Federal Court of Appeal

Cour d'appel fédérale

**Date: 20110505**

**Docket: A-53-10**

**Citation: 2011 FCA 153**

**CORAM:** **DAWSON J.A.**
**LAYDEN-STEVENSON J.A.**
**STRATAS J.A.**

**BETWEEN:**

**ZACK STEEL**

Applicant

and

**THE ATTORNEY GENERAL OF CANADA**

Respondent

Heard at Toronto, Ontario, on December 14, 2010.

Judgment delivered at Ottawa, Ontario, on May 5, 2011.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
CONCURRING REASONS BY: STRATAS J.A.

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## REASONS FOR JUDGMENT

**DAWSON J.A.**

[1] A person in receipt of benefits under the *Employment Insurance Act*, S.C. 1996, c. 23 (Act) may also receive monies that are determined to be earnings. If a claimant receives benefits and earnings for the same period of time, the claimant is obliged to repay to the Receiver General any overpayment of benefits that results from the receipt of earnings. The amount to be repaid is equal to the amount of the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid (section 45 of the Act).

[2] Paragraph 54(*k*) of the Act authorizes the Commission to make regulations allowing it to write-off amounts owing under various sections of the Act, including monies owing under section 45 as a result of the overpayment of benefits. Subsection 56(1) of the *Employment Insurance Regulations*, SOR/96-332 (Regulations) allows overpayments owing under section 45 of the Act to be written-off in a number of circumstances including where:

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| 56. (1)(*f*) the Commission considers that, having regard to all the circumstances,<br><br>(i) the penalty or amount, or the interest accrued on it, is uncollectable, or<br><br>(ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor. [emphasis added] | 56. (1)*f*) elle estime, compte tenu des circonstances, que :<br><br>(i) soit la pénalité ou la somme, y compris les intérêts courus, est irrécouvrable,<br><br>(ii) soit le remboursement de la pénalité ou de la somme, y compris les intérêts courus, imposerait au débiteur un préjudice abusif. [Non souligné dans l'original.] |

[3] A line of jurisprudence from this Court, commencing with *Cornish-Hardy v. Canada (Board of Referees)*, [1979] 2 F.C. 437; aff'd [1980] 1 S.C.R. 1218 and *Canada (Attorney General) v. Filiatrault* (1998), 235 N.R. 274 has consistently held that decisions of the Commissioner with respect to write-offs are not subject to the appeal provisions in the Act. A claimant must therefore seek judicial review of such decisions in what is now the Federal Court.

[4] In *Cornish-Hardy* the relevant provision with respect to the right of appeal was subsection 94(1) of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, which, by the time of *Filiatrault*, had become subsection 79(1) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1. This provision gave a right of appeal to a "claimant or an employer".

[5] In 1996, Parliament amended the *Unemployment Insurance Act*. Its title became the *Employment Insurance Act.* The appeal provisions were placed in subsection 114(1) of the Act which provided that a "claimant or other person who is the subject of a decision of the Commission" might appeal to the Board of Referees (Board).

[6] Zack Steel, the applicant, brings this application for judicial review of a decision of an Umpire (CUB 73803) who was seized with Mr. Steel's appeal from a decision of the Board. On this application Mr. Steel wishes to argue that a claimant, such as himself, who has been refused a write-off by the Commission is a person who is "the subject of a decision of the Commission" and so is entitled to appeal the refusal of a write-off to the Board. He states that all of the decisions of this Court subsequent to the 1996 amendment of the Act which have followed *Cornish-Hardy* and *Filiatrault* were made *per incurium* because the Court's attention was not called to the change in wording of the appeal provision. Specifically, Mr. Steel asks the Court to quash the decisions of the Commission, the Board, and the Umpire and order that costs be paid to him because:

1. The Umpire failed to exercise his jurisdiction to determine whether the Commission had properly exercised its discretion to write-off overpayments of benefits paid to Mr. Steel.

2. The Umpire failed to find that the Commission improperly exercised its discretion to write-off amounts because the Commission failed to provide reasons concerning Mr. Steel's request for a write-off and failed to respond at all to his request.

3. The Umpire failed to find that the Commission's calculation of the overpayment was incorrect and inconsistent with the Act and the Regulations.

The sections of the Act and the Regulations referred to in these reasons are set out in the Appendix to these reasons.

[7] I will first review the facts before the Court before framing the issues that I believe must be decided.

**The Facts**

[8] Mr. Steel left his employment and applied for regular employment insurance benefits under the Act. After some initial difficulties, his claim was established effective July 29, 2007. On December 2, 2007, Mr. Steel was involved in a car accident. Around May 28, 2008, Mr. Steel received a lump sum payment of $8,642.92 from his motor vehicle insurer in respect of income replacement benefits. On July 31, 2008, Mr. Steel disclosed the receipt of these income replacement benefits to the Commission.

[9] Shortly thereafter, Mr. Steel was informed by a representative of the Commission that it might be necessary to reassess his claim. Mr. Steel claims that he responded that he should be entitled to a write-off of any amounts he owed to the Commission because, for a variety of reasons, he had experienced significant delay in receiving his employment insurance benefits.

[10] The Commission subsequently determined that the income replacement benefits Mr. Steel had received constituted earnings, and allocated these monies to the period commencing on December 9, 2007 and ending on June 7, 2008. On its own motion, the Commission then transformed Mr. Steel's claim into a claim for sickness benefits and informed him that he would be paid the maximum 15 weeks of special benefits on account of sickness. The rationale for this change was that Mr. Steel had indicated in his reports to the Commission that he would not be able and available to return to perform the same work under the same conditions. The effect of this transformation was to limit Mr. Steel's claim to a maximum period of 15 weeks. Finally, the Commission determined that as a result of receiving the income replacement benefits Mr. Steel had been overpaid benefits and he owed the Commission $9,115.00. Two Notices of Debt were issued to Mr. Steel for the combined sum of $9,115.00 in August 2008.

[11] Mr. Steel says that after receiving the Notices of Debt he spoke with a representative of the Commission and expressed concern about the calculation of the amount of overpayment. He asserts he also informed the representative that he should be entitled to a write-off. He claims that he did not receive a satisfactory response from the Commission concerning his request for a write-off and that it failed to provide him with any explanation as to why his request for a write-off was rejected.

[12] On August 22, 2008, Mr. Steel filed a notice of appeal to the Board. In the notice of appeal Mr. Steel complained that the amount of overpayment had never been properly determined because he was still owed money for his regular benefits. Mr. Steel stated that the overpayment was unforeseeable and occurred due to administrative error and a "lag in co-operation with legal

proceedings." No reference is made in the notice of appeal to any request for a write-off having been made.

[13] At the appeal, after characterizing the issues before it, the Board found that:

1. The Commission had correctly allocated the income replacement benefits as earnings. The Commissioner's interpretation was supported by sections 35 and 36 of the Regulations.
2. Mr. Steel had received 15 weeks of sickness benefits and was not entitled to additional sickness benefits in the qualifying period at issue.
3. Neither the Board, nor an Umpire, were empowered to deal with issues relating to the write-off of an overpayment.

[14] Mr. Steel appealed the decision of the Board to an Umpire.

**The Decision of the Umpire**

[15] The Commission made two concessions before the Umpire. They were:

1. The Commission erred when it converted Mr. Steel's claim to sickness benefits as of December 2, 2007.
2. The Commission erred when it denied sickness benefits as of March 31, 2008.

[16] The consequence of these errors was that Mr. Steel was entitled to regular benefits at the time his claim was in effect and so he was not subject to having his claim end when the 15 week maximum period for sickness benefits expired. The monetary effect of the Commission's concessions was to reduce the amount of the asserted overpayment to $6,146.00.

[17] In his brief reasons the Umpire confirmed that the income replacement benefits were properly allocated to income pursuant to paragraph 35(2)(*d*) of the Regulations and that Mr. Steel was not entitled to more than 15 weeks of sickness benefits because that is the maximum entitlement to such benefits. The record does not explain why the Umpire had no regard to the Commission's concessions, including its concession that the claim should not have been converted to a claim for sickness benefits.

**The Issues to be Decided**

[18] In my view, the issues to be decided are:

1. Did the Commission make any decision in respect of a request to write-off monies owing by Mr. Steel on account of an overpayment of benefits?
2. If so:
    a. Did the Board and the Umpire err by failing to review the Commission's decision?
    b. Did the Commission breach Mr. Steel's right to procedural fairness by failing to provide reasons or respond to his request for a write-off?

3. Did the Umpire err by affirming the Commission's calculation of the amount of the overpayment of benefits?

4. What is an appropriate award of costs?

**Consideration of the Issues**

a. Did the Commission make any decision in respect of a request to write-off monies owing by Mr. Steel on account of an overpayment of benefits?

[19] As referenced above, subsection 114(1) of the Act allows a person "who is the subject of a decision of the Commission" to appeal to the Board. In the words of subsection 114(1):

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|---|---|
| 114. (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may appeal to the board of referees in the prescribed manner at any time within<br>(*a*) 30 days after the day on which a decision is communicated to them; or<br>(*b*) such further time as the Commission may in any particular case for special reasons allow. [emphasis added] | 114. (1) Quiconque fait l'objet d'une décision de la Commission, de même que tout employeur d'un prestataire faisant l'objet d'une telle décision, peut, dans les trente jours suivant la date où il en reçoit communication, ou dans le délai supplémentaire que la Commission peut accorder pour des raisons spéciales dans un cas particulier, interjeter appel de la manière prévue par règlement devant le conseil arbitral. [Non souligné dans l'original.] |

[20] It follows that, irrespective of the legal argument Mr. Steel wishes to advance concerning a requested write-off, he must establish that either the Commission refused a request to write-off a debt, or it refused to consider a request for a write-off. In the absence of either a refusal or a refusal to consider by the Commission, Mr. Steel could not pursue the write-off issue at all because he would not be a "person who is the subject of a decision of the Commission." As will be explained below, the Commission in this case neither considered nor refused to consider a request for a write-off.

[21] It is indisputable that any request for a write-off must, in the first instance, be made to the Commission. Whether the Commission made a decision about a write-off request is an issue that was not considered by either the Board or the Umpire. The Board simply relied upon the prior jurisprudence of this Court to dismiss Mr. Steel's appeal. The Umpire was silent on the issue of a write-off. Notwithstanding that this issue was not considered below, given the opposing views of the parties in this respect, we must first be satisfied that the Commission rendered a decision on Mr. Steel's request for a write-off. Resolution of this issue requires a review of Mr. Steel's affidavit and the whole of the Appeal Docket.

[22] Mr. Steel swears in his affidavit that he requested a write-off in three telephone conversations. Each telephone conversation he references in his affidavit appears to be memorialized in a document called an "AppliMessage" prepared by a Service Canada employee. In each relevant AppliMessage a Service Canada employee purports to summarize the information received by telephone from Mr. Steel. Mr. Steel has raised no complaint about the accuracy or the completeness of the relevant AppliMessages.

[23] Mr. Steel states that he spoke to a representative of the Commission after making his voluntary disclosure. The first AppliMessage is in respect of a telephone conversation with Mr. Steel on August 13, 2008. Mr. Steel is said to raise an issue with respect to the conversion of his claim for regular benefits to a claim for sickness benefits. No reference is made to a request for a write-off of an overpayment.

[24] Mr. Steel states that the second telephone conversation occurred after he received the two Notices of Debt. This appears to correspond with the second AppliMessage prepared in respect of a conversation with Mr. Steel on August 22, 2008. Mr. Steel is reported to have requested an explanation of the overpayment and to have expressed concern about the requirement to repay monies within a specified period. No reference is made to a request for a write-off.

[25] Mr. Steel states his third request was made on September 3, 2008. An AppliMessage exists for a call made on that day. This message does make reference to the issue of a write-off. The text of the message is as follows:

> Mr. Steel said:
>
> He is interested in having the overpayment written off because the error is not his.
>
> I said the overpayment is a result of allocation, and of the change in claim type, not an error, but even if there were an error, he would be expected to return any moneys he is not entitled to.
>
> He said that he never asked for sickness benefits, and was not sick, but had to do modified work, and that the insurance company paid him on those terms after he was injured coming out of a car.
>
> I said:
>
> He should ask the doctor for a letter giving his status, letting us know what his limitations were during the claim, what dates he was unable to work, and what date he became able to work, and we can reconsider his file.
>
> He said he may discuss it with his lawyer, and I gave him my phone number and fax number.

[26] This is the sole evidence Mr. Steel points to in the Appeal Docket which documents any reference to a request for a write-off of an overpayment. The AppliMessage refers only to an expression of interest on Mr. Steel's part.

[27] Nowhere in the record is there any indication that Mr. Steel provided information to the Commission detailing the basis of any request for a write-off, nor is there any information in the record about the collectibility of any overpayment or the hardship that would result if an overpayment was collected. The absence of the latter information is significant because those are the grounds for relief set out in paragraph 56(1)(*f*) of the Regulations, which is the only write-off provision in the Regulations potentially applicable to Mr. Steel.

[28] There is no evidence in the record that the Commission at any time considered a request to write-off any overpayment.

[29] I am satisfied on the basis of the unchallenged content of the AppliMessages that Mr. Steel never actually requested a decision from the Commission concerning a write-off. At best, on September 3, 2008, he expressed interest in receiving a write-off because any overpayment was the result of someone else's error. In consequence, the Commission never made any decision about whether any overpayment should be written-off nor did it refuse to make a decision it was asked to make. In his memorandum of fact and law at paragraph 56 counsel for Mr. Steel argued that "the lack of any communication from the Commission at all leads one to infer that no decision was made at all: Mr. Steel's request was ignored or forgotten." While in oral argument counsel referred to this

as an “imprudent” statement, I believe, in the circumstances, it is a fair inference from the Commission’s silence that no decision was made by the Commission.

[30] In the absence of a decision there is no basis upon which the Board or the Umpire could decide the issues Mr. Steel wishes to raise concerning a write-off of his indebtedness. He is not a “person who is the subject of a decision of the Commission” who may appeal from the decision to the Board. Nor is there a decision that could be judicially reviewed in the Federal Court. The question Mr. Steel wishes to raise simply does not arise on this record. There is no justiciable issue.

[31] Before leaving this issue, I should deal with Mr. Steel’s submission that the two Notices of Debt evidence a decision on the write-off. I am satisfied that the Notices of Debt can be treated as decisions taken under subsection 52(2) of the Act that are subject to appeal under subsection 114(1). See *Braga v. Canada (Attorney General)*, 2009 FCA 167, 392 N.R. 295 at paragraph 41. However, I have not been satisfied that the Notices of Debt evidence any decision about a write-off because Mr. Steel’s only recorded reference to a write-off came after the issuance of these documents. The Notices of Debt simply evidence the amount calculated by the Commission to be owing by Mr. Steel.

[32] Absent a decision by the Commission concerning a requested write-off, there is also no basis on which to consider Mr. Steel’s complaint that the Commission breached his right to procedural fairness by failing to give reasons. I therefore turn to consideration of the proper quantification of the overpayment.

b. Did the Umpire err by affirming the Commission's calculation of the amount of the overpayment of benefits?

[33] Leaving aside for the moment the concessions made by the Commission before the Umpire, in his written submissions Mr. Steel argued that the Umpire erred by:

1. Concluding that the income replacement benefits Mr. Steel received fell within the definition of earnings pursuant to paragraph 35(2)(*d*) of the Regulations;
2. In the alternative, if the income replacement benefits did fall within the definition of earnings, failing to apply the deduction rules found in subsection 19(2) of the Act.

[34] During oral argument counsel for Mr. Steel abandoned the second asserted error and so it is not necessary to deal with this argument.

i. Did the Umpire err by concluding that the income replacement benefits fell within the definition of earnings pursuant to paragraph 35(2)(*d*) of the Regulations?

[35] Monies received by claimants that are determined to be earnings are taken into account to determine the amount of benefits to be repaid to the Commission (section 45 of the Act). Section 35 of the Regulations specifies what income received by a claimant constitutes earnings. For the purpose of this application, the relevant provision is paragraph 35(2)(*d*) which provides:

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| 35. (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or | 35. (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de |

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| section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including | l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment : |
| […] | . . . |
| (*d*) notwithstanding paragraph (7)(*b*) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan; [emphasis added] | *d*) malgré l'alinéa (7)*b*) et sous réserve des paragraphes (3) et (3.1), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime d'assurance-automobile prévu par une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi par suite de blessures corporelles, si les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir dans le cadre de ce régime; [Non souligné dans l'original.] |

[36] Paragraph 35(7)(*b*) and subsections 35(3) and (3.1), referred to in paragraph 35(2)(*d*) are contained in the Appendix to these reasons. They are not material to the issue now before the Court.

[37] It is not disputed by the parties that the income replacement benefits in issue were received by Mr. Steel from a motor vehicle accident insurance plan provided under a provincial law, or that the benefits paid under the Act were not taken into account in order to determine the amount Mr. Steel received from his insurer. Therefore, the question to be determined on this application is whether the payments Mr. Steel received were "in respect of the actual or presumed loss of income from employment due to injury."

[38] Mr. Steel argues that he was unemployed at the time of his accident so that it follows that he lost no income due to the accident and indeed could lose no income. The income replacement benefits he received were paid pursuant to paragraph 2 of subsection 4(1) of the *Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996*, O. Reg. 403/96 (Ontario Regulations). He states that such benefits are not based on an actual or presumed loss of employment and therefore do not fall within paragraph 35(2)(*d*) of the Regulations. Mr. Steel relies upon the decision of this Court in *Gall v. Canada*, [1995] 2 F.C. 413.

[39] In my view, this Court's decision in *Gall* does not assist Mr. Steel. *Gall* does not stand for the proposition that persons unemployed at the time of an accident cannot receive benefits in respect of actual or presumed loss of income from employment. The Court explained, at paragraph 26 of its reasons, that it is necessary to "examine applicable provincial legislation in each case in order to determine the precise purpose for which the no-fault payments were in fact made." The Court was not satisfied on the evidence that benefits paid in that case were earnings within the scope of the provision then equivalent to paragraph 35(2)(*d*) of the Regulations.

[40] The relevant provincial regulation has been amended subsequent to the decision in *Gall*. The relevant provisions of the Ontario Regulations for the purpose of this application are sections 4, 5 and 6 (found in the Appendix to these reasons). The following points may be taken from those sections:

1. These sections are found in Part II of the Regulations under the heading "Income Replacement Benefit." Headings may be used as an aid to the construction of an enactment. See *Gall* at paragraph 16.

2. Under subsection 4(1) of the Ontario Regulations, income replacement benefits can be paid if the insured person meets any of the following qualifications:

| | |
|---|---|
| 1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. | 1. Elle était employée au moment de l'accident et souffre, à la suite de l'accident et dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de cet emploi. |
| 2. The insured person, | 2. Elle : |
| i. was not employed at the time of the accident, | i. n'était pas employée au moment de l'accident, |
| ii. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident, | ii. était employée pendant au moins 26 des 52 semaines qui ont précédé l'accident ou recevait des prestations en vertu de la *Loi sur l'assurance-emploi* (Canada) au moment de l'accident, |
| iii. was 16 years of age or more or was excused from attendance at school under the *Education Act* at the time of the accident, and | iii. avait au moins 16 ans ou était dispensée de la fréquentation scolaire aux termes de la *Loi sur l'éducation* au moment de l'accident, |
| iv. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident. | iv. souffre, à la suite de l'accident et dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de l'emploi auquel elle a consacré le plus de temps pendant les 52 semaines qui ont précédé l'accident. |
| 3. The insured person, | 3. Elle : |
| i. was entitled at the time of the | i. avait le droit, au moment de |

| | |
|---|---|
| accident to start work within one year under a legitimate contract of employment that was made before the accident and that is evidenced in writing, and<br>ii. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment he or she was entitled to start under the contract. [emphasis added] | l'accident, de commencer à travailler dans l'année aux termes d'un contrat de travail légitime, conclu avant l'accident et attesté par écrit,<br>ii. souffre, à la suite de l'accident et dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de l'emploi qu'elle avait le droit de commencer à occuper aux termes du contrat. [Non souligné dans l'original.] |

3. Under subsection 5(1), subject to subsection 5(2), income replacement benefits are payable during the period "the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4."

4. Pursuant to subsection 6(1), the amount of the income replacement benefits is calculated with respect to the insured person's "net weekly income from employment determined in accordance with section 61."

5. Pursuant to subsection 6(2), the insurer may deduct from the amount of the income replacement benefits payable 80% of the net income received by the insured person in respect of any employment subsequent to the accident.

[41] On the basis of the plain language of the relevant provisions of the Ontario Regulations, I conclude that the income replacement benefits are paid "in respect of the actual or presumed loss of

income from employment due to injury" and so fall within the scope of paragraph 35(2)(*d*) of the Regulations.

[42] This construction is consistent with the evidence before the Umpire, which included advice from the automobile insurer that the processing of the income replacement benefits claim was based in part upon information provided from his former employer.

[43] It follows that Mr. Steel has not established that the Umpire erred by affirming the Commission's characterization of the income replacement benefits as earnings.

ii. The Commission's concessions

[44] As a result of the Commission's concessions before the Umpire, the Umpire erred by affirming the Commission's quantification of the overpayment. The overpayment should have been reduced to $6,146.00. It follows that I would allow this application in part and would return the matter to the Chief Umpire or his designate for redetermination in accordance with the direction that, without prejudice to Mr. Steel's right to request that the amount owing be written-off, the amount of the overpayment is $6,146.00.

c. Costs

[45] The parties agree that if Mr. Steel is wholly successful on this appeal he should receive costs in the amount of $5,000.00. While Mr. Steel has not been wholly successful, I would award him the

costs of this application fixed in the amount of $5,000.00, all-inclusive. In my view, such an award is appropriate for the reasons that follow.

[46] First, the Commission knew by the time of the hearing before the Board that Mr. Steel wished to pursue a write-off of the overpayment, albeit on the ground of administrative error. Notwithstanding that knowledge, no substantive response was made to Mr. Steel by the Commission. The Commission confined its response to arguing before the Board that neither the Board nor the Umpire were empowered to deal with the request (See Representations of the Commission to the Board, at page 65 of the respondent's record). It would have been helpful to all if the Commission had clarified that it had made no decision about a requested write-off.

[47] Second, having conceded before the Umpire that its calculation of the overpayment was wrong, the Commission then did nothing to rectify the error after the Umpire inexplicably failed to deal with this issue. Section 120 of the Act permits an Umpire to rescind or amend a decision if the Umpire is satisfied that the decision was based on a mistake as to some material fact. When its concession was ignored, the Commission ought to have asked the Umpire to amend his decision.

[48] In my view, the Commission's conduct unnecessarily lengthened this proceeding. At the least, by failing to seek an amendment of the Umpire's decision the Commission compelled Mr. Steel to put this aspect of his claim in issue in this application. At worst, this proceeding would have been unnecessary had the Commission clarified that it made no decision about a write-off and then corrected its error in the calculation of the overpayment.

**Conclusion**

[49] In summary, on the basis of the Commission's concession I would allow the application in part and would return the matter to the Chief Umpire or his designate for redetermination in accordance with the direction that the amount of the overpayment is $6,146.00. I would order the respondent to pay costs to the applicant fixed in the amount of $5,000.00, all-inclusive.

"Eleanor R. Dawson"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

**STRATAS J.A. (Concurring Reasons)**

## A. Introduction

[50] Mr. Steel has appealed from the Commission to the Board of Referees and then to the Umpire, and now he has proceeded to this Court by way of judicial review. Was that the right route? Or should he have proceeded directly from the Commission to the Federal Court by way of judicial review?

[51] Simply put, we are faced with a basic jurisdictional question: is it our job to determine this case, or is it the job of the Federal Court? The parties fully argued this question before us.

[52] Can we decline to answer this jurisdictional question and simply deal with the merits of this case? I think not. On the merits of this case, the respondent invites us to examine the evidentiary record, find as a fact that the Commission has not decided Mr. Steel's write-off request, and dismiss this application as premature. But is it our job to examine the evidentiary record, make factual findings, and reach a conclusion on the merits, or is it the job of the Federal Court? The jurisdictional question cannot be avoided. Until it is answered, we cannot proceed. And, aside from necessity, there are many good reasons, set out below, why we *should* answer this question in this particular case.

[53] In my view, this Court does have jurisdiction, for the reasons set out below. Accordingly, this Court can determine the merits of Mr. Steel's case. On the merits, I agree with my colleague's cogent reasons and I concur with the judgment that she proposes.

**B. The jurisdictional issue**

[54] In this case, Mr. Steel became liable to pay back an overpayment of benefits. He says that he requested the Commission to write-off that liability under subsection 56(1) of the *Employment Insurance Regulations*, SOR/96-332 because of "undue hardship." Mr. Steel contends that the Commission decided against his request for a write-off.

[55] Accordingly, Mr. Steel has pursued appeals to the Board of Referees and the Umpire under subsection 114(1) and section 115 of the *Employment Insurance Act*, S.C. 1996, c. 23. These provisions, set out in the schedule to my colleague's reasons, allow a "claimant" or an "other person" to appeal to the Board of Referees and the Umpire. From there, a judicial review may be brought to this Court under section 118 of the Act.

[56] On the existing authorities of this Court, Mr. Steel is not a "claimant": *Cornish-Hardy v. Canada (Board of Referees)*, [1979] 2 F.C. 437 (C.A.); aff'd [1980] 1 S.C.R. 1218 and *Canada (Attorney General) v. Filiatrault* (1998), 235 N.R. 274 (F.C.A.).

[57] Therefore, the jurisdictional issue boils down to whether Mr. Steel is an "other person" under subsection 114(1) and section 115 of the Act. If Mr. Steel is an "other person," then he can appeal to the Board of Referees and the Umpire and, from there, can apply to this Court for judicial review under section 118 of the Act. If Mr. Steel is not an "other person," then his only recourse is by way of judicial review from the Commission's refusal to the Federal Court under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[58] For some time now, this Court has held that persons aggrieved by write-off decisions made by the Commission have to proceed by way of application for judicial review to the Federal Court: *Cornish-Hardy* and *Filiatrault*, both *supra*. The appeal and review route involving the Board of Referees, the Umpire and this Court is not available.

[59] However, *Cornish-Hardy* and *Filiatrault* arose under different statutory provisions: just before a statutory reform in 1996, these provisions were subsection 79(1) and section 80 of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1. These provisions were more limited than subsection 114(1) and section 115 of the current Act. Subsection 79(1) only allowed a "claimant" or "an employer of the claimant" to appeal from a decision of the Commission to the Board of Referees. Section 80 allowed "the Commission, a claimant, an employer or an association of which the claimant or employer is a member" to appeal from a decision of the Board of Referees to the Umpire. Neither provision allowed an "other person" to appeal.

[60] Although subsection 114(1) and section 115 of the current Act are broader in that they allow an "other person" to appeal, our Court has continued to follow the position in *Cornish-Hardy* and *Filiatrault*: *Buffone v. Canada (Minister of Human Resources Development)*, 2001 CanLII 22143 (F.C.A.); *Canada (Attorney General) v. Mosher*, 2002 FCA 355; *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440.

[61] In each of *Buffone*, *Mosher* and *Villeneuve*, this Court regarded the jurisdictional issue as settled. The reasons of each case suggest that the Court had not received any submissions on the relevant statutory provisions. In each case, the Court had before it a benefits recipient without legal representation.

**C. Why we must determine the jurisdictional issue, and determine it at the outset**

[62] In my view, the jurisdictional issue logically precedes all other issues before us. In particular, it precedes what I shall call the "next issue." The next issue is whether the judicial review should be dismissed for prematurity: whether the Commission has made a decision one way or the other in this matter.

[63] As I have mentioned in paragraph 52 above, and as my colleague's detailed reference to the record of the case demonstrates, the next issue involves examining the factual minutia in the evidentiary record, making factual findings, and reaching a conclusion on the merits. In my view, before we delve into the next issue and perform those tasks, we should first ask whether those tasks

are to be done by this Court or the Federal Court. Since this Court is a statutory court, not a court of inherent jurisdiction, we should be cautious about embarking upon tasks that, in reality, may be the tasks of others.

### D. Why, in any event, we should exercise our discretion in favour of determining the jurisdictional issue

[64] Even if we did not have to determine the jurisdictional issue, I would still exercise my discretion in favour of determining it.

[65] To be sure, there is much to be said for not determining the jurisdictional issue. A minimal approach to judicial decision-making usually has great merit. Under this approach, sometimes called "judicial minimalism," we fashion solutions that are practical, routine, and uncontroversial and apply them to the cases before us, avoiding broad, unnecessary pronouncements. Sometimes, in search of solutions, we might consider a modest reform to our judge-made law. But we reform it only if necessary and appropriate, only as little as necessary, and always subject to Parliament's laws which bind us.

[66] When we discard judicial minimalism and, instead, gratuitously pronounce sweeping legal principles, we expose ourselves to the charge that we are law-making – a task beyond our remit, unelected as we are. Also, without the real-life facts that inform our pronouncements, temper our judgment, and keep us accountable, we are more likely to be wrong, more likely to cause disorder, and more likely to injure.

[67] This is especially so in social benefits cases, such as this. In these cases, usually we see the Crown with counsel facing benefits claimants without counsel. One-sided submissions are the norm. In such circumstances, broad pronouncements founded upon such submissions are hazardous, and the appearance of fairness, if not fairness itself, may suffer.

[68] But too great a devotion to judicial minimalism sometimes can impose too great a cost. Pressing issues can linger and fester, and litigants may suffer for that.

[69] Consider, as an example, the plight of Mr. Steel. The majority of this Court will decide this case without determining the jurisdictional issue he has placed before us. Then the Commission will rule on whether Mr. Steel is entitled to a write-off. Assuming the Commission rules adversely to him, he will have to choose a route of review without the benefit of a determination on the jurisdictional issue. If he chooses the wrong route of review, he will be forced to go back to where he was before and start all over again. In a case like this, too great a devotion to judicial minimalism can ensnare benefits recipients in a frustrating game of “snakes and ladders.”

[70] Of course, after receiving our judgment in this case, Mr. Steel may not have the resources or the resolve to bother further with any of this. If that happens, the jurisdictional issue will be left for next time. Next time, though, there will be one big difference: it is almost certain that the benefits recipient appearing before us will lack legal representation.

[71] This particular social benefits case is quite unusual: before us are opposing parties, both represented by counsel of capability, both proffering legal submissions of high quality. This makes it safer and fairer to determine the jurisdictional issue, which is a narrow issue of law divorced from the particular facts of this case. Further, by determining the jurisdictional issue once and for all, we will provide some assistance to the benefits recipients who fend for themselves in this administrative regime. To the extent that we can make basic things like appeal routes clearer and more accessible, we should.

[72] Seizing this opportunity and determining the jurisdictional issue in these circumstances is not dissimilar from what we do in other exceptional circumstances. We decide moot, academic or unnecessary issues when it is in the public interest to do so (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). We allow public interest litigation to proceed where the claimant, albeit not directly affected, is dedicated, the issue is important, and no one else is likely to advance to bring the issue forward (*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236). In the area of social benefits law, we have sometimes taken advantage of the rare presence of represented parties to go further than necessary in order to clear up some jurisprudential uncertainty: e.g. *Gill v. Canada (Attorney General)*, 2010 FCA 182. Why not do so here?

[73] In this case, despite the merits of judicial minimalism, we should decide the jurisdictional issue even if it is not necessary to decide it. It is safe, practical and just to do so.

**E. The merits of the jurisdictional issue**

[74] In my view, Parliament's decision to add the words "other person" to subsection 114(1) and section 115 of the current Act was intended to allow persons, such as Mr. Steel, to appeal rulings on write-off requests to the Board of Referees and the Umpire, and then to proceed to this Court. Were it not so, it would be very difficult to see what Parliament had in mind when it added those words.

[75] In my view, this interpretation should be tested by examining Parliament's overall purpose behind this administrative scheme, as shown by the specific statutory provisions it adopted: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394. This administrative scheme is aimed at diverting issues relating to employment insurance from the court system into the more informal, specialized, efficient adjudicative mechanisms set up by Parliament. My interpretation of "other person" is consistent with, and furthers that aim.

[76] A contrary interpretation would mean that the writing-off of liabilities to repay the overpayment of benefits, a matter related to the entitlement to employment insurance benefits, would be diverted from this informal, specialized, efficient regime into the slower, more formal, more resource-intensive court system. That interpretation makes no sense. Only the clearest of statutory wording, not present here, could drive us to such a result.

[77] The statements in *Buffone, Mosher* and *Villeneuve* that suggest a different answer to the jurisdictional question in this case are best regarded as not being the considered opinion of the panels that decided them. Further, to the extent that *Cornish-Hardy* and *Filiatrault* bar persons like Mr. Steel from appealing to the Board of Referees and the Umpire under subsection 114(1) and 115 of the Act, they should no longer be followed. Those cases were decided under the former Act which, unlike the current Act, did not allow "other persons" to appeal.

[78] Therefore, in my view, Mr. Steel was an "other person" under subsection 114(1) and section 115 and could appeal to the Board of Referees and the Umpire and, under subsection 118, could apply for judicial review in this Court. Therefore, this Court has jurisdiction.

[79] On the merits of Mr. Steel's judicial review in this Court, I agree with my colleague's reasons and concur with her proposed disposition of the application.

"David Stratas"

J.A.

## APPENDIX TO THE REASONS OF DAWSON J.A.

Subsection 19(2), section 45, subsection 52(3), paragraph 54(k), subsection 114(1) and section 120 of the *Employment Insurance Act* read as follows:

| | |
|---|---|
| 19. (2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds<br>(*a*) $50, if the claimant's rate of weekly benefits is less than $200; or<br>(*b*) 25% of the claimant's rate of weekly benefits, if that rate is $200 or more. | 19. (2) Sous réserve des paragraphes (3) et (4), si le prestataire reçoit une rémunération durant toute autre semaine de chômage, il est déduit des prestations qui lui sont payables un montant correspondant à la fraction de la rémunération reçue au cours de cette semaine qui dépasse 50 $, ou vingt-cinq pour cent de son taux de prestations hebdomadaires si celui-ci est de 200 $ ou plus. |
| […] | . . . |
| 45. If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid. | 45. Lorsque le prestataire reçoit des prestations au titre d'une période et que, soit en application d'une sentence arbitrale ou d'un jugement d'un tribunal, soit pour toute autre raison, l'employeur ou une personne autre que l'employeur — notamment un syndic de faillite — se trouve par la suite tenu de lui verser une rémunération, notamment des dommages-intérêts pour congédiement abusif ou des montants réalisés provenant des biens d'un failli, au titre de la même période et lui verse effectivement la rémunération, ce prestataire est tenu de rembourser au receveur général à titre de remboursement d'un versement excédentaire de prestations les prestations qui n'auraient pas été payées si, au moment où elles l'ont été, la rémunération avait été ou devait être versée. |
| […] | . . . |

52. (3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,
(*a*) the amount calculated is repayable under section 43; and

(*b*) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

[…]

54. (*k*) for the ratification of amounts paid to persons while they are not entitled to them and for writing off those amounts and any penalties under section 38, 39 or 65.1 and amounts owing under section 43, 45, 46, 46.1 or 65 and any costs recovered against those persons;

[…]

114. (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may appeal to the board of referees in the prescribed manner at any time within
(*a*) 30 days after the day on which a decision is communicated to them; or
(*b*) such further time as the Commission may in any particular case for special reasons allow.

[…]

52. (3) Si la Commission décide qu'une personne a reçu une somme au titre de prestations auxquelles elle n'avait pas droit ou au bénéfice desquelles elle n'était pas admissible :
*a*) la somme calculée au titre du paragraphe (2) est celle qui est remboursable conformément à l'article 43;
*b*) la date à laquelle la Commission notifie la personne de la somme en cause est, pour l'application du paragraphe 47(3), la date où la créance a pris naissance.

. . .

54. *k*) pour la validation des sommes versées à des personnes n'y étant pas admissibles et pour la défalcation de ces sommes ainsi que de toute pénalité prévue par l'article 38, 39 ou 65.1 et de toute somme due en vertu des articles 43, 45, 46, 46.1 ou 65 et de tous frais recouvrés auprès de ces personnes;

. . .

114. (1) Quiconque fait l'objet d'une décision de la Commission, de même que tout employeur d'un prestataire faisant l'objet d'une telle décision, peut, dans les trente jours suivant la date où il en reçoit communication, ou dans le délai supplémentaire que la Commission peut accorder pour des raisons spéciales dans un cas particulier, interjeter appel de la manière prévue par règlement devant le conseil arbitral.

. . .

| | |
|---|---|
| 120. The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact. | 120. La Commission, un conseil arbitral ou le juge-arbitre peut annuler ou modifier toute décision relative à une demande particulière de prestations si on lui présente des faits nouveaux ou si, selon sa conviction, la décision a été rendue avant que soit connu un fait essentiel ou a été fondée sur une erreur relative à un tel fait. |

Subsections 35(2), (3), (3.1) and (7), and subsection 56(1) of the *Employment Insurance Regulations* read as follows:

| | |
|---|---|
| 35. (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including<br>(*a*) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;<br>(*b*) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;<br>(*c*) payments a claimant has received or, on application, is entitled to receive under | 35. (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :<br>*a*) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;<br>*b*) les indemnités que le prestataire a reçues ou recevra pour un accident du travail ou une maladie professionnelle, autres qu'une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation;<br>*c*) les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, aux termes : |

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act, or

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act;

(*d*) notwithstanding paragraph (7)(*b*) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(*e*) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(*f*) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work

(i) soit d'un régime collectif d'assurance-salaire,

(ii) soit d'un régime de congés payés de maladie, de maternité ou d'adoption,

(iii) soit d'un régime de congés payés pour soins à donner à un ou plusieurs enfants visés aux paragraphes 23(1) ou 152.05(1) de la Loi,

(iv) soit d'un régime de congés payés pour soins ou soutien à donner à un membre de la famille visé aux paragraphes 23.1(2) ou 152.06(1) de la Loi;

*d*) malgré l'alinéa (7)b) et sous réserve des paragraphes (3) et (3.1), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime d'assurance-automobile prévu par une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi par suite de blessures corporelles, si les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir dans le cadre de ce régime;

*e*) les sommes payées ou payables au prestataire, par versements périodiques ou sous forme de montant forfaitaire, au titre ou au lieu d'une pension;

*f*) dans les cas où les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir en vertu d'une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi, les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, en vertu de cette loi provinciale du fait qu'il a cessé de travailler parce que la continuation de son travail mettait en danger l'une des

entailed physical dangers for
(i) the claimant,
(ii) the claimant's unborn child, or
(iii) the child the claimant is breast-feeding.

personnes suivantes :
(i) le prestataire,
(ii) l’enfant à naître de la prestataire,
(iii) l’enfant qu’allaite la prestataire.

(3) Where, subsequent to the week in which an injury referred to in paragraph (2)(*d*) occurs, a claimant has accumulated the number of hours of insurable employment required by section 7 or 7.1 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3) Lorsque le prestataire a, après la semaine où il a subi les blessures corporelles visées à l’alinéa (2)d), accumulé le nombre d’heures d’emploi assurable exigé aux articles 7 ou 7.1 de la Loi, les indemnités visées à cet alinéa ne sont pas comptées comme rémunération.

(3.1) If a self-employed person has sustained an injury referred to in paragraph (2)(*d*) before the beginning of the period referred to in section 152.08 of the Act, the payments referred to in that paragraph shall not be taken into account as earnings.

(3.1) Lorsque le travailleur indépendant a subi les blessures corporelles visées à l’alinéa (2)d) avant le début de la période visée à l’article 152.08 de la Loi, les indemnités visées à cet alinéa ne sont pas comptées comme rémunération.

[…]

. . .

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(7) La partie du revenu que le prestataire tire de l’une ou l’autre des sources suivantes n’a pas valeur de rémunération aux fins mentionnées au paragraphe (2) :

(*a*) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

*a*) une pension d’invalidité ou une somme forfaitaire ou une pension versées par suite du règlement définitif d’une réclamation concernant un accident du travail ou une maladie professionnelle;

(*b*) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

*b*) les indemnités reçues dans le cadre d’un régime non collectif d’assurance-salaire en cas de maladie ou d’invalidité;

(*c*) relief grants in cash or in kind;

*c*) les allocations de secours en espèces ou en nature;

(*d*) retroactive increases in wages or salary;

*d*) les augmentations rétroactives de salaire ou de traitement;

(*e*) the moneys referred to in

*e*) les sommes visées à l’alinéa (2)e) si :

paragraph (2)(*e*) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(*f*) employment income excluded as income pursuant to subsection 6(16) of the Income Tax Act.

[…]

56. (1) A penalty owing under section 38, 39 or 65.1 of the Act or an amount payable under section 43, 45, 46, 46.1 or 65 of the Act, or the interest accrued on the penalty or amount, may be written off by the Commission if

(*a*) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Human Resources Development does not exceed $20, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;

(*b*) the debtor is deceased;

(*c*) the debtor is a discharged bankrupt;

(*d*) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee

(i) dans le cas du travailleur indépendant, ces sommes sont devenues payables avant le début de la période visée à l'article 152.08 de la Loi,

(ii) dans le cas des autres prestataires, le nombre d'heures d'emploi assurable exigé aux articles 7 ou 7.1 de la Loi pour l'établissement de leur période de prestations a été accumulé après la date à laquelle ces sommes sont devenues payables et pendant la période pour laquelle il les a touchées;

*f*) le revenu d'emploi exclu du revenu en vertu du paragraphe 6(16) de la Loi de l'impôt sur le revenu.

. . .

56. (1) La Commission peut défalquer une pénalité à payer en application des articles 38, 39 ou 65.1 de la Loi ou une somme due aux termes des articles 43, 45, 46, 46.1 ou 65 de la Loi ou les intérêts courus sur cette pénalité ou cette somme si, selon le cas :

*a*) le total des pénalités et des sommes, y compris les intérêts courus, que le débiteur doit à Sa Majesté en vertu de tout programme administré par le ministère du Développement des ressources humaines ne dépasse pas vingt dollars, aucune période de prestations n'est en cours pour le débiteur, et ce dernier ne verse pas de paiements réguliers en vertu d'un plan de remboursement;

*b*) le débiteur est décédé;

*c*) le débiteur est un failli libéré;

*d*) le débiteur est un failli non libéré à l'égard duquel le dernier dividende a été payé et le syndic a été libéré;

has been discharged;

(*e*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from

(i) a retrospective decision or ruling made under Part IV of the Act, or

(ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or

(*f*) the Commission considers that, having regard to all the circumstances,

(i) the penalty or amount, or the interest accrued on it, is uncollectable, or

(ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the debtor.

*e*) le versement excédentaire ne résulte pas d'une erreur du débiteur ni d'une déclaration fausse ou trompeuse de celui-ci, qu'il ait ou non su que la déclaration était fausse ou trompeuse, mais découle :

(i) soit d'une décision rétrospective rendue en vertu de la partie IV de la Loi,

(ii) soit d'une décision rétrospective rendue en vertu des parties I ou IV de la Loi à l'égard des prestations versées selon l'article 25 de la Loi;

*f*) elle estime, compte tenu des circonstances, que :

(i) soit la pénalité ou la somme, y compris les intérêts courus, est irrécouvrable,

(ii) soit le remboursement de la pénalité ou de la somme, y compris les intérêts courus, imposerait au débiteur un préjudice abusif.

Subsection 79(1) of the *Unemployment Insurance Act* read as follows:

79. (1) The claimant or an employer of the claimant may at any time within thirty days after the day on which a decision of the Commission is communicated to him, or within such further time as the Commission may in any particular case for special reasons allow, appeal to the board of referees in the manner prescribed.

79. (1) Le prestataire ou un employeur du prestataire peut, dans les trente jours de la date où il reçoit communication d'une décision de la Commission, ou dans le délai supplémentaire que la Commission peut accorder pour des raisons spéciales dans un cas particulier, interjeter appel de la manière prescrite devant le conseil arbitral.

Sections 4, 5 and 6 of the *Statutory Accident Benefits Schedule-Accidents on or After November 1, 1996*, read as follows:

| | |
|---|---|
| Eligibility Criteria | Critères d'admissibilité |
| 4. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications: | 4. (1) L'assureur verse une indemnité de remplacement de revenu à la personne assurée qui souffre d'une déficience à la suite d'un accident si elle répond à l'un ou l'autre des critères d'admissibilité suivants : |
| 1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment. | 1. Elle était employée au moment de l'accident et souffre, à la suite de l'accident et dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de cet emploi. |
| 2. The insured person, | 2. Elle : |
| i. was not employed at the time of the accident, | i. n'était pas employée au moment de l'accident, |
| ii. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident, | ii. était employée pendant au moins 26 des 52 semaines qui ont précédé l'accident ou recevait des prestations en vertu de la *Loi sur l'assurance-emploi* (Canada) au moment de l'accident, |
| iii. was 16 years of age or more or was excused from attendance at school under the *Education Act* at the time of the accident, and | iii. avait au moins 16 ans ou était dispensée de la fréquentation scolaire aux termes de la *Loi sur l'éducation* au moment de l'accident, |
| iv. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident. | iv. souffre, à la suite de l'accident et dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de l'emploi auquel elle a consacré le plus de temps pendant les 52 semaines qui ont précédé l'accident. |
| 3. The insured person, | 3. Elle : |
| i. was entitled at the time of the accident to start work within one year under a legitimate contract of employment that was made before the accident and that is evidenced in writing, and | i. avait le droit, au moment de l'accident, de commencer à travailler dans l'année aux termes d'un contrat de travail légitime, conclu avant l'accident et attesté par écrit, |
| ii. as a result of and within 104 weeks | ii. souffre, à la suite de l'accident et |

after the accident, suffers a substantial inability to perform the essential tasks of the employment he or she was entitled to start under the contract.

dans les 104 semaines qui le suivent, d'une incapacité importante à accomplir les tâches essentielles de l'emploi qu'elle avait le droit de commencer à occuper aux termes du contrat.

(2) Despite subsection (1), paragraph 3 of that subsection applies only if the accident occurs before April 15, 2004.

(2) Malgré le paragraphe (1), la disposition 3 de ce paragraphe ne s'applique que si l'accident survient avant le 15 avril 2004.

Period of Benefit

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4.

Période d'indemnisation

5. (1) Sous réserve du paragraphe (2), une indemnité de remplacement de revenu est payable pendant la période au cours de laquelle la personne assurée souffre d'une incapacité importante à accomplir les tâches essentielles de l'emploi à l'égard duquel elle est admissible à cette indemnité aux termes de l'article 4.

(2) The insurer is not required to pay an income replacement benefit,

(*a*) for the first week of the disability;

(*b*) for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;

(*c*) in the case of an insured person who qualifies for the benefit under paragraph 3 of section 4, for the period before the day he or she would have been entitled under the contract to begin employment;

(*d*) for any period longer than 12 weeks after the accident, in the case of an insured person whose impairment is a Grade I whiplash-associated disorder

(2) L'assureur n'est tenu de verser une indemnité de remplacement de revenu :

*a*) ni pour la première semaine d'invalidité;

*b*) ni pour une période d'invalidité de plus de 104 semaines, sauf si, à la suite de l'accident, la personne assurée souffre d'une incapacité totale à occuper un emploi qu'elle est raisonnablement apte à occuper en raison de ses études, de sa formation ou de son expérience;

*c*) ni, dans le cas de la personne assurée qui est admissible à l'indemnité aux termes de la disposition 3 de l'article 4, pour la période qui précède le jour où elle aurait eu le droit de commencer à occuper l'emploi aux termes du contrat;

*d*) ni pour plus de 12 semaines après l'accident, dans le cas de la personne assurée dont la déficience représente des troubles associés à l'entorse

that comes within a Pre-approved Framework Guideline, if the accident occurred after April 14, 2004; or

(*e*) for any period longer than 16 weeks after the accident, in the case of an insured person whose impairment is a Grade II whiplash-associated disorder that comes within a Pre-approved Framework Guideline, if the accident occurred after April 14, 2004.

cervicale de stade I visés par une directive relative à un cadre de traitement préapprouvé, si l'accident est survenu après le 14 avril 2004;
*e*) ni pour plus de 16 semaines après l'accident, dans le cas de la personne assurée dont la déficience représente des troubles associés à l'entorse cervicale de stade II visés par une directive relative à un cadre de traitement préapprouvé, si l'accident est survenu après le 14 avril 2004.

Amount of Benefit

6. (1) The amount of the income replacement benefit shall be,
(*a*) for each of the first 104 weeks of disability, 80 per cent of the insured person's net weekly income from employment determined in accordance with section 61; and
(*b*) for each week after the first 104 weeks of disability, the greater of the amount specified in clause (a) and $185.

Montant de l'indemnité

6. (1) Le montant de l'indemnité de remplacement de revenu est égal :
*a*) pour chacune des 104 premières semaines d'invalidité, à 80 pour cent du revenu hebdomadaire net que la personne assurée a tiré d'un emploi, calculé conformément à l'article 61;
*b*) pour chaque semaine suivant les 104 premières semaines d'invalidité, au plus élevé du montant précisé à l'alinéa a) et de 185 $.

(2) The insurer may deduct from the amount of the income replacement benefit payable to an insured person 80 per cent of the net income received by the insured person in respect of any employment subsequent to the accident.

(2) L'assureur peut déduire du montant de l'indemnité de remplacement de revenu payable à la personne assurée 80 pour cent du revenu net que celle-ci a reçu à l'égard d'un emploi postérieur à l'accident.

(3) For the purpose of subsection (2), the net income received by an insured person in respect of employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:
1. The premium payable by the person

(3) Pour l'application du paragraphe (2), le revenu net que la personne assurée a reçu à l'égard d'un emploi postérieur à l'accident est calculé en soustrayant les montants suivants du revenu brut qu'elle a reçu à l'égard de cet emploi :

1. La cotisation payable sur le revenu

under the Employment Insurance Act (Canada) on the gross income.
2. The contribution payable by the person under the Canada Pension Plan on the gross income.
3. The income tax payable by the person under the Income Tax Act (Canada) and the Income Tax Act (Ontario) on the gross income.

brut par la personne sous le régime de la Loi sur l'assurance-emploi (Canada).
2. La cotisation payable sur le revenu brut par la personne dans le cadre du Régime de pensions du Canada.
3. L'impôt sur le revenu payable sur le revenu brut par la personne sous le régime de la Loi de l'impôt sur le revenu (Canada) et de la Loi de l'impôt sur le revenu (Ontario).

(4) For the purpose of subsection (2), net income from self-employment for an insured person who was self-employed at the time of the accident shall be determined without making any deductions for,
(*a*) expenses that were not reasonable or necessary to prevent a loss of revenue;
(*b*) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose; and
(*c*) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident.

(4) Pour l'application du paragraphe (2), le revenu net que la personne assurée a tiré d'un emploi à son compte qu'elle occupait au moment de l'accident est calculé sans déduire les dépenses suivantes :
*a*) les dépenses qui n'étaient pas raisonnables ou nécessaires pour éviter une perte de revenu;
*b*) les dépenses salariales qui ont été payées pour remplacer la participation active de la personne à l'entreprise, sauf dans la mesure où elles étaient raisonnables à cette fin;
*c*) les dépenses non salariales de nature autre que les dépenses non salariales engagées avant l'accident ou qui leur étaient supérieures, sauf dans la mesure où elles étaient nécessaires pour éviter ou réduire les pertes résultant de l'accident.

(5) If the insured person was self-employed at the time of the accident and the person incurs losses from self-employment as a result of the accident, the insurer shall add to the amount of the income replacement benefit payable to the person 80 per cent of the losses from self-employment incurred as a result of the accident.

(5) Si la personne assurée était employée à son compte au moment de l'accident et qu'elle subit, à la suite de l'accident, des pertes relatives à l'emploi à son compte, l'assureur ajoute au montant de l'indemnité de remplacement de revenu payable à la personne un montant égal à 80 pour cent de ces pertes.

(6) For the purpose of subsection (5),

(6) Pour l'application du paragraphe

losses from self-employment shall be determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the Income Tax Act (Canada) and the Income Tax Act (Ontario), without making any deductions for,

(*a*) expenses that were not reasonable or necessary to prevent a loss of revenue;
(*b*) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose;
(*c*) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident;
(*d*) expenses that are eligible for capital cost allowance or an allowance on eligible capital property; or

(*e*) losses deductible under section 111 of the Income Tax Act (Canada).

(5), les pertes relatives à un emploi à son compte sont calculées de la même manière que les pertes relatives à l'entreprise dans laquelle la personne était employée à son compte seraient calculées aux termes du paragraphe 9 (2) de la Loi de l'impôt sur le revenu (Canada) et aux termes de la Loi de l'impôt sur le revenu (Ontario), sans déduire les dépenses et pertes suivantes :
*a*) les dépenses qui n'étaient pas raisonnables ou nécessaires pour éviter une perte de revenu;
*b*) les dépenses salariales qui ont été payées pour remplacer la participation active de la personne à l'entreprise, sauf dans la mesure où elles étaient raisonnables à cette fin;
*c*) les dépenses non salariales de nature autre que les dépenses non salariales engagées avant l'accident ou qui leur étaient supérieures, sauf dans la mesure où elles étaient nécessaires pour éviter ou réduire les pertes résultant de l'accident;
*d*) les dépenses admissibles à titre de déductions pour amortissement ou de déductions relatives aux immobilisations admissibles;
*e*) les pertes déductibles en vertu de l'article 111 de la Loi de l'impôt sur le revenu (Canada).

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-53-10 |
| **STYLE OF CAUSE:** | ZACK STEEL v. THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | December 14, 2010 |
| **REASONS FOR JUDGMENT BY:** | DAWSON J.A. |
| **CONCURRED IN BY:** | LAYDEN-STEVENSON J.A. |
| **CONCURRING REASONS BY:** | STRATAS J.A. |
| **DATED:** | May 5, 2011 |

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