

## Noteworthy Decision Summary

**Decision:** WCAT-2005-02379      **Panel:** Susan L. Polsky Shamash      **Date:** May 10, 2005

***Workers' Compensation Board Reconsideration – 75 Day Time Limit – Effect of Statutory Amendments – Transition Law – Presumption Against Retroactivity – Presumption Against Interference with Vested Rights – Former Section 96(2) and Current Section 96(5)(a) of the Workers Compensation Act***

A worker who applied for reconsideration before the 75 day time limit in section 96(5)(a) of the *Workers Compensation Act* (Act) was enacted does not have a vested right to a reconsideration such that the new provisions should be interpreted not to have immediate effect. A worker did not have a right to a reconsideration under the former provisions, despite the application procedure set out in related policy items, because the Board's discretion to reconsider was unfettered.

On February 25, 2003, the worker wrote to the Disability Awards Department requesting reconsideration of his permanent partial disability award. On March 6, 2003, a disability awards case manager wrote a letter referring to the newly enacted section 96(5)(a) of the Act, stating that, as more than 75 days had passed since the original award was granted in 1993, he could not reconsider it. The Workers' Compensation Review Division concluded that the March 6, 2003 letter did not contain a reviewable decision because it simply communicated a statutory time limit. The worker appealed to the Workers' Compensation Appeal Tribunal.

The worker argued that he had a right to apply for reconsideration under the former section 96(2) of the Act, and that the right vested in him prior to the repeal and replacement of that section on March 3, 2003 (transition date). He argued that the right was not extinguished when the current provisions came into force, relying on the transition provisions of the *Workers Compensation Amendment Act (No. 2), 2002*, the *Interpretation Act*, and the common law presumption against retroactivity and retrospectivity.

The panel noted that there were no transition provisions set out in the legislation for reconsiderations pending before the Workers' Compensation Board (Board) on the transition date. Therefore, the more general interpretive rules of transition law must be used to determine how reconsiderations should be treated. The panel outlined some relevant interpretive rules and principles:

- Retroactive legislation changes the past effects of a past situation, retrospective legislation changes the future effects of a past situation, and prospective legislation changes the future effects of an ongoing situation, or the future effects of a future situation.
- The presumption against retroactive application of legislation is strong and applies unless such construction is expressly, or by necessary implication, required by the language of the statute.
- Retrospective or prospective legislation, changing the future effects of past or ongoing situations, should be given immediate effect unless to do so would unfairly interfere with vested rights. The presumption against interference with vested rights is not as strong as the presumption against retroactivity; the key is to ascertain the degree of unfairness.

- To be a vested right, a right must be: (1) particularized and personalized, meaning that the individual claiming the right must have placed himself in a distinctive legal position different from other members of society; and (2) acted upon and effectively claimed.
- If legislation sets out a benefit which may be given at the unfettered discretion of an administrative decision maker, a claimant cannot have a vested right to that benefit.

The worker in this case did not have a vested right because the scope of the discretion to reconsider under the former section 96(2) was unfettered by any conditions; the only restriction related to the type of decision that could be reconsidered, namely that the Board could not reconsider a decision of the Workers' Compensation Appeal Division. The related policy items set out an application process, but they did not grant a right of reconsideration either. Even where, as in this case, the worker applied to the Board for a reconsideration, he had at best, a "mere hope or expectation" that the Board might exercise its discretion to undertake reconsideration. As there was no right to reconsideration, there was nothing that could have vested in the worker.

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## Introduction

The worker appeals an August 14, 2003 decision of a review officer (*Review Decision #4386*) declining to review a March 6, 2003 letter written by a disability awards case manager (DACM) of the Workers' Compensation Board (Board). The DACM was responding to a workers' adviser's February 25, 2003 request for reconsideration of the September 13, 1993 decision regarding the worker's pension entitlement. Relying on section 96(5)(a) of the *Workers Compensation Act* (Act), the DACM said he could not reconsider the 1993 pension entitlement decision because more than 75 days had elapsed since it had been made.

In his August 14, 2003 decision, the review officer concluded that the March 6, 2003 letter did not contain a reviewable decision because the Board officer simply communicated the fact that there is a statutory time limit on the Board's authority to reconsider a decision and that the time limit had elapsed. In addition to section 96(5)(a), the review officer relied upon binding Board policy in item 103.01 of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), which provides that the 75-day restriction applies to all decisions made prior to March 3, 2003, the date on which significant changes to the Act came into force.

The worker is represented by a workers' adviser. The employer is not participating in this appeal although advised of its right to do so. This appeal has been conducted based on a review of the claim file and the workers' adviser's December 8, 2004 letter resubmitting a June 13, 2003 written argument provided to the Review Division.

The workers' adviser submits that the worker's request for reconsideration of the September 13, 1993 decision should be governed by section 96(2) of the Act as it read at the time of his application in October 2002 and February 2003 (former section 96(2)). Relying on the former section 96(2), the provisions of the British Columbia *Interpretation Act*, and the common law presumption against retroactivity and retrospectivity, he submits that he had a right to apply for reconsideration under the former provision, that his right to apply could be exercised at any time, and that the right vested in him prior to the repeal and replacement of the former section 96(2) on March 3, 2003. He argues that the right was not extinguished when the current provisions came into force. Had the legislature intended to extinguish a vested right\*, it would have done so explicitly in

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\* Vested right is defined in *Black's Law Dictionary*, 8<sup>th</sup> Edition (St. Pauls: West, a Thompson Business: 2004), as "a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent".

the Act. He also argues that the transition provisions of the *Workers Compensation Amendment Act (No.2), 2002* (Bill 63) reveal a legislative intent not to extinguish existing substantive rights.

## **Background**

Although there is a lengthy adjudicative history to this claim, the following events are most relevant to this appeal:

- August 2, 1989 – the worker injured his right elbow. The Board accepted his claim for compensation and paid him wage loss and health care benefits until February 4, 1990. His claim was reopened for several months in 1991.
- September 13, 1993 – a disability awards officer awarded the worker a permanent partial disability pension of 7% of total on a permanent functional impairment basis effective from February 4, 1990. The disability awards officer concluded that the worker would not suffer a loss of earnings greater than the functional impairment award. Although he could not return to his pre-injury form of employment as a carpenter, with the assistance of a vocational rehabilitation consultant (consultant) he had obtained alternative employment at a rate of pay that exceeded his pre-injury earnings. The worker did not appeal this decision.
- April 4, 1997 – the worker contacted a consultant again with a request for retraining as he was suffering a loss of earnings.
- August 28, 1997 – the consultant denied the request. The worker had obtained successive employment in two firms both of whom subsequently closed operations. His compensable disability was not the reason for his loss of earnings. The worker did not appeal this decision.
- October 28, 2002 – the workers' adviser requested reconsideration of the consultant's August 28, 1997 decision as well as the employability assessment that was the foundation for the September 13, 1993 disability awards officer's decision. He enclosed an employability assessment completed by an external vocational rehabilitation consultant.
- February 14, 2003 – a client services manager treated the workers' adviser's letter as a request for a manager's review of the August 28, 1997 decision. She concluded that there was no significant new evidence submitted, no critical evidence overlooked, nor was there an error in law or policy. There were therefore no grounds to change the previous vocational rehabilitation decision. She also said that if the worker wanted to have the pension decision reconsidered, he would need to direct his request to the pension department.

- February 25, 2003 – the workers’ adviser wrote to the Disability Awards Department requesting reconsideration of the September 13, 1993 permanent partial disability award decision.
- March 6, 2003 – a DACM referred to section 96(5)(a) of the Act and said that, as more than 75 days had passed since the September 13, 1993 decision, he could not reconsider it.
- The worker requested a review of that decision at the Review Division.
- August 14, 2003 – the Review Division refused to review the March 6, 2003 letter on the ground that it did not contain a reviewable decision. Rather it merely advised the worker that the statutory time limit for requesting a reconsideration of a prior decision had elapsed.

**Issue(s)**

The primary issue to be decided on this appeal is:

- Does the DACM’s March 6, 2003 letter contain a reviewable decision?

To answer this question, however, several other questions must first be answered:

- What was the nature of the Board’s reconsideration power under the former section 96(2)?
- Did the worker have a right to reconsideration under the former section 96(2) which vested on March 3, 2003?
- Is the 75-day time limit found in section 96(5)(a) of the current provisions a limitation period?

**Jurisdiction**

Section 239(1) of the Act provides that a final decision made by a review officer in a review under section 96.2, including a decision declining to conduct a review, may be appealed to the Workers’ Compensation Appeal Tribunal (WCAT).

## Analysis

### A. Statutory Framework – *Workers Compensation Act*

#### (1) Reconsiderations

Prior to the significant amendments occasioned by Bill 63, section 96(2) stated:

Notwithstanding subsection (1), the board may at any time **at its discretion** reopen, rehear and redetermine any matter, except a decision of the appeal division, which has been dealt with by it or by an officer of the board.

[emphasis added]

Section 19(b) of Bill 63 repealed the former sections 96(2) to (8) and substituted the current sections 96(2) to (9) (Regulation No. 320/2002, OIC 1038/2002, dated November 29, 2002).

The current section 96(4) and (5) provide:

(4) Despite subsection (1), the Board may, **on its own initiative**, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.

(5) Despite subsection (4), the Board may not reconsider a decision or order if

- (a) more than 75 days have elapsed since that decision or order was made,
- (b) a review has been requested in respect of that decision or order under section 96.2, or
- (c) an appeal has been filed in respect of that decision or order under section 240.

[emphasis added]

#### (2) Transition Provisions

Part 2 of Bill 63 contains transitional provisions. Sections 38 and 39 provide for the continuation of “all proceedings pending” before the Workers’ Compensation Review Board (Review Board) and the Appeal Division on the transition date, March 3, 2003. Sections 40 and 41 address situations in which a person had “not exercised a right under the Act” to appeal to the Review Board or the Appeal Division respectively before the transition date.

There are no transitional provisions for reconsiderations pending before the Board on the transition date nor for situations in which the Board had not yet initiated a reconsideration.

## B. Transition Law

### (1) Generally

As the transition provisions in Bill 63 do not explicitly address reconsiderations of Board decisions, it is necessary to consider more general interpretive rules to determine how reconsiderations should be treated. The temporal application of legislation is a complicated area of the law. Known as 'transitional law', it is governed by the common law, as well as *Interpretation Acts* passed by the provincial legislatures and the federal parliament, although in the provincial workers' compensation context, the federal *Interpretation Act* does not apply.

One of the difficulties with transitional law is the terminology. Three terms commonly used are: retroactive, retrospective, and prospective. Academic writers have distinguished between the three and the Supreme Court of Canada has adopted that distinction for *Canadian Charter of Rights and Freedoms* (Charter) cases. However, outside Charter cases, the courts have tended to blur the distinction between retroactive and retrospective application of the law which has resulted in some imprecision in transition law: *Sullivan and Driedger on the Construction of Statutes*<sup>†</sup> (Sullivan and Driedger) pages 548 and 549.

Sullivan and Driedger adopt the following terminology and distinctions:

- *retroactive application*: legislation which changes past effects of a past situation, that is, changes the legal character of the past transaction;
- *retrospective application*: legislation which changes the future effects of a past situation; and
- *prospective application*: legislation which changes the future effects of an ongoing situation (immediate application), or which changes the future effects of a future situation (future application).

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<sup>†</sup> Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed. (Markham: The Butterworth Group of Companies, 2002).

Sullivan and Driedger distinguish among three further concepts:

- *retroactive effect*: when new legislation is applied so as to change the past effects of situations;
- *immediate effect*: when new legislation is applied so as to change the future effects of situations; and
- *survival*: when new legislation is not applied so as to avoid retroactive or immediate effects (the previous law survives even though it has been repealed or displaced).

Sullivan and Driedger note that while having “consistent terminology is essential, distinguishing retrospective from retroactive application on the one hand and from immediate application on the other may not be as helpful as it first appears” (page 550). Difficulties arise not so much from the terminology but in properly identifying the “situation”, that is, characterizing whether a situation is past, ongoing, or future, and whether the change introduced by the new legislation operates for the future only or also changes the past.

## (2) Presumption against Retroactivity

Retroactive application occurs when the effect of applying law to particular facts is to deem the law to be different from what it actually was when the facts occurred: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 SCR 271, (1975) 66 D.L.R. (3d) 449 (*Gustavson Drilling*). Although legislatures are permitted to create law with retroactive application, doing so is a serious violation of the rule of law because people are entitled to govern their affairs according to the law. To do so, they must have advance knowledge of what the law is. It is arbitrary and unfair to change the law retroactively. There is therefore a strong presumption that legislation is not intended to be retroactive unless such construction is expressly, or by necessary implication, required by the language of the statute.

## (3) Retrospective Application of Law

According to Mr. Justice Dickson, writing for the court in *Gustavson Drilling*, legislation that changes the future effects of past or ongoing situations is not retroactive because there is no attempt to reach into the past and alter the law as of an earlier date. Mr. Justice Dickson found that such legislation is prospective and should receive an immediate effect. Sullivan and Driedger conclude that a statutory provision should be given immediate effect unless to do so would change the past or interfere with vested rights (page 557).

Sullivan and Driedger classify this as retrospective application of legislation. They point out that if there was a presumption against the retrospective application of legislation, it would



be much weaker than the one against retroactive application and would probably be easy to rebut, particularly in circumstances involving long-term relationships (page 559).

#### (4) Rebutting the Presumption Against Retroactivity

The presumption against retroactive application of legislation can be rebutted expressly in the legislation or by necessary implication. To do so, the legislation must indicate whether it is meant to apply not only to ongoing or future events, but also to events that are past. This can be accomplished expressly by wording that deems the legislation to come into force or to take effect on a date prior to the date of the enactment (Sullivan and Driedger, page 562). Legislation may also state that it applies to designated facts occurring before the particular date or time the legislation is proclaimed.

While such express wording is helpful in determining whether the presumption against retroactivity is rebutted, it is not necessary (Sullivan and Driedger, page 562). The legislature's intent can be deduced from the purpose of the legislation and the circumstances in which it was adopted, that is, by applying a purposive approach. It may be inferred from the procedures set out in the legislation and it may be inferred from the only possible interpretation which is likely to make sense in the circumstances.

#### (5) Survival of Repealed Law

At common law the presumption against retroactivity did not apply to repealed law. The British courts ruled that, when an Act is repealed, it must be considered to have never existed except with respect to transactions in the past that were already completed. The effect of this common law rule was to preclude the application of repealed legislation to circumstances and events occurring prior to the repeal. Anything that had not been dealt with definitively before repeal was effectively abandoned. For example, persons charged with offences were free to go and persons entitled to benefits or privileges lost those entitlements. Sullivan and Driedger point out at page 565 that, for obvious reasons, such an arbitrary result proved unacceptable and all jurisdictions displaced this common law presumption by statute. In British Columbia the applicable statute is the *Interpretation Act*, RSBC 1996, chapter 238.

Section 2 of the *Interpretation Act* provides that the *Interpretation Act* applies to every enactment unless there is an express contrary intention in the enactment. Sections 35, 36 and 37 relating to repeal and replacement of a statute or a law, provide that repeal of an enactment does not extinguish rights and privileges, obligations, or liabilities that had arisen, or were arising under the repealed enactment. Thus, any proceedings relating to events which preceded the repeal may be started and continued under the old enactment despite its repeal.

While this is the general rule set out in the *Interpretation Act*, specific transition provisions in new legislation may either supplement or displace it and produce different results. Transition provisions (both in specific statutes and the *Interpretation Act*) are intended to

ensure that there is no gap between the application of old legislation and new legislation. Sullivan and Driedger point out at page 568 that there is an obvious relationship between the circumstances in which survival of old legislation is permitted under the *Interpretation Act* and the common law presumption against interference with vested rights. The *Interpretation Act* provides that repeal does not affect rights or privileges acquired, accrued, or accruing under the repealed legislation. The common law presumption against interference with vested rights is a mirror image of the *Interpretation Act* and the two should be read together.

(6) Vested Rights

In *Gustavson Drilling*, Dickson, J., citing *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. Alta.*, [1933] 4 D.L.R. 545 at p. 552, [1933] S.C.R. 620 at p. 638, wrote that a “statute should not be given a construction that would impair existing rights as regards to person or property unless the language in which it is couched requires such a construction”.

The presumption that vested rights are not affected unless the intention of the legislature to affect them is clear, applies whether the legislation is retrospective or prospective. (If the conclusion is that the statute is retroactive, it cannot help but affect vested rights because that was its intent.) This presumption has been consistently applied by the courts. If the application of a provision would interfere with vested rights, the court would refuse to apply it unless there was evidence that the legislature clearly meant the provision to apply despite its prejudicial impact.

The reason for the presumption was explained in *Upper Canada College v. Smith*, (1920), 61 SCR 413 at p. 417, where the court said it would be “a flagrant violation of natural justice’ to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time”. Depriving people of existing interests or expectations that have economic value would be similar to expropriation without compensation.

It is difficult to decide whether a particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right and sufficiently defined and in the control of the claimant to be recognized as vested or accrued.

Sullivan and Driedger state on page 571 that, to determine whether a right has vested, the Saskatchewan Court of Appeal identified two criteria in *Scott v. College of Physicians & Surgeons of Saskatchewan* (1992), 95 D.L.R. (4<sup>th</sup>) 706, p. 727. First, the right claimed must be particularized and personalized. In other words, “[t]he individual claiming the right must have placed himself in a distinctive legal position different from other members of society”. Second, the right claimed must have been acted upon and effectively claimed. This means that the person must have taken some step, or some event must have occurred, toward the realization of the right. However, the right will not be defeated simply because all of the procedural steps necessary to claim the right have not been taken, as long as all of the substantive conditions needed to claim it have occurred before the repeal

of the legislation. If some substantive condition to claiming the right is missing, the right will not be recognized: *R v. Puskas*, [1998] 1 S.C.R. 1207.

The presumption against interfering with vested rights is not as strong as the presumption against retroactivity. According to Sullivan and Driedger, the key to weighing the presumption against interference with vested rights is to ascertain the degree of unfairness the interference would create in particular circumstances (page 577). If the abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature intended such a result. When the interference is less troubling, the presumption is more easily rebutted.

In order to rebut the presumption, Sullivan and Driedger suggest that evidence of legislative intent is gathered in the usual way. One looks to the legislation, to the purpose, to the consequences, and to extrinsic materials. That is, it is necessary to undertake a purposive analysis. In applying a purposive analysis, the fact that legislation is remedial is insufficient to rebut the presumption against interference with vested rights. However, where the rights sought to be preserved are part of the “mischief” at which the legislation is aimed, the presumption is readily rebutted.

#### (7) Discretionary Benefits

Many statutes authorize the payment of benefits. In some instances the statutory provision requires that a benefit be paid to a claimant who satisfies certain specified criteria. Generally speaking, this provision creates an entitlement to the benefit for that claimant which can be characterized as one kind of right. However, in other instances the payment of the benefit will be at the unfettered discretion of an administrative decision maker. In these cases, the courts have held that unless the discretion was exercised in the claimant’s favour, the claimant does not have a right to that benefit: Sullivan and Driedger, page 573, citing *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at 772 (F.C.A.).

In this case, Apotex, a generic manufacturer and distributor of drugs, applied to the minister of National Health and Welfare for a notice of compliance (NOC) under the *Food and Drug Act* (FDA) for a particular drug. The minister did not issue the NOC under “old” legislation and “new” legislation subsequently prevented its issuance. Apotex applied for judicial review and an order compelling the issuance of a NOC.

The Federal Court of Appeal said:

55 Simply stated, this Court must decide whether Apotex is entitled to the advantages of the "old" law or bound to accept the disadvantages arising from the "new". The traditional approach to this issue focuses on whether the decision-maker reached a decision before the intervening legislation came into effect. In other words, did Apotex acquire a vested right to the NOC by March 12, 1993?

56 **If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision.** This is the ratio of the Judicial Committee of the Privy Council in *Director of Public Works v. Ho Po Sang*, [1961] A.C. 901. In that case, the Court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a rebuilding permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force. *Ho Po Sang* has been applied by the Exchequer Court in *Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra*. These cases provide the necessary background for an appreciation of the principles underlying the "vested rights" issue.

[emphasis added]

After reviewing the *Ho Po Sang* and *Merck & Co.* cases, the Federal Court of Appeal continued:

63 This analytical framework focuses the determination of whether Apotex had an "accrued" or "vested" right to the NOC. It is common ground that by February 4, 1993, "the matter was ready for decision". The question is whether the Minister's discretion with respect to the NOC had been spent as of that date.

64 Four issues are relevant to the determination of whether Apotex had a vested right to the NOC: (a) **the scope of the Minister's discretion**; (b) the relevance of legal advice; (c) the relevance of "pending legislative policy"; and (d) whether the matter had reached the Minister for his consideration.

[emphasis added]

The Court had to decide whether to compel the minister to exercise his statutory discretion to issue a NOC. In doing so, the court set out the following rules to apply in distinguishing between two kinds of discretion: an “unqualified”, “absolute”, “permissive” or “unfettered” discretion (all of which the Court considered to be synonymous) and “fettered” discretion. The rules the Court applied in *Apotex* to the problem reflected this distinction. The rules were itemized as follows:

- 45(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
- (b) mandamus<sup>†</sup> is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
- (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
- (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
- (e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

In *Apotex*, the Regulations under the FDA specified that the minister was to consider a drug's safety and efficacy in deciding whether to issue a NOC. The Court concluded that the minister's discretion was restricted to a consideration of those factors and therefore fettered. Moreover, the minister's discretion not to decide was effectively “spent” once the applicant had demonstrated the drug's safety and efficacy, thereby acquiring a vested right to a decision. The new legislation would effectively take away that vested right and thus it was subject to a presumption against retrospective operation. Therefore the Court concluded that there was no discretion in the minister to deny an application that met the requirements. *Apotex* had a vested right in the NOC rather than a mere hope.

The appeal from the Federal Court of Appeal's decision to the Supreme Court of Canada was dismissed<sup>§</sup>.

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<sup>†</sup> An order of *mandamus* compels the performance of a statutory duty owed to an applicant, in essence, requiring action where a decision-maker refuses to exercise power that he or she is compelled to use.

<sup>§</sup> [1994] 3 S.C.R. 1100, [1991] S.C.J. No. 113.

## (8) Procedural Legislation

Transition law differentiates between two types of legislation: substantive and procedural. Procedural legislation provides rules for the conduct of actions or applications and indicates how applications will be prosecuted, what evidence will be accepted, and how rights will be enforced in the context of a legal proceeding. Such legislation is presumed to apply immediately to ongoing proceedings, including those commenced but not completed under old legislation. The presumption against retroactivity applies to procedural legislation. Sullivan and Dreidger note that this presumption is formulated in a variety of ways: there is no vested right in procedure; the effect of procedural change is deemed to be beneficial for all; procedural provisions are an exception to the presumption against retrospectivity; and procedural provisions are ordinarily intended to have immediate effect (page 582).

What is a procedural provision? Whether a provision is procedural must be determined in the circumstances of each case. What may be a procedural provision when applied to one set of facts may be substantive when applied to another. For example, where a new limitation provision (time limit) comes into force before the previous limitation period has lapsed, and where applying the new provision would not have the effect of extinguishing the right of action or application, the application of the new legislation would be purely procedural. However, in a case where the new provision would result in extinguishing a right of action that existed at the time the provision came into force, more than procedure is at stake and the provision would have to be considered under the transition law that applies to substantive matters as discussed above.

## C. Application of the Law to the Worker's Appeal

I will now apply the statutory provisions and principles of transition law set out above to the facts before me in this case.

### (1) Conditions Worker Must Satisfy To Succeed

Following the principles articulated in *Apotex*, for the worker to be successful on this appeal, three conditions must be met:

- the Board's discretion to reconsider must be fettered;
- if it is, the worker must have, on application, met the conditions specified by the former Act which fettered the Board's discretion as a result of which the Board's discretion effectively became spent. In other words, he must have acquired a vested right to a reconsideration; and
- if the first two conditions are met, the current legislation must retrospectively deprive the worker of his vested right.

(2) Nature of the Board's Discretion to Reconsider

If the Board's power to decide whether to reconsider a decision under the former section 96(2) is fettered by specified conditions, as it was in *Apotex*, and if the worker satisfies those conditions on application, the worker arguably obtains a vested right to a reconsideration. On the other hand, if the scope of the discretion to reconsider under the former section 96(2) is unfettered by any conditions, arguably no right ever vested in the worker. There is no vested right with which the change in legislation can interfere.

The former section 96(2) of the Act contains no factors, constraints or restrictions governing the grounds for reconsideration. The only restriction is that the Board could not reconsider a decision of the Appeal Division. However, that restriction goes to the type of decision that may be reconsidered rather than the scope of reconsideration. Therefore, I find that the Board's discretion to reconsider under former section 96(2) was unfettered because it was unqualified, absolute and permissive. I am bolstered in my conclusion by a plain reading of the words of the former section 96(2): "... the board may at any time at its discretion ...".

Board policy interpreting the former section 96(2) is found in Chapter 14 of the *Rehabilitation Services and Claims Manual (RSCM)* in force at the time. Item 106.10 stated:

Not only is the reopening of a matter discretionary, but the Legislature has used the emphatic phrase "full discretionary power". This authorizes the Board to determine when it will reopen previous decisions, and the criteria by which it will do so. ... The Board is not required in every circumstance to reopen an erroneous decision, and it is not required in every circumstance to substitute the decision which ought to have been made on the earlier occasion. Section 96(2) authorizes the Board to consider its own judgment on what is fair in deciding whether that decision should be reopened or reversed.

Notwithstanding this policy recognition that the Board's discretion to reconsider under the former section 96(2) was unfettered, item 108.00 and following set out an application process. It provided that "[a]n application for reconsideration will not be considered unless grounds for reconsideration ... are specified." The grounds were two-fold: significant new evidence indicating that a different decision should be reached; or a mistake of law or evidence. Item 108.40 provided that a reconsideration was a two-step process. The first step was a determination of whether the application met one of the grounds; if it did, the second step was a determination of the merits of the application.

(3) Effect of Policy on Right to Reconsideration

No application for reconsideration was required or mandated under the former section 96(2). While nothing prevented a party from requesting reconsideration, and Board policy expressly spoke of an application, there was no application process articulated in the legislation. Indeed, whether to undertake reconsideration was expressly stated to be at the discretion of the Board. In other words, neither the legislation nor the policy granted a right of reconsideration to the worker.

Thus, even where, as in this case, a worker requested or applied to the Board for a reconsideration, there was no right to a reconsideration under former section 96(2) because the party at best had only a “mere hope or expectation”<sup>\*\*</sup> that the Board might exercise its discretion to undertake reconsideration. As there was no right to reconsideration, there was nothing that could have vested in the worker.

Consequently, the worker’s assertion of a “right to apply for reconsideration at any time” under the former section does not reflect the law. Instead, it reflects the policy that permitted applications for reconsideration under the Act. However, simply because Board policy provided an opportunity to the worker, does not mean that the opportunity creates a right in law. Legal rights are not born from administrative policies; they are independent of them.

Given that I have found the Board’s discretion to reconsider to be unfettered, I must find that there was no right to reconsideration which could have vested in the worker on transition day March 3, 2003.

#### **E. Is the 75 days a Limitation Period?**

The worker’s representative has argued that the worker had a vested right to reconsideration on transition day which could not be retrospectively extinguished by the application of the 75-day limitation period in the current section 96(5)(a).

I have concluded that it is not necessary for me to decide this question. The transition law which applies to new limitation periods is contingent upon interference with a vested right. In this case I have concluded that there was no vested right to reconsideration. Therefore, the submissions regarding limitation periods are not relevant.

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<sup>\*\*</sup> *Apotex*, citing *Director of Public Works v. Ho Po Sang*, [1961] A.C. 901.



**F. Summary**

Given my conclusion that the Board's discretion to reconsider a decision under the former section 96(2) was unfettered, and therefore there was no right in law to reconsideration, there was nothing to vest in the worker on the transition date. The absence of transition provisions with respect to reconsiderations bolsters my conclusion. I find that the lack of transitional provisions respecting reconsiderations reflects that the legislature did not see a need for such provisions because no party ever had a right to reconsideration by the Board.

Similarly, the presumption against retroactive or retrospective operation of law or interference with vested rights does not apply because they are premised on the existence of a vested right. Neither the former nor the current provisions require an application for reconsideration to be made for the reconsideration power in section 96 to be exercised by the Board. The genesis of the reconsideration process lies in the exercise of Board discretion, not in the bringing of an application. A worker cannot create a vested right to a reconsideration by a unilateral application where the Act does not require the worker to apply for a reconsideration and where the Board's discretion to reconsider is unfettered.

**Conclusion**

Based on the analysis set out above, I deny the appeal. I find that the Review Division lacks the authority to grant the requested remedy, that is, to compel the Board to reconsider the September 13, 1993 decision. I therefore confirm the Review Division's August 14, 2003 decision rejecting the worker's request for review of the March 6, 2003 letter.

Susan L. Polsky Shamash  
Vice Chair

SLPS/dlh