of the statute, including s. 52, have not changed. Throughout the remainder of these reasons, I will refer to the legislation as the DESDA.

[25] Section 52 of the DESDA reads as follows:

> *Appeal to Tribunal — General Division*
>
> 52 (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
>
> (a) in the case of a decision made under the *Employment Insurance Act*, 30 days after the day on which it is communicated to the appellant; and

[9] The leave to appeal decision that was issued on July 7, 2017 erroneously stated (at para. 42) that s. 52(2) of the DESDA came into force on April 1, 2013.

> (b) in any other case, 90 days after the day on which the decision is communicated to the appellant.
>
> (2) The General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant. [underlining added]

[26] On April 1, 2013, ss. 82 to 86.1 of the CPP were repealed and replaced with new ss. 82 and 83.[10] Prior to April 1, 2013, s. 82(1) of the CPP (referred to herein as "Former s. 82(1)") read as follows:

> *Appeal to Review Tribunal*
>
> 82 (1) A party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), or a person who is dissatisfied with a decision of the Minister made under subsection 27.1(2) of the *Old Age Security Act*, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and of the reasons for it.

[27] It is to be noted that Former s. 82(1) stipulated that a person could appeal a Ministerial reconsideration decision to a Review Tribunal in writing within 90 days "or any longer period" that the Commissioner of Review Tribunals might allow. Thus, under the former regime, there was no one-year absolute time limitation to file an appeal.

[28] As of April 1, 2013, s. 82 of the CPP (referred to herein as "Amended s. 82") was enacted and replaced Former s. 82(1). It read as follows:

> *Appeal to the Social Security Tribunal*
>
> 82. A party who is dissatisfied with a decision of the Minister made under section 81, including a decision in relation to further time to make a request, or, subject to the regulations, any person on their behalf, may appeal the decision to the Social Security Tribunal established under

[10] Pursuant to ss. 229 and 281 of the JGLPA. Section 83 of the CPP, which pertains to appeals to the Appeal Division, is not relevant on this appeal.

> section 44 of the *Department of Human Resources and Skills Development Act*.

[29] Amended s. 82 removed all reference to the deadline to appeal a reconsideration decision of the Minister. Instead this was now provided for in s. 52 of the DESDA, which had come into force on June 29, 2012. Paragraph 52(1)(*b*) of the DESDA continued the 90-day limit to file an appeal of, among other things, a Ministerial decision to reconsider under the CPP, subject to possible extension by the General Division. Pursuant to s. 52(2) of the DESDA, in no case could the General Division extend the time to appeal past one year after the day on which the reconsideration decision was communicated to an applicant.

[30] The JGLPA included transitional provisions (Transitional Provisions),[11] which also came into force on June 29, 2012. The Transitional Provisions covered, among other things, appeals filed and heard by the Review Tribunal before April 1, 2013.

[31] Under the Transitional Provisions, if an appeal of a Ministerial reconsideration decision was filed and heard before April 1, 2013, the Review Tribunal remained seized of that appeal until it made a decision or March 31, 2014, whichever came first. If no decision was made by the Review Tribunal by March 31, 2014, the General Division became seized of the appeal.

[32] The Transitional Provisions dealing with appeals to the Review Tribunal state:

> *Appeals — Review Tribunal*
>
> 255. (1) A Review Tribunal remains seized of any appeal filed and heard before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229.
>
> *Time Limit*
>
> (2) A Review Tribunal must make its decision no later than March 31, 2014 or, if an order is made under subsection 253(3), the day before the day fixed by that order.[12]
>
> *Failure to decide*
>
> (3) The General Division of the Social Security Tribunal becomes seized of any appeal referred to in subsection (1) if no decision is made by the

[11] Sections 251 to 270 of the JGLPA constitute the "Transitional Provisions".
[12] No order was made by the Governor in Council specifying another date.

> day referred to in subsection (2). The appeal is deemed to be an appeal filed with the General Division of the Social Security Tribunal on April 1, 2014 or, if an order is made under subsection 253(3), the day fixed by that order.
>
> *Appeals — Social Security Tribunal*
>
> (4) A person who is dissatisfied with a decision made under subsection (1) may appeal the decision to the Appeal Division of the Social Security Tribunal.
>
> […]
>
> *Appeals — Social Security Tribunal*
>
> 257. Any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013, if section 255 does not apply to it.
>
> […]
>
> 262. The provisions of the *Canada Pension Plan* and *Old Age Security Act* repealed by this Act, and their related regulations, continue to apply to appeals of which a Review Tribunal or the Pension Appeals Board remains seized under this Act, with any necessary adaptations.

[33] Thus, pursuant to s. 262 of the JGLPA, Former s. 82(1) continued to apply to any appeals of which the Review Tribunal remained seized. By necessary implication, provisions of the CPP that were repealed by the JGLPA (including Former s. 82(1)) did not apply to appeals to the General Division.

[34] Finally, s. 43(*c*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, is relevant to this appeal. Paragraph 43(*c*) states:

> 43. Where an enactment is repealed in whole or in part, the repeal does not
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

ISSUE

[35] The issue before me on this appeal is whether the General Division committed a reviewable error by granting the Respondent an extension of time to file an appeal of the reconsideration decision.

SUBMISSIONS

[36] The Appellant submits that, given s. 52(2) of the DESDA, the General Division acted beyond its jurisdiction by failing to apply s. 52(2) of the DESDA, an error falling within the ambit of s. 58(1)(*a*) of the DESDA.

[37] The Appellant also submits that, although the reconsideration decision was made under the former legal structure (i.e. before the coming into force of the JGLPA), the DESDA applies to the appeal to the General Division because the DESDA was in force when the Respondent filed his appeal. Given this, s. 52(2) of the DESDA governs and the Respondent's appeal was statute-barred. By failing to apply s. 52(2), the General Division member erred in law, a reviewable error under s. 58(1)(*b*) of the DESDA.

[38] The Appellant argues that the Respondent's right to appeal was not acquired, accrued or accruing on June 29, 2012, when s. 224 of the JGLPA (which included s. 52(2) of the DESDA) came into force, or on April 1, 2013, when Former s. 82(1) was repealed and replaced by Amended s. 82. Section 262 of the JGLPA provided that the repealed provisions of the CPP and their related regulations continued to apply only to those appeals of which the Review Tribunal and Pension Appeals Board remained seized. Therefore, the repealed law does not apply to the Respondent's appeal to the General Division.

[39] The Appellant also argues that an extension is not a matter of right and, even if it had jurisdiction to grant an extension of time, the General Division was required to consider and weigh the factors identified in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, before deciding whether to exercise its discretion to extend the time

within which the appeal was brought. In failing to do so, the General Division committed an error of law that is reviewable under s. 58(1)(*b*) of the DESDA.

[40] Finally, the Appellant argues that the General Division committed a reviewable error under s. 58(1)(*c*) of the DESDA by ignoring the evidence that the Respondent's appeal was brought after the one-year limit imposed by s. 52(2) of the DESDA.

[41] As noted above, although he had an opportunity to do so, the Respondent made no submissions on the appeal.

DISCUSSION

The effect of the new statutory regime

[42] The in-force dates of the various relevant provisions in the JGLPA are important to determining the issue on this appeal.

[43] The result of the coming into force of s. 52 of the DESDA on June 29, 2012, the repeal of Former s. 82(1) and enactment of Amended s. 82 of the CPP on April 1, 2013, is that the 90-day limit for appeals from a Ministerial reconsideration decision under the CPP was the same both before and after April 1, 2013. However, the absolute limit of one year was new and applied to appeals to the General Division as of June 29, 2012, when s. 52 of the DESDA came into force.

[44] Pursuant to s. 262 of the Transitional Provisions, Former s. 82(1) continued to apply *only* to those appeals of which the Review Tribunal remained seized until the Review Tribunal made a decision or March 31, 2014, whichever came first.

[45] In the present case, the Minister's reconsideration decision was mailed to the Respondent on July 27, 2011. As noted earlier in these reasons, although the Respondent stated in a letter dated January 21, 2016 that he did not learn of the reconsideration decision until April 2014, this is clearly wrong as he was aware when he wrote his July 22, 2013 letter/Notice of Appeal that the reconsideration decision had been issued, that it went against him (hence his request to appeal) and that the appeal period had expired. This inconsistency was noted in the leave to appeal decision and, although the Respondent had an opportunity to file submissions on

the appeal to clarify this point, he chose to file no submissions. I draw, and am entitled to draw, an adverse inference to the Respondent's position. I note that, as is apparent from correspondence in the record, the Respondent's mailing address has remained the same throughout the proceedings before the General Division and on appeal. I take judicial notice that ordinary letter mail in Canada typically arrives within 10 days of being mailed, a fact that is reflected in s. 19(1) of the Regulations.[13] On this basis, I find that the reconsideration decision was communicated to the Respondent on August 6, 2011. He did not send a Notice of Appeal (incomplete) until July 22, 2013, and his appeal was not perfected until July 10, 2015. Both events occurred outside the one-year time limitation under s. 52 of the DESDA.

[46] In accordance with the Transitional Provisions, because the appeal was not filed before April 1, 2013, the Review Tribunal was not seized of the Respondent's appeal. Instead, the appeal was made to the General Division. For all intents and purposes relating to the Respondent's appeal, Former s. 82(1) of the CPP had been repealed and did not apply to the appeal to the General Division.

[47] The combined effect of s. 52 of the DESDA coming into force on June 29, 2012 and Amended s. 82 of the CPP coming into force on April 1, 2013 was that the one-year time limitation in s. 52 of the DESDA applied to the Respondent's appeal. Therefore, his appeal was statutorily barred by the one-year limitation in s. 52 of the DESDA.

[48] I find support for this result in the Federal Court's decision in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100. In that case, the applicant had filed an application for leave to appeal with the Pension Appeals Board prior to April 1, 2013. In accordance with s. 260 of the Transitional Provisions, as no decision had been rendered by the Pension Appeals Board, the applicant's application for leave to appeal was deemed to be an application for leave to appeal filed with the Appeal Division on April 1, 2013. Under the former regime, an applicant could rely on submissions of new material facts through a *de novo* proceeding to establish that his or her proposed appeal had a reasonable chance of success. Based on the applicant's legitimate expectations at the time the leave application was filed, the Appeal Division member

[13] Section 19 of the Regulations states: "A decision made under subsection 53(1), 54(1), 58(3), 59(1) or 66(1) of the Act [DESDA] is deemed to have been communicated to a party (a) if sent by ordinary mail, 10 days after the day on which it is mailed to the party."

had decided the application for leave to appeal on the basis of a *de novo* proceeding, permitting the applicant to adduce new evidence. The Court held that the Transitional Provisions made clear that Parliament intended that matters dealt with by the Tribunal would be subject to the new legislation.[14] The member had erred in assessing the applicant's leave application in accordance with the doctrine of legitimate expectations at the time the leave application was filed as that doctrine only applies to questions of procedural fairness, and does not apply to an expectation that the law would not remain unchanged.[15] The Court held that Parliament intended that matters dealt with by the Tribunal would be subject to the new legislation.[16]

[49] *Belo-Alves* was concerned with an application for leave to appeal that had been filed before April 1, 2013: the Transitional Provisions were found to preclude reliance on the regime in place before the JGLPA came into force. In the present case, given the in-force date of s. 52(2) of the DESDA, the repeal of Former s. 82(1) and its replacement with Amended s. 82 on April 1, 2013, and the clear language that Former s. 82(1) continued to apply only to appeals of which the former tribunals remained seized, Parliament made clear that appeals brought to the General Division would be governed by the new regime, including the one-year time limitation to bring an appeal of a Ministerial reconsideration decision.

Vested Rights

[50] No one has a vested right in the continuance of the law as it stood in the past: see *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271. In that case, Dickson J., writing for the majority of the Supreme Court of Canada, stated:

> The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction [citation omitted]. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is

[14] *Belo-Alves* at para. 79.
[15] *Ibid.* at para. 81.
[16] *Ibid.* at para. 79.

> perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. […] No one has a vested right to continuance of the law as it stood in the past. […][17] [underlining added]

[51] The regime applicable to the Tribunal, as enacted under the JGLPA, with particular regard to the in-force dates and the terms of the Transition Provisions, are unambiguous that Amended s. 82 applies to all appeals to the General Division. Former 82(1) was repealed as of April 1, 2013, and only continued to apply to appeals commenced before April 1, 2013, of which the Review Tribunal or the Board remained seized. The absence of an absolute one-year deadline for filing an appeal, which was provided for under Former s. 82(2), was not available to the Respondent. Instead, s. 52(2), which came into force on June 29, 2012, applied to appeals to the General Division. The intention of Parliament is clear. As there is no ambiguity in the legislation, in accordance with the Supreme Court's decision in *Gustavson Drilling*, the presumption that vested rights shall not be affected does not apply.

[52] In *Gustavson Drilling*, the Supreme Court of Canada considered the common law principles with respect to vested rights. In *R. v. Puskas*, [1998] 1 S.C.R. 1207, the Court considered the statutory provision in the federal *Interpretation Act* dealing with vested rights.

[53] Paragraph 43(*c*) of the *Interpretation Act* provides that the repeal of an enactment does not affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed. In *Puskas*, the Court held that "a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled."[18]

[54] The old and new statutory appeal regimes required, and require, a person to file a Notice of Appeal in order to exercise the right to appeal. Filing a Notice of Appeal is therefore a condition precedent to accruing a right to appeal. The Respondent did not file a Notice of Appeal with the Review Tribunal or request an extension of time to appeal before the Transitional Provisions came into effect on June 29, 2012. Applying the Court's reasoning in *Puskas*, the Respondent had not accrued or acquired, and was not accruing, the right to appeal

[17] *Gustavson Drilling*, at p. 282.
[18] *Puskas*, at para. 14.

or to seek an extension of time before the one-year limitation came into effect on June 29, 2012; therefore, s. 43(*c*) of the *Interpretation Act* was not engaged.

[55] Because the Respondent did not file a Notice of Appeal or a request for an extension of time until after April 1, 2013, the JGLPA mandated that his appeal be brought to the General Division and the new regime applied to his appeal. As his appeal was not one of which the Review Tribunal remained seized, Former s. 81(1) did not apply to his appeal.

General Division Errors

[56] The General Division member did not consider the effect of the enactment of s. 52 of the DESDA on June 29, 2012, and the repeal of Former s. 82(1) of the CPP on April 1, 2013, on whether he had jurisdiction to grant the Respondent an extension of time to file an appeal. I find the General Division member erred in law by failing to consider the effect of these provisions on the Respondent's right to commence an appeal outside the one-year limitation, an error falling within the ambit of s. 58(1)(*b*) of the DESDA. Moreover, I find the General Division committed an error of law by not applying s. 52(2) of the CPP to act as a statutory bar to the Respondent's appeal. Because there was a statutory bar, the General Division member had no jurisdiction to exercise any discretion to permit an extension of time to the Respondent to file his appeal. He therefore exceeded his jurisdiction, a reviewable error falling within s. 58(1)(*a*) of the DESDA.

[57] I also find that the General Division committed a reviewable error under s. 58(1)(*c*) of the DESDA by ignoring the evidence that the Respondent's appeal was brought after the one-year limit imposed by s. 52(2) of the DESDA.

[58] In light of these errors, the appeal must be allowed. Given that the General Division member had no authority to exercise his discretion to grant an extension of time, I need not consider the Respondent's submissions that the member erred by failing to consider and apply the *Gattellaro* factors in the exercise of his discretion.

DISPOSITION

[59] The appeal is allowed.

[60] The General Division member had no jurisdiction to grant the Respondent an extension of time to appeal the Minister's reconsideration decision and therefore the General Division member's decision is a nullity.

[61] The only proper decision open to the General Division member was to deny the extension of time. Pursuant to the powers granted to me under s. 59(1) of the DESDA, I may give the decision the General Division should have given and I do so: the Respondent's request to the General Division for an extension of time is denied as statute-barred by s. 52(2) of the DESDA.

Nancy Brooks
Member, Appeal Division