Date: 20080718

Docket: A-256-07

Citation: 2008 FCA 240

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

HENRY MARTENS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Regina, Saskatchewan, on June 2, 2008.

Judgment delivered at Ottawa, Ontario, on July 18, 2008.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: SHARLOW J.A.

CONCURRING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an application for judicial review of a decision (CUB 67904) of Umpire Riche (the "Umpire") dated March 27, 2007, under the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"), dismissing the appeal of Mr. Henry Martens from a decision of the Board of Referees (the "Board") that Mr. Martens is not entitled to benefits under the Act for the period from April 4, 2004 to April 1, 2005 (the "Benefit Period") because he was self-employed within the meaning of subsection 30(1) of the *Employment Insurance Regulations*, S.O.R./96-332 (the "Regulations") during that period. Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the Regulations.

[2] When an insured person makes an initial claim for benefits, section 9 of the Act requires the establishment of a benefit period and mandates the payment of benefits to the claimant for each week of unemployment that falls within the benefit period. Subsection 11(1) of the Act provides that a week of unemployment for a claimant is a week in which that claimant does not work a full working week.

[3] If a claimant is self-employed or engaged in the operation of a business on his or her own account during any week in a benefit period, subsection 30(1) deems that claimant to have worked a full working week during that week. As a result, that week will not be considered to be a week of unemployment for the purposes of section 9 of the Act. Subsection 30(2) provides an exception to the deeming rule in subsection 30(1) where the self-employment or engagement in the operation of the claimant's business is minor in extent. The issue in this appeal is whether that exemption applies to Mr. Martens.

BACKGROUND

[4] Mr. Martens has operated a farm near Mossbank, Saskatchewan since 1972. He also has a long history of working off the farm. For a period of approximately thirteen years, he was employed by Encore Gourmet Food Corporation in their food processing plant (the "Plant") in Mossbank. Prior to that, he worked as a mechanic for a farm equipment company. During his thirteen years at the Plant, he worked himself up to the position of Plant Manager, occupying that position from

February 21, 2000 until the closure of the Plant in September 2003. After the closure, Mr. Martens was seconded to the Montreal facility of his employer and was laid off on April 2, 2004.

[5] On April 29, 2004, Mr. Martens applied for employment insurance benefits and completed a Farm Questionnaire as part of the application. In it, he disclosed that since 1972, he has been the 100% owner of a grain farm that consisted of 2400 acres of land, of which 640 acres were owned and the balance was leased. Typically, half of the land was seeded in each year.

[6] Mr. Martens also disclosed in the Farm Questionnaire that he did not consider farming his main livelihood and that in addition to his farm work he was available for full-time work all year round.

[7] In his income tax returns for 2002, 2003 and 2004, Mr. Martens reported the following amounts in respect of his farming business:

Taxation Year	**Gross Income**	**Net Income**
2002	$ 110,994	$ 682
2003	$ 160,064	$ 24,229
2004	$ 121,251	$ 3,471

[8] At the time that Mr. Martens lost his job at the Plant, the value of the land and equipment that were used in his farming operations was $120,000 and $130,000 respectively, and his farm-related debt was $30,000.

[9] In respect of the work performed on the farm, Mr. Martens' practice, prior to the Benefit Period, was to take one week of holidays in the spring to seed and two weeks in the fall to harvest. If there was a need, Mr. Martens would cultivate after hours. However, after he became Plant Manager, he hired a worker to cultivate. Mr. Martens' son resided on the farm from March to August of each year and worked on the farm for approximately five hours per day during those months. At harvest time, Mr. Martens typically hired additional help. The wages paid to all of the people who were hired to do farm work in the taxation years referred to in the preceding paragraph, including Mr. Martens' son, were deducted in computing Mr. Martens' net farming income in those taxation years.

[10] During the Benefit Period, Mr. Martens built a seed cleaner for his farm, which he used in a seed cleaning business that commenced operations in April 2005.

STATUTORY PROVISIONS

[11] The relevant statutory provisions are section 9 and subsection 11(1) of the Act and section 30.

PROCEDURAL HISTORY

[12] The Employment Insurance Commission (the "Commission") denied Mr. Martens' application for benefits, as of April 4, 2004, on the basis that he was self-employed or engaged in his farming business, within the meaning of subsection 30(1), and that the exception for self-employment or engagement in business operations to a minor extent, which is provided in subsection 30(2), was not applicable to him.

[13] Mr. Martens' appeal from the decision of the Commission was dismissed by the Board on the basis that during the Benefit Period his farming activities were of such a major extent as to be considered a principal means of livelihood, and as a self-employed farmer he was not entitled to benefits. Mr. Martens appealed the decision of the Board to Umpire Goulard who held that the Board failed to analyze the six factors in subsection 30(3) in light of the evidence pertaining to the Benefit Period. Accordingly, Umpire Goulard set aside the decision of the Board and ordered the matter to be redetermined by a differently constituted Board.

[14] On redetermination, the second Board (the "Second Board") framed the issue to be decided as whether Mr. Martens was engaged in his farming operation to a minor extent so as to be considered unemployed. The Second Board identified that the applicable legislation required a consideration of the six factors in subsection 30(3) to determine whether Mr. Martens' engagement in the operation of his farm was of the minor extent described in subsection 30(2).

[15] In considering the enumerated factors in subsection 30(3), the Second Board noted that the factors of the time spent and the intention and willingness of a claimant to seek and immediately accept alternate employment are of fundamental importance. The Second Board determined that substantial time was spent by Mr. Martens doing farm work having regard to the time spent by Mr. Martens' son and hired workers. While Mr. Martens' willingness to work off the farm full-time was acknowledged, the Second Board was of the view that this fact was undermined by the flexibility of his previous employment at the Plant that had allowed him to take holidays at the times that he needed to be on the farm.

[16] With respect to the nature and amount of capital and resources invested, the Second Board was of the view that substantial capital had been invested in the farm and that there was little farm-related debt. The Second Board determined that both the gross and net income of the farming business for the 2002, 2003 and 2004 taxations years were relevant to the analysis of the factor of the financial success of the business. In respect of this factor, the Second Board also pointed to the fact that despite drought, a change to organic farming and hiring workers, the farm still had net income in those taxation years. However, the Second Board did not consider the quantum of such net income. The Second Board found that the only fact relevant to the continuity of the business factor was Mr. Martens' involvement in the operation of the farm since 1972. Finally, in relation to the nature of the business factor, the Second Board found that Mr. Martens was a farmer and that he was in the farming business.

[17] The Second Board stated that after due consideration of the facts, the legislation and the legal arguments presented in relation to the six-factor test, it concluded that "Mr. Martens' farming operation is in fact major in extent". The Second Board went on to make the following statement at page 5 of its reasons:

> … Even though Mr. Martens was fully available to take on full time employment after April 2004, in considering all of the six factors, and weighing them, we find that his operation is major in extent. [Emphasis added.]

Based on these findings, the Second Board dismissed Mr. Martens' appeal and upheld the denial of benefits.

[18] Mr. Martens appealed the Second Board's decision to the Umpire.

[19] The Umpire identified the issue before him as whether benefits could be paid to the claimant as of April 4, 2004, due to the extent of his involvement in farming activities. The Umpire reviewed the facts of the case as found by the Second Board as well as the decision of the Second Board which was summarized as follows at page 3 of his reasons:

> The Board of Referees, having considered the six factors in relation to the operation of a business, found that the claimant was in fact not minor in respect of his operation of his farm, even though he spent many years working off the farm. [Emphasis added.]

[20] The Umpire began his analysis with a general examination of the six factors in subsection 30(3). The Umpire referred to the Second Board's consideration of the time spent by Mr. Martens on the farm and its acknowledgment of the time spent by the son and hired workers. He agreed with the Second Board that Mr. Martens had shown that he was available for work other than on his farm

after his layoff in April 2004. The Umpire described the farm as being “fairly large” and emphasized that it has been operated by Mr. Martens since 1972. Additionally, the Umpire pointed to the evidence showing a substantial investment in the farm and a fairly substantial gross income.

[21] Based on his consideration of the factors in subsection 30(3), the Umpire determined that Mr. Martens was involved in his farming business to a major extent during the Benefit Period as explained at page 5 of the Umpire’s reasons:

> Having considered the factors under s. 30(3), I am satisfied that the claimant in this case, as found by the Board of Referees, is a farmer and engaged in that occupation to a major extent and therefore, in accordance with Regulation 30(1) could not be said to be unemployed. [Emphasis added.]

[22] The Umpire went on to dismiss the appeal finding that the evidence before the Second Board was sufficient to support its determination that Mr. Martens was self-employed more than a minor extent in farming. The Umpire also found that this determination was based on factual findings that had been made in consideration of the six factors in subsection 30(3), as required.

[23] Mr. Martens brought an application in this Court for judicial review of the decision of the Umpire.

ISSUE

[24] The issue in this application for judicial review is whether the Umpire made a reviewable error in upholding the decision of the Second Board when it held that Mr. Martens was self-

employed or engaged in his farming business to more than a minor extent, with the result that he was not entitled to benefits during the Benefit Period

ANALYSIS

Section 30

[25] Subsection 30(1) effectively denies employment insurance benefits to a claimant who is self-employed or engaged in the operation of a business on his or her own account. That provision reads as follows:

30(1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.	30(1) Sous réserve des paragraphes (2) et (4), le prestataire est considéré comme ayant effectué une semaine entière de travail lorsque, durant la semaine, il exerce un emploi à titre de travailleur indépendant ou exploite une entreprise soit à son compte, soit à titre d’associé ou de coïntéressé, ou lorsque, durant cette même semaine, il exerce un autre emploi dans lequel il détermine lui-même ses heures de travail.

[26] Subsection 30(2) will negate the application of subsection 30(1) where a claimant is self-employed or engaged in the operation of a business to a minor extent. The test for minor self-employment or engagement in business operations requires a determination of whether the extent of such employment or engagement, when viewed objectively, is so minor that the claimant would not normally rely on that level of engagement as a principal means of livelihood. Subsection 30(3)

requires six factors to be considered in determining whether the claimant's self-employment or engagement in the operation of the particular business is minor in extent. These factors represent a codification of the six factors outlined in *Re Schwenk* (CUB 5454).

[27] Subsections 30(2) and (3) read as follows:

30(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.	30(2) Lorsque le prestataire exerce un emploi ou exploite une entreprise selon le paragraphe (1) dans une mesure si limitée que cet emploi ou cette activité ne constituerait pas normalement le principal moyen de subsistance d'une personne, il n'est pas considéré, à l'égard de cet emploi ou de cette activité, comme ayant effectué une semaine entière de travail.
30(3) The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are	30(3) Les circonstances qui permettent de déterminer si le prestataire exerce un emploi ou exploite une entreprise dans la mesure décrite au paragraphe (2) sont les suivantes :
(*a*) the time spent;	*a*) le temps qu'il y consacre;
(*b*) the nature and amount of the capital and resources invested;	*b*) la nature et le montant du capital et des autres ressources investis;
(*c*) the financial success or failure of the employment or business;	*c*) la réussite ou l'échec financiers de l'emploi ou de l'entreprise;
(*d*) the continuity of the employment or business;	*d*) le maintien de l'emploi ou de l'entreprise;

(*e*) the nature of the employment or business; and	*e*) la nature de l'emploi ou de l'entreprise;
(*f*) the claimant's intention and willingness to seek and immediately accept alternate employment.	*f*) l'intention et la volonté du prestataire de chercher et d'accepter sans tarder un autre emploi.

[28] In interpreting these provisions, it is important to consider that their objective is the determination of the extent of the self-employment or engagement in a business by a claimant in any given week in a benefit period that has been established pursuant to section 9 of the Act. If such self-employment or engagement is minor in extent, then the claimant will have overcome the presumption contained in subsection 30(1) and will not be regarded as having worked a full working week during that week.

Standard of Review

[29] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, Justices Bastarache and LeBel provided the following guidance with respect to the identification of the appropriate standard of review, at paragraph 62:

> 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. [Emphasis added.]

[30] This Court has held that the standard of review of a decision of a Board of Referees and an Umpire on a question of law is correctness (see *Canada (Attorney General) v. Sveinson (C.A.)*,

[2002] 2 F.C. 205, 2001 FCA 315; *Canada (Attorney General) v. Kos*, 2005 FCA 319; and *Stone v. Canada (Attorney General)*, 2006 FCA 27.

[31] The proper interpretation of the test contained in subsection 30(2) is a legal issue. Accordingly, the decision as to whether this legal question was appropriately addressed by the Second Board and the Umpire should be reviewed on a standard of correctness. The proper application of that test is a question of mixed fact and law that should be reviewed on the standard of reasonableness. However, it is to be noted that a test that has not been considered cannot be properly interpreted, much less applied.

The Error of the Second Board and the Umpire

[32] Mr. Martens contends that both the Second Board and the Umpire erred in law by failing to consider, and therefore properly interpret and apply, the test for self-employment or engagement in the operation of a business to a minor extent, as contained in subsection 30(2). More particularly, Mr. Martens contends that this test requires an objective consideration of whether the level of such self-employment or engagement, viewed in light of the factors set forth in subsection 30(3), would be sufficient to enable a person to normally rely upon that level of self-employment or engagement as a principal means of livelihood. In my view, this is the correct interpretation of the test in subsection 30(2) and its correlation to subsection 30(3).

[33] While the Second Board identified the relevant statutory considerations, in subsections 30(2) and (3), with respect to the determination of whether Mr. Martens' engagement in the farm

operations was minor in extent, there is no indication that the objective test in subsection 30(2) was actually considered by the Second Board in arriving at its conclusion that this engagement was more than minor in extent. Indeed, the Umpire summarized the decision of the Second Board as having reached that conclusion based on a consideration of the six factors in subsection 30(3) alone. The Umpire then proceeded to confirm the conclusion of the Second Board following his own consideration of those factors without expressly addressing the objective test contained in subsection 30(2).

[34] While not bound to apply *de novo* the test in subsection 30(2), the Umpire was required to determine whether the relevant legal principles were correctly identified, considered and applied by the Second Board. In my view, the Umpire committed a reviewable error in failing to detect the legal error of the Second Board in not considering, and therefore not applying, the objective test that is mandated by subsection 30(2). In particular, the Umpire did not detect that the Second Board failed to ask itself whether, viewed objectively, the extent of Mr. Martens' engagement in his farming business during the Benefit Period, determined in light of the factors set out in subsection 30(3), was such that Mr. Martens would not normally have relied on that level of engagement as a principal means of livelihood.

[35] Moreover, the Umpire similarly failed to consider and apply the objective test in subsection 30(2) when he examined the factors set forth in subsection 30(3). This is evident from the following excerpt from page 5 of the Umpire's reasons:

> Having considered the factors under s. 30(3), I am satisfied that the claimant in this case, as found by the Board of Referees, is a farmer and engaged in that occupation to a major extent

> and therefore, in accordance with Regulation 30(1) could not be said to be unemployed. [Emphasis added.]

[36] Since the objective test in subsection 30(2) was not considered, either by the Second Board or the Umpire, in the context of Mr. Martens' actual circumstances in the Benefit Period, determined in light of the factors contained in subsection 30(3), that test could not have been applied, as it should have been. That exercise will now be undertaken.

Paragraph 30(3)(a) – Time Spent

[37] The record discloses that prior to the commencement of the Benefit Period, the time spent by Mr. Martens in the farming operations was such that it did not interfere with his maintenance of full-time employment at the Plant for a period of thirteen years. This indicates a relatively minor involvement on his part in the farming operations.

[38] The Second Board considered the time spent by Mr. Martens' son and by hired workers and appeared to attribute that time to Mr. Martens. It is not clear whether the Umpire endorsed this approach. In my view, such attribution of the time spent by others to Mr. Martens is inappropriate. While the time spent by other employees of the business may be relevant to a determination of the size and scope of the business – a matter more likely to be relevant to other factors in subsection 30(3) – it should not be a relevant consideration in relation to the factor contained in paragraph 30(3)(*a*).

[39] The record does not establish that the time spent by Mr. Martens in his farming operations increased after his employment at the Plant came to an end. This suggests that Mr. Martens' level of engagement in the farming business during the Benefit Period was consistent with the time that he spent in the farming operations while he was working full-time at the Plant. Accordingly, when viewed objectively, this factor points away from a level of engagement in those operations in the Benefit Period that would normally be relied upon as a principal means of livelihood.

[40] It is noted that the record does not contain an abundance of evidence that demonstrates what Mr. Martens actually did with his time during the Benefit Period. There is no dispute that he spent time looking for employment. However, the record also indicates that Mr. Martens built a seed cleaner on his farm and that, as of April 2005, he became engaged in a free-standing seed cleaning business. In *Canada (Attorney General) v. Jouan* (1995), 179 N.R. 127 (F.C.A.), and *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61, this Court denied benefits to claimants who spent considerable time during their benefit periods in the establishment of new businesses. In this case, the Crown focused on Mr. Martens' engagement in his farming business, which had been in existence since 1972, and did not argue that any weight should be given to the establishment of the new seed cleaning business in the Benefit Period. In these circumstances, no further consideration of the seed cleaning business is warranted.

Paragraph 30(3)(b) – Nature and Amount of Invested Capital and Resources

[41] The record shows that approximately $250,000 worth of property was deployed in Mr. Martens' farming operations at the commencement of the Benefit Period. That is a considerable

amount of money. Accordingly, when considered objectively, this factor indicates a level of engagement in the farming business in the Benefit Period that is of a sufficient size to underpin a business operation upon which Mr. Martens would normally have relied as a principal means of livelihood.

Paragraph 30(3)(c) – Financial Success or Failure of the Business

[42] The record discloses information that points to an average profitability of the farming business for a three year period of approximately $9,500 per year. While the Crown urged the Court to consider the gross revenues that were generated by the farming operations in those years, I am of the view that gross revenues are of limited value in the determination of the financial success of a business.

[43] It must be remembered that the factors in subsection 30(3) are required to be considered in the context of the test in subsection 30(2). That test requires an objective consideration of whether the degree of self-employment or engagement in the operation of a business constitutes a sufficient basis upon which a person would normally rely as a principal means of livelihood. In that regard, the term livelihood is undefined in the Act and the Regulations. However, *Black's Law Dictionary*, 7th ed., defines livelihood as "a means of supporting one's existence, especially financially". That definition, in my view, underscores the importance of focusing on net income rather than gross income, in the context of this factor. In that regard, it seems obvious that the gross income from the operation of a business by a person in any particular period, however large, cannot provide that

person with any such financial means of support where the full amount of such gross income is offset by an equivalent amount of expenses incurred in that period.

[44] In the present circumstances, the gross income of Mr. Martens' farming operation was reduced in each of his 2002, 2003 and 2004 taxation years by wages that were paid to his son and other farm employees. While his net income would have increased if those wages had not been paid, nothing in section 30 required Mr. Martens to terminate the employment of those employees after he lost his job at the Plant so that he could do their jobs and thereby increase his net income from the farming business by the amount of the wages that would otherwise have been paid to them.

[45] In my view, the relatively modest average net income generated by Mr. Martens' farm in the years referred to in the record, indicates that reliance by Mr. Martens on the engagement in the farming operations in the Benefit Period as a principal means of livelihood in those years would not have been normal or reasonable.

Paragraph 30(3)(d) – Continuity of the Business

[46] The evidence in relation to this factor is sparse. It establishes only that the farming business had been in operation since 1972 and was still in operation during and after the Benefit Period. The Crown contends that this leads to the inference that the farming operations constitute a sustainable business. Assuming that to be the case, it does not advance the debate, one way or the other. A business that has been sustainable for a long period of time will not necessarily afford a reasonable

prospect of a principal means of livelihood at all times. In my view, the evidence relating to this factor neither advances nor detracts from Mr. Martens' cause.

Paragraph 30(3)(e) – Nature of the Business

[47] This factor considers whether there is any connection between the employment that has been lost and the business in which the claimant is engaged. If the employment that has been lost is similar to the activity undertaken in the business, it may indicate that the employment is a stepping stone into the business.

[48] The record indicates that the Plant operated in the food processing business which, in my view, is not similar to the farming business. Accordingly, this factor, objectively considered, does not tend to indicate that Mr. Martens would normally have relied on his engagement in the farming business in the Benefit Period as his principal means of livelihood.

Paragraph 30(3)(f) – Intention and Willingness to Seek and Accept Alternate Employment

[49] The record indicates a willingness on the part of Mr. Martens to seek and accept alternative full-time employment during the Benefit Period. The evidence of Mr. Martens on this point is uncontradicted. This objectively indicates that Mr. Martens would not normally have relied on his engagement in the farming operations in the Benefit Period as his principal means of livelihood.

Application

[50] Based upon the record, the application of the objective test contained in subsection 30(2) to the circumstances of Mr. Martens, determined in accordance with subsection 30(3), reveals that at least four of the relevant factors point to the conclusion that Mr. Martens' engagement in his farming business during the Benefit Period was minor in extent. When all six factors are viewed objectively, the only reasonable conclusion is that it would not have been normal or reasonable for Mr. Martens to have relied on that level of engagement as his principal means of livelihood. It follows that the exception in subsection 30(2) should have been found to apply in respect of Mr. Martens' engagement in his farming business during the Benefit Period.

Subsection 30(4)

[51] In view of my conclusion with respect to the application of subsection 30(2), it is unnecessary to consider the potential application of subsection 30(4), or the Crown's concession in that regard.

DISPOSITION

[52] I would allow this application for judicial review, with costs, set aside the decision of the Umpire and refer the matter back to the Chief Umpire for redetermination in accordance with these reasons.

"C. Michael Ryer"

J.A.

"I agree
K. Sharlow J.A."

PELLETIER J.A. (Concurring reasons)

[53] I have read in draft the reasons of my colleague Ryer J.A. Like him, I conclude the Umpire erred in law, though not on the same grounds as my colleague. In the circumstances of this case, I would direct that the matter be returned to the designated Chief Umpire or his designate for redetermination with a direction that the appeal from the Board of Referees should be allowed and that the Board of Referees decision be set aside. I would further direct the Umpire to render the decision that the Board of Referees should have made, and to allow Mr. Martens appeal from the Commission's refusal to award him benefits.

[54] The operation of section 30 of the Regulations was the subject of a recent decision of this Court, *Charbonneau v. Canada (Attorney General)*, 2004 FCA 61, [2004] F.C.J No. 245, in which it was held that while the six factors identified in subsection 30(3) of the *Employment Insurance Regulations* SOR/96-332 must all be considered in deciding to what extent an individual is engaged in a business, two factors are paramount: the time spent by the person in the operation of the business, and the person's availability for work:

> 10 In conclusion, if it is true to say that all the factors listed in subsection 30(3) of the *Employment Insurance Regulations* must be taken into consideration, the fact is that the "time" factor" (paragraph (*a*)) and the "intention and willingness" factor (paragraph (*f*)) are of utmost importance. A claimant who does not have the time to work or who is not actively seeking work should not benefit from the Employment Insurance system.
>
> *Charbonneau, supra*, para. 10

In this case, the Board of Referees considered the six factors as they were called upon to do by the legislation. In the course of doing so, they noted that Mr. Martens looked extensively for work after being laid off and that he was willing and available to work off the farm full time. The Board also

considered that Mr. Martens' son did most of the farm work (see page 5 of the Board of Referee's decision) which leads one to believe that Mr. Martens did relatively little, suggesting little time spent at the farm business. The evidence is clear that he spent relatively little time on farm work in the period preceding the benefit period.

[55] The Board also considered this Court's decision in *Charbonneau*. In considering the time spent on farm work, the Board concluded that it should consider not only Mr. Martens' time, which was apparently minimal, but also that of his son and of any hired labour. When all the labour which was required to operate the farm was considered, the Board concluded that Mr. Martens had a major interest in the operation of the farm and was thus not unemployed during each week of the benefit period.

[56] The Board of Referees erred in considering the time spent on farm labour by persons other than Mr. Martens. The rationale underlying the paramountcy of time spent was set out in *Charbonneau* in the following terms:

> 8 Whatever the case may be and more fundamentally, it appears to me that the foremost reason which led Marceau J.A. adopt "time" as the paramount factor is that this factor was "most relevant", the "only basic factor to be taken into account" in all cases. The only thing that interests us, he says, is the notion of working a full week and "the conclusion ... depends directly and necessarily on the 'time spent'". This primary reason still exists.

[57] The notion of working a full week is inconsistent with the pooling of the hours of all persons connected with the business. It is the claimant's engagement which is in issue and thus it is his time spent which is relevant, not that of those who might also work in the same business. Thus the Board

of Referees erred in its interpretation of the factor of time spent, given the decision of this Court in *Charbonneau.*

[58] The Umpire failed to correct this error as he ought to have since the Board of Referees' error was one of law and was therefore within the Umpire's jurisdiction to correct: see subsection 115(2) of the *Employment Insurance Act*, S.C. 1996 c. 23. The Umpire's failure to do so constitutes an error of law on his part which justifies our intervention.

[59] In the normal course of events, this matter would be sent back for re-hearing with a direction as to the law to be applied. The difficulty is that this matter has already been heard twice. A third hearing is not in accordance with the timely and efficient administration of justice. Given the findings, both implicit and explicit of the Board of Referees as to the time spent by Mr. Martens on farm work and his availability and willingness to accept full time work, the Umpire is in a position to make the order which the Board of Referees should have made in light of this Court's decision in *Charbonneau*.

[60] I would therefore allow the application for judicial review, set aside the decision of the Umpire and send the matter back to the designated Chief Umpire or his designate for reconsideration with a direction that the appeal from the Board of Referees should be allowed, the

decision of the Board of Referees should be set aside and Mr. Martens' appeal from the Commission's refusal to grant him benefits should be allowed.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-256-07
(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE HONOURABLE DAVID G. RICHE, UMPIRE APPOINTED UNDER THE EMPLOYMENT INSURANCE ACT, DATED MARCH 27, 2007)	
STYLE OF CAUSE:	**HENRY MARTENS Applicant** **v.** **THE ATTORNEY GENERAL OF CANADA Respondent**
PLACE OF HEARING:	REGINA, SK
DATE OF HEARING:	JUNE 2, 2008
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	SHARLOW J.A.
CONCURRING REASONS BY:	PELLETIER J.A.
DATED:	JULY 18, 2008

APPEARANCES:

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