Federal Court  Cour fédérale

**Date: 20091116**

**Docket: T-562-09**

**Citation: 2009 FC 1156**

**Ottawa, Ontario, November 16, 2009**

**PRESENT: The Honourable Mr. Justice Boivin**

**BETWEEN:**

**SHERIDAN GARDNER**

**Applicant**

**and**

**CANADA BORDER SERVICES AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review by the Applicant of a final level decision by Paul Burkholder, Vice-President, Human Resources Branch of the Canada Border Services Agency (CBSA) (the decision-maker), dated March 3, 2009, denying the Applicant's grievance challenging the June 2007 recovery by the Respondent of overpayments made to the Applicant in 1998 and 2001.

Factual Background

[2] The Applicant, Ms. Sheridan Gardner, is an employee of the Respondent and its predecessor, the Canada Customs and Revenue Agency. She was on leave without pay for medical reasons for approximately 8.5 years commencing on October 31, 1998 until she returned to work on June 4, 2007.

[3] On November 10, 1998, the Applicant received a regular paycheque for the period from October 29 to November 11, 1998. This paycheque paid the Applicant for eight working days which she did not work and for which she was not entitled to be paid. Thus, the November 10, 1998 paycheque included an overpayment in the amount of $1,276.64.

[4] Following a salary increase for her bargaining unit signed in October 1999, on January 14, 1999, the Applicant received a $781.82 payment for a retroactive salary increase from August 17, 1998 to October 30, 1998. The Respondent applied the entire amount from the $781.82 salary revision towards the overpayment which resulted from the issuance of the November 10, 1998 paycheque.

[5] Following a second salary revision in November 2000, the Applicant received $1,519.09 on January 11, 2001, which covered the period between June 22, 2000 and January 17, 2001. The net amount of the cheque, which was cashed by the Applicant on February 13, 2001, totalled $310.48. The payment stub indicated that the Respondent had recovered $494.82 in relation to a previous overpayment.

[6] On March 6, 2001, the Applicant was advised by the Respondent that the January 11, 2001 salary revision payment was made in error as the Applicant was not entitled to any retroactive salary increase because she was on leave without pay for the period intended to be covered by the payment. The letter requested the Applicant to contact a representative of the Respondent to rectify the situation. The Applicant did not act upon the letter because she was ill.

[7] The Applicant then received a T-4 for the year 2001 which indicated that she had earned income in the amount of $1,519.09. The Applicant wrote to the Respondent advising that the T-4 was not accurate and asked that either the T-4 or the payment be amended. Another T-4 was issued but the Applicant submits it still contained errors, such as the fact that the amount of $1,519.00 still appeared as insurable earnings.

[8] In a letter dated March 14, 2002, the Respondent replied, advising the Applicant that she had received income in the amount stated in her T-4 in error and that she was not entitled to the January 11, 2001 payment. There was a note indicating “Over payment pending – 494.82” in a bracket detailing the deductions from the 2001 cheque. In that letter, the Applicant was also advised that the payment would be reversed, resulting in a revised overpayment.

[9] On March 21, 2002, an overpayment for $955.30 was recorded in the Applicant’s file. The overpayment was calculated on the basis that due to the January 2001 salary revision payment, the Applicant owed the Respondent $115.82 in unrecoverable taxes, $34.18 in employment insurance

contributions, and $310.48 which represented the net funds received as a result of the January 2001 payment.

[10] On May 3, 2004, the Applicant received an information package relating to her possible medical retirement. The information package set out that the Applicant was indebted to the Crown in the amount of $955.30 and that the Crown could deduct this amount from the Applicant's superannuation pension if she chose to receive a pension for medical reasons.

[11] On October 31, 2004, Ms. Maureen O'Hara wrote to the Respondent on behalf of the Applicant to inquire about the Applicant's $955.30 debt to the Crown. On February 3, 2005, the Respondent e-mailed Ms. O'Hara and provided her with details about the debt.

[12] The Applicant returned to work on June 4, 2007, and she again sought information on the status of the debt she might be owing to the Crown. The Applicant was initially advised there was no trace of a debt to the Crown from a review of her file. On June 7, 2007, the Applicant was issued her first paycheque and, from this cheque, the Respondent recovered the Applicant's $955.30 debt to the Crown.

[13] On May 5, 2008, the Applicant filed a grievance contesting the Respondent's recovery of $955.30 from her June 7, 2007 paycheque and this grievance was denied at the final level by the Vice-President of Human Resources at CBSA on March 3, 2009 on the basis that the employer acted in accordance with the Treasury Board's *Recovery of Amounts due to the Crown Policy* (the

Policy) and the employer acted to extend the time limits provided by section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (*CLPA*):

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| **32.** Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. | **32.** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans. |

[14] The Applicant commenced an application for judicial review on April 8, 2009, seeking to set aside the March 3, 2009 decision denying her grievance.

Impugned Decision

[15] Section 2.1 of the *Treasury Board Recovery of Amounts due to the Crown Policy* states that overpayments on account of salary, wages, or pay and allowances must be recovered in full from the first available funds payable to the employee. Therefore, according to the decision-maker, the employer's final recovery action from the Applicant's first available funds upon her return to work was in accordance with the said policy.

[16] The Applicant argued that the employer cannot require a reimbursement over the limitation period of the six years as prescribed by section 32 of the *CLPA* because the recovery actions occurred in June 2007, six years after the overpayment was initially made. Thus, the employer had no right to proceed with the recovery. However, the limits provided under section 32 of the *CLPA* may be extended if the debtor acknowledges the debt or if the Crown initiates collection proceedings within the limitation period so as to demonstrate that it has not given up on the collection of the debt. Consequently, the decision-maker found the limitation period was renewed by several pieces of correspondence relating to this overpayment from the Compensation Advisors, namely, correspondence dated March 6, 2001, March 14, 2002, May 3, 2004 and February 3, 2005. The Applicant's grievance was therefore denied.

Issues

[17] This application raises the following issues:

1. What is the appropriate standard of review to be applied in this case?
2. Did the decision-maker err in denying the Applicant's grievance and concluding that the Respondent was not statute-barred from recovering the salary overpayment in the amount of $955.30 from the Applicant?

[18] At the hearing, the parties did not submit arguments on the issue of judicial review jurisdiction, as they did in their written submissions. It is therefore unnecessary to address this issue.

*1. What is the appropriate standard of review to be applied in this case?*

Applicant's Arguments

[19] The Applicant submits a final level grievance decision is subject to a very weak privative clause at section 214 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*), which points to a lesser degree of deference. According to section 214 of the *PSLRA*, a final level grievance decision is considered "final and binding for all purposes of this *Act* and no further action under this *Act* may be taken on it", while subsection 233(1) of the *PSLRA* states that "every decision of an adjudicator is final and may not be questioned or reviewed in any court" (*Hagel v. Canada (Attorney General)*, 2009 FC 329, [2009] F.C.J. no. 417 (QL) at par. 23-24):

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| Binding effect<br>**214.** If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it. | Décision definitive et obligatoire<br>**214.** Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause. |
| Decisions not to be reviewed by court<br>**233.** (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court. | Caractère définitif des décisions<br>**233.** (1) La décision de l'arbitre de grief est définitive et ne peut être ni contestée ni révisée par voie judiciaire. |
| No review by certiorari, etc.<br>(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, | Interdiction de recours extraordinaires<br>(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie |

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| prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part. | d'injonction, de certiorari, de prohibition ou dequo warranto — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre de grief exercée dans le cadre de la présente partie. |

[20] However, the Applicant submits the test to be applied in determining whether the recovery of certain amounts from an employee's salary is statute-barred is a question of law arising from the interpretation of the applicable legislation. The Applicant further submits that the final grievance decision-maker has no expertise in addressing this legal question.

[21] As stated in *Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at par. 55 and 60, questions of law which are outside the specialized area of expertise of an administrative decision-maker will attract a correctness standard. Furthermore, questions of law necessary to the resolution of a grievance in the federal public service are typically reviewed on a standard of correctness. In *Aubert v. Canada (Transport)*, 2008 FCA 386, 387 N.R. 140 at par. 11, the Federal Court of Appeal stated that "issues regarding the applicable rule of prescription generally relate to questions of law", while in *Canada (Attorney General) v. Assh*, 2006 FCA 358, [2007] 4 F.C.R. 46 at par. 37, 38 and 40, the Federal Court of Appeal indicated that courts "are more apt to regard the interpretation of law as a question on which they are at least as expert as the tribunal under review".

[22] The Applicant submits that in recent applications for judicial review from decisions of final level grievance decision-makers dismissing the grievance of federal public servants such as the Applicant, the applicable standard of review was found to be correctness (see *Blais v. Canada*

*(Attorney General)*, 2004 FC 1638, 263 F.T.R. 151 at par. 16; *Endicott v. Canada (Treasury Board)*, 2005 FC 253, 270 F.T.R. 220 at par. 9).

Respondent's Arguments

[23] The Respondent submits that a salary overpayment was made to the Applicant in January 2001 and that the Respondent obtained its authority to recover salary overpayments from subsection 155(3) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*) :

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| Recovery of over-payment<br>**155.** (3) The Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made. | Recouvrement<br>**155.** (3) Le receveur général peut recouvrer les paiements en trop faits sur le Trésor à une personne à titre de salaire, de traitements ou d'allocations en retenant un montant égal sur toute somme due à cette personne par Sa Majesté du chef du Canada. |

[24] Like the Applicant, the Respondent maintains that section 214 of the *PSLRA* establishes a weak privative clause, which suggests a degree of deference should be accorded to the decision-maker (*Cox v. Canada (Attorney General)*, 2008 FC 596, 78 W.C.B. (2d) 196 at par. 10; *Assh* at par. 35; *Vaughan v. Canada*, 2003 FCA 76, [2003] 3 F.C. 645 at par. 125-130 (*Vaughan* (FCA)). Furthermore, as to the relative expertise of the decision-maker, the decision-maker in question was

not independent of the employer, which suggests that less deference should be accorded to the decision-maker (*Assh* at par. 44).

[25] The Respondent recalls that the purpose of the *PSLRA* and the grievance process is to create a complete system for dispute resolution in labour relations. The object of sections 208 and 209 of the *PSLRA* is to resolve grievances through an internal procedure of the employer and, if applicable, an outside adjudicator, therefore deference should be accorded to the decision-maker (*Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 at par. 38-39 (*Vaughan* (SCC)):

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| Right of employee<br>**208.** (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved | Droit du fonctionnaire<br>**208.** (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé : |
| (a) by the interpretation or application, in respect of the employee, of | a) par l'interprétation ou l'application à son égard : |
| (i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment, or | (i) soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi, |
| (ii) a provision of a collective agreement or an arbitral award; or | (ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale; |
| (b) as a result of any occurrence or matter affecting his or her terms and conditions of employment. | b) par suite de tout fait portant atteinte à ses conditions d'emploi. |

Limitation
(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the Canadian Human Rights Act.

Réserve
(2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la Loi canadienne sur les droits de la personne.

Limitation
(3) Despite subsection (2), an employee may not present an individual grievance in respect of the right to equal pay for work of equal value.

Réserve
(3) Par dérogation au paragraphe (2), le fonctionnaire ne peut présenter de grief individuel relativement au droit à la parité salariale pour l'exécution de fonctions équivalentes.

Limitation
(4) An employee may not present an individual grievance relating to the interpretation or application, in respect of the employee, of a provision of a collective agreement or an arbitral award unless the employee has the approval of and is represented by the bargaining agent for the bargaining unit to which the collective agreement or arbitral award applies.

Réserve
(4) Le fonctionnaire ne peut présenter de grief individuel portant sur l'interprétation ou l'application à son égard de toute disposition d'une convention collective ou d'une décision arbitrale qu'à condition d'avoir obtenu l'approbation de l'agent négociateur de l'unité de négociation à laquelle s'applique la convention collective ou la décision arbitrale et d'être représenté par cet agent.

Limitation
(5) An employee who, in respect of any matter, avails himself or herself of a complaint procedure established by a policy of the employer may not present an individual grievance in respect

Réserve
(5) Le fonctionnaire qui choisit, pour une question donnée, de se prévaloir de la procédure de plainte instituée par une ligne directrice de l'employeur ne peut présenter de grief individuel à l'égard de cette

of that matter if the policy expressly provides that an employee who avails himself or herself of the complaint procedure is precluded from presenting an individual grievance under this Act.

question sous le régime de la présente loi si la ligne directrice prévoit expressément cette impossibilité.

Limitation
(6) An employee may not present an individual grievance relating to any action taken under any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Réserve
(6) Le fonctionnaire ne peut présenter de grief individuel portant sur une mesure prise en vertu d'une instruction, d'une directive ou d'un règlement établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Order to be conclusive proof
(7) For the purposes of subsection (6), an order made by the Governor in Council is conclusive proof of the matters stated in the order in relation to the giving or making of an instruction, a direction or a regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Force probante absolue du décret
(7) Pour l'application du paragraphe (6), tout décret du gouverneur en conseil constitue une preuve concluante de ce qui y est énoncé au sujet des instructions, directives ou règlements établis par le gouvernement du Canada, ou au nom de celui-ci, dans l'intérêt de la sécurité du pays ou de tout État allié ou associé au Canada.

Reference to adjudication
**209.** (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is

Renvoi d'un grief à l'arbitrage
**209.** (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :

related to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;

(c) in the case of an employee in the core public administration,

c) soit, s'il est un fonctionnaire de l'administration publique centrale :

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

(i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).

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| Application of paragraph (1)(a)<br>(2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings. | Application de l'alinéa (1)a)<br>(2) Pour que le fonctionnaire puisse renvoyer à l'arbitrage un grief individuel du type visé à l'alinéa (1)a), il faut que son agent négociateur accepte de le représenter dans la procédure d'arbitrage. |
| Designation<br>(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d). | Désignation<br>(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct. |

[26] The Respondent argues that in the case at bar, the decision-maker accepted the Applicant's submission that the *CLPA* applied to the recovery of the overpayment. Under the *CLPA* framework, the question of whether the Respondent took actions which would allegedly extend the limitation period established by section 32 of the *CLPA* is a question of applying law to facts. As such, some degree of deference should be accorded to the decision-maker and the standard of review of reasonableness should apply.

Analysis

[27] The issue of whether the Respondent was statute-barred from recovering the amounts due from the Applicant is a question of law which requires an analysis of section 32 of the *CLPA* and its application to the decision-maker in the case at bar. This is an exercise of statutory interpretation that is not within the decision-maker's expertise and therefore should attract a standard of correctness (*Bullock v. Canada (Attorney General)*, 2008 FC 1117, 336 F.T.R. 73 at par. 15). Courts

generally tend to be deferential to administrative agencies' application of law to facts, but tend to regard the interpretation of the law as a question on which they are at least as expert as the tribunal under review (*Assh* at par. 37).

[28] I agree with the parties that section 214 of the *PSLRA* establishes a weak privative clause (*Assh* at par. 35) and that the decision-maker is not independent of the employer. This suggests that less deference should be accorded in the circumstances (*Assh* at par. 44). However, I also agree with the Applicant that the test to be applied in determining the question of whether the recovery of certain amounts from an employee's salary is statute-barred is a question of law arising from the interpretation of the applicable legislation and that the final level grievance decision-maker has no expertise in addressing this legal question.

[29] In accordance with the recent Supreme Court of Canada decision in *Dunsmuir*, where jurisprudence has already determined in a satisfactory manner the required degree of deference to be accorded to a particular category of question, as in the present case, there is no need to engage in what is now referred to as a "standard of review analysis" (*Macdonald v. Canada (Attorney General)*, 2008 FC 796, 330 F.T.R. 261). I am thus of the opinion that correctness is the appropriate standard for reviewing the final level grievance decision respecting the interpretation of section 32 of the *CLPA*.

*2. Did the decision-maker err in denying the Applicant's grievance and concluding that the Respondent was not statute-barred from recovering the salary overpayment in the amount of $955.30 from the Applicant?*

Applicant's Arguments

[30] According to the Applicant, the Respondent is statute-barred from recovering the overpayment because the six year limitation period under the *CLPA* applies in the circumstances. More particularly, the Respondent's authority to recover salary overpayments is provided in subsection 155(3) of the *FAA*. Pursuant to subsection 3(2) of the *Canada Border Services Agency Act*, S.C. 2005, c. 38, the Agency is deemed to be an agent of Her Majesty the Queen for all purposes and, as a result, the authority to recover an overpayment under subsection 155(3) of the *FAA* applies in this case. Section 32 of the *CLPA* sets out the applicable six-year limitation period and, pursuant to section 35 of the *CLPA*, section 32 is made applicable to Crown agents such as the Canada Border Services Agency.

[31] In *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 at par. 11 and 20, the Supreme Court noted that section 32 of the *CLPA* presumptively applies to all Crown proceedings unless narrowed by an Act of Parliament. Section 32 requires that there be a "proceeding… in respect of a cause of action" for the limitation period to apply. The Applicant submits the decision of the Agency to recover its overpayment of wages against her is clearly a "proceeding", as clearly defined by the Supreme Court. The expression "cause of action" was also broadly defined as "a set of facts that provides the basis for an action in court" (*Markevich* at par. 27) and the Applicant submits the case at bar constitutes a "cause of action" because the Agency could have sought repayment of the Applicant's alleged debt by way of court action.

[32] The Applicant submits that unless the Respondent can establish that it took enforcement steps within the limitation period, or where there is an express acknowledgement of a debt by the debtor, the limitation period will be found to have expired. In order for the Crown to be allowed to benefit from the extension of the limitation period, there must be due diligence and the Crown must demonstrate evidence that concrete steps to collect had been taken within the limitation period (*Gibson v. Canada*, 2004 FC 809, 254 F.T.R. 54 at par. 17-18, rev'd on other grounds 2005 FCA 180, 334 N.R. 288).

[33] The Applicant further argues that the correspondence between the parties since 2005 does not demonstrate the Applicant's acknowledgment of a debt to the Crown. According to the Applicant, the Respondent cannot establish that it took any concrete steps or that the Applicant acknowledged the debt so as to extend the limitation period to June 2007, when the Respondent ultimately recovered the remaining amount of $955.30. According to the Applicant, the Respondent was thus statute-barred from recovering that amount and to allow the Respondent to extend the limitation period in this case would run counter to the purpose of section 32 of the *CLPA* as stated in *Markevich*.

Respondent's Arguments

[34] The Respondent submits that the recovery of the overpayment was made in accordance with the Treasury Board policy and alleges that the *Markevich* decision cannot be applied in the case at hand. The Respondent also questions the fact that the recovery of overpayment mentioned at section 155(3) of the *FAA* is indeed a proceeding according to section 32 of the *CLPA*.

[35] The Respondent emphasizes that the decision-maker pointed to the letters that were sent to the Applicant which explained why the Applicant was indebted to the Crown in the amount of $955.30 and found that the Crown had initiated collection proceedings within the limitation period to demonstrate that it had not given up on the collection of the overpayment. In particular, the correspondence referenced in the March 3, 2009 final level decision was found to show the Respondent had not given up on collecting the overpayment made to the Applicant on January 11, 2001.

[36] The Respondent also submits that even if section 32 of the *CLPA* applies to the recovery of an overpayment made pursuant to subsection 155(3) of the *FAA*, the only question remaining is whether it was reasonable for the decision-maker to find that the limitation period established under section 32 of the *CLPA* had been extended by the Crown initiating collection proceedings within the limitation period so as to demonstrate that it had not given up on the collection of the overpayment. As per the jurisprudence, the Crown need only demonstrate that it took positive steps to collect its debt within the prescribed time limit imposed by section 32 of the *CLPA* in order to extend the limitation period (*Gibson*; *Ross v. Canada*, 2002 FCT 401, 218 F.T.R. 276, aff'd. 2002 FCA 359, 301 N.R. 23).

[37] The evidence before the decision-maker (correspondence dated March 6, 2001, March 14, 2002, May 3, 2004 and February 3, 2005) showed that the Respondent continuously reminded the Applicant of her debt to the Crown and updated its system in order to allow the overpayment to be

collected at the first possible opportunity. According to the Respondent, it was therefore reasonable for the decision-maker to conclude that the Respondent was not statute-barred from recovering the $955.30 overpayment from the Applicant's wages when she returned to work in June 2007.

Analysis

[38] Section 32 of the *CLPA* is a legislative provision of general application which applies unless its application conflicts with another Act of Parliament. Limitation provisions provided in section 32 of the *CLPA* are therefore applicable to both court and statutory collection procedures. After the expiry of the relevant limitation period, the cause of action is extinguished (*Ross* at par. 31).

[39] Subsection 155(3) of the *FAA* provides the Respondent with its authority to recover overpayment. The provision states that the "Receiver General may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowance out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made". Furthermore, the *Treasury Board Recovery of Amounts due to the Crown Policy* provides direction with respect to the recovery of amounts due to the Crown. The Policy states at section 2 that, where possible, the overpayment may be deducted from numerous sources including subsequent salary payments and any other money payable to the employee. In the event that this method of recovery of amounts is possible, the Policy further states that overpayment

on account of salary must be recovered in full from the first funds payable to the employee, namely salary wages.

[40] Therefore, if a recovery of overpayment is possible within the limitation period, the Policy provides direction on the recovery method (e.g. deduction from salary). However, if a claimant envisages that this recovery method provided for by the Policy cannot be called upon because, as in the case at hand, the employee is on leave without pay for a period exceeding the six-year limitation period (section 32 of the *CLPA*), other methods are available or the claimant should act accordingly and take remedial steps within the limitation period and require payment. A claimant cannot wait for his/her cause of action to be extinguished and argue that recovery of overpayment was performed according to the Policy. A policy of limited application cannot override a statute.

[41] In *Markevich*, although the case dealt with the *Income Tax Act*, 1985, c. 1 (5th Supp.), the Supreme Court found that the Crown can extend the limitation period in a variety of ways (par. 18). Further, in *Ross*, it was held that the registration of a certificate in accordance with subsection 223(3) of the *Income Tax Act* gives rise to a renewal of the limitation period, whereas in *MacKinnon v. Canada*, 2002 FCT 824, 222 F.T.R. 306, aff'd 2003 FCA 158, 303 N.R. 109, this Court found that the taxpayer's acknowledgment of indebtedness by way of a hypothecation agreement with the Minister, and his partial payment of the tax debt, each served to renew the limitation period. In the case at bar, the Respondent had taken remedial steps to collect the debt within the limitation period of 6 years (section 32 of the *CLPA*).

[42] The decision-maker found that the Respondent demonstrated a continued intention to collect the debt from the Applicant through correspondence dated March 6, 2001, March 14, 2002, May 3, 2004 and February 3, 2005:

> Your representative is of the view that the employer cannot require a reimbursement over the limitation period of the six years as prescribed by section 32 of the Crown Liability and Proceedings Act (CLPA). She bases her findings on the fact the recovery actions in this case occurred in 2007, that being six years after the overpayment was initially made, the Employer has no right to proceed with the recovery, I have been advised that the limits provided under section 32 of the CLPA may be extended if the debtor acknowledges the debt of if the Crown initiates collection proceedings within the limitation period so as to demonstrate that it has not given up on the collection of the debt. Consequently, I am of the opinion that the limitation period was renewed by several pieces of correspondence relating to this overpayment from the Compensation Advisors. Namely, correspondence dated March 6, 2001, March 14 2002, May 3, 2004 and finally February 3, 2005.
>
> In light of the foregoing, your grievance is denied and your requested corrective measures will not be forthcoming. [Emphasis added]

[43] Based on its review of the record, the Court does not agree that the limitation period was renewed by the above-mentioned correspondence from Compensation Advisors. Rather, in light of the correspondence between 2001 and 2005, the Court finds that although the letters from the Respondent repeatedly refer to the debt of the Applicant, no reference is made to any future and concrete steps to recover the overpayment. Further, upon returning to work the Applicant stated that she was informed there was no amount owing in her file and this statement was not challenged. The Respondent had ample opportunity to demonstrate its intention to recover the claimed amount and how it would be recovered but failed to do so (*Ross* at paragraph 36; *Gibson* at paragraph 8).

Moreover, the correspondence between the parties does not show the Applicant's acknowledgment of a debt to the Crown.

[44] It is trite law "that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence…" (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 69 N.R. 321 at par. 77). In *Michelin Tires (Canada) Ltd. v. Canada*, 2001 FCA 145, [2001] 3 F.C. 552 at par. 33-34, the Federal Court of Appeal held that the limitation period presumptively commenced from the date of the overpayment and only evidence that the Applicant could not have discovered the overpayment earlier through the exercise of due diligence could have delayed the commencement of the limitation period. Accordingly, from the 2001-2005 correspondence, it can be determined that the cause of action arose in January 11, 2001 when a cheque was issued to the Applicant for a salary revision covering the period from June 22, 2000 to January 17, 2001. The Applicant was later informed in March 2001 that the amount had been sent in error and that she was not entitled to the payment.

[45] Consequently, the Court finds that the six-year limitation period commenced running in January 2001 and had expired in January 2007. The mere repetition of the existence of the debt by the Applicant in the 2002, 2004 and 2005 correspondence, absent a reasonable intention to collect, cannot amount to an extension of the limitation period at issue. This line of reasoning would result in a continuous and indefinite extension of the limitation period and thus offend its *raison d'être*.

[46] The final recovery of the overpayment in the amount of $955.30 occurred in June 2007 but, at that time, the Respondent was barred from collecting the debt because six years had lapsed after the right to do so first arose in January 2001.

[47] For these reasons, the application for judicial review is granted.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that :**

1. the application for judicial review is granted without costs.
2. the matter is sent back to the decision-maker for reconsideration in accordance with the Court's decision.

"Richard Boivin"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-562-09 |
| **STYLE OF CAUSE:** | SHERIDAN GARDNER v. THE CANADIAN BORDER SERVICES AGENCY |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | November 9, 2009 |
| **REASONS FOR JUDGMENT:** | BOIVIN J. |
| **DATED:** | November 17, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Ms. Isabelle Roy | FOR THE APPLICANT |
| Ms. Talitha Nabbali | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| The Professional Institute of the Public Service of Canada | FOR THE APPLICANT |
| John H. Sims, Q.C., Deputy Attorney General of Canada | FOR THE RESPONDENT |