

# S.C.C. Decides When Legislation is Retroactive, when *Res Judicata* Attaches, and how *Stare Decisis* is to be Applied

A Commentary on  
*Régie des rentes du Québec v. Canada Bread Company Ltd.*, [2013 SCC 46](#)

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The decision of the Supreme Court of Canada in *Régie des rentes du Québec v. Canada Bread Company Ltd.*, [2013 SCC 46](#), (released Sept. 13, 2013) deals with some very interesting and unusual issues of statutory interpretation, *res judicata* and *stare decisis*.

In that case, the Court ruled that the usual rule that substantive legislation is prospective only does not apply to declaratory legislation. Declaratory legislation is retroactive and applies to ongoing cases to which *res judicata* has not attached. In dissent, the Chief Justice and Justice Fish agreed with this statement but disagreed with the majority as to when *res judicata* attached. The majority also dealt with the issue of whether *stare decisis* can be legislatively overruled.

This was a very unusual fact situation dealing with the Canada Bread Company's pension plan. The Régie had effected a partial termination of the plan and, in the process of determining whether or not the employer was liable for the deficiency in the plan, held that certain rules of the pension plan were incompatible with the *Supplemental Pension Plans Act*, R.S.Q., c. R-15.1. This decision was overturned by the Quebec Court of Appeal which held that the Régie had misinterpreted the *Act* and that the plan rules were not incompatible with the *Act*. As a result, the Court of Appeal remitted the matter back to the Régie for re-consideration. The Régie sought leave to Appeal to the Supreme Court of Canada, and while the leave application was pending, the Quebec National Assembly amended the *Act*, basically to adopt the interpretation of the *Act* by the Régie and reject the interpretation of the Court of Appeal. The amending the legislature expressly provided, in s. 319.1, that these new sections of the *Act* were declaratory in nature.

The Supreme Court subsequently denied leave to appeal. The matter then fell to the Régie to recalculate the amount owing by the employer pursuant to the order of the Court of Appeal.

The issue then, was whether the Régie, in doing the recalculation, was bound to follow the reasoning of the Court of Appeal (on the basis that the issue of whether or not the rules of the plan were incompatible with the *Act* had been finally determined by that court and was *res judicata*), or was bound to follow the declaratory provisions of the amended *Act*. The Régie chose the latter and that decision wound its way back through

the courts a second time, ultimately resulting in the decision by the Supreme Court of Canada herein.

The majority of the Court commented on the effect of declaratory legislation as follows:

[27] In enacting declaratory legislation, the legislature assumes the role of a court and dictates the interpretation of its own law: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 562. As a result, declaratory provisions operate less as legislation and more as jurisprudence. They are akin to binding precedents, such as the decision of a court: P. Roubier, *Le droit transitoire : conflits des lois dans le temps* (2nd ed. 1993), at p. 248. Such legislation may overrule a court decision in the same way that a decision of this Court would take precedence over a previous line of lower court judgments on a given question of law.

[28] It is also settled law that declaratory provisions have an immediate effect on pending cases, and are therefore an exception to the general rule that legislation is prospective. The interpretation imposed by a declaratory provision stretches back in time to the date when the legislation it purports to interpret first came into force, with the effect that the legislation in question is deemed to have always included this provision. Thus, the interpretation so declared is taken to have always been the law: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 682-83.

[29] The immediate effect of declaratory legislation is limited, however. In 1953, in *Western Minerals*, this Court endorsed the statement in W. F. Craies, *A Treatise on Statute Law* (4th ed. 1936), that declaratory laws “decide like cases pending when the judgments are given, but do not re-open decided cases”: p. 370, citing Craies, at pp. 341-42. Like a binding precedent, an interpretation the legislature adopts by enacting a declaratory provision is applicable to all future cases as well as to cases that are pending when the provision comes into force, despite the fact that the events that gave rise to any such dispute would have taken place before the provision was enacted. However, declaratory provisions do not reopen cases that have been resolved in a final judgment.

Where the majority and the dissent differed was the issue of whether the retroactive amending legislation was applicable in the circumstances of this case.

The dissenting justices (at para. 53) agreed with the majority that, “It is a settled principle that laws can take effect retroactively, so long as the legislature indicates its intention in clear statutory language. In this way, the legislature can change the outcome of a legal dispute, by enacting provisions which apply to a pending case.”

However (para. 54) they stated that, “When a retroactive law comes into force while a case is being appealed, it falls to be applied by whatever level of appellate court is seized of the matter at that time.”

The dissenting Justices went on to say,

[55] Once all avenues of appeal have been exhausted, the authority of *res judicata* applies to preclude parties from re-litigating an issue that has been decided on the merits. This is so even if the legislature has changed the law retroactively and, as a result, the final judgment now contains an error in law. Indeed, “the authority of *res judicata* exists even when there is an error in the judgment” (*Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at p. 403).

[56] In the present case, only the Supreme Court of Canada, before which an application for leave to appeal was pending at the time of the coming into force of the retroactive provisions, had the jurisdiction to apply the provisions to resolve the dispute between Multi-Marques and the pension beneficiaries. Once it denied leave to appeal, all avenues of appeal were exhausted. Consequently, the Quebec Court of Appeal’s judgment acquired the authority of *res judicata* between the parties with respect to the issue [of whether the fund rules were incompatible with the *Act*].

As a result, in the view of the dissenting Justices, it was not open to the Régie to re-open the issue as to whether the rules of the pension plan were incompatible with the *Act* as that issue was *res judicata*.

The majority of the Court disagreed. It distinguished between situations in which a *case* has been finally determined and ones in which an *issue* has been finally determined and held that declaratory legislation applies to all *cases* which are still *pending*. It held (at para. 32) that, “Pending cases are cases that are currently before a competent tribunal and are awaiting a final and irrevocable determination on the merits.” The majority went on to say,

[33] In the case at bar, the declaratory legislation will therefore apply unless it is found that a *case*, and not merely an *issue*, has been decided.

The majority then went on to say (at para. 39),

...a pending case is one in which a final and irrevocable judgment determining the parties’ rights and obligations has not yet been rendered. A final judgment on an issue in a case that falls short of a resolution of the case on its merits does not preclude an authority responsible for the final determination of the parties’ rights and obligations from applying declaratory legislation that has been enacted since that judgment.

The majority therefore held it was open to the Régie to consider the effect of the amending legislation, subject only to any obligation to follow the decision of the Court of Appeal on the basis of *stare decisis*.

The majority stated,

[47] In the case at bar, once the matter had been remitted to the Régie for redetermination, the Régie's jurisdiction was limited only by the principle of *stare decisis*. It was by virtue of *stare decisis* that the Régie was bound to apply the Court of Appeal's interpretation to the case before it. When the declaratory legislation came into force, however, it operated as a part of the jurisprudence and overruled the court's interpretation. This legislation then became the new binding precedent on the question of the interpretation of certain provisions of the SPPA. The principle of *stare decisis* dictates, therefore, that changes to the law in the form of declaratory legislation that occur before a final disposition of the litigation will negate the precedential value of directions from the reviewing court that conflict with them.

The end result was to uphold the Régie's decision to base its award on the amended legislation.

One wonders if the Court might not, in retrospect, have regretted not granting the Régie leave to appeal the original decision.

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