Federal Court of Appeal | Cour d'appel fédérale

Date: 20220215

Docket: A-320-19

Citation: 2022 FCA 29

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

MICHEL FAULLEM

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on December 2, 2021.

Judgment delivered at Ottawa, Ontario, on February 15, 2022.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Mr. Faullem is asking this Court to set aside a decision of the Appeal Division of the Social Security Tribunal of Canada (the Appeal Division). The Appeal Division dismissed an appeal from the decision of the General Division of the Tribunal confirming that the Canada Employment Insurance Commission (the Commission) was correct to tell the applicant that money retroactively received from the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST) for the weeks during which he had received Employment

Insurance benefits was earnings, and that the applicant therefore had to pay back an overpayment of $26,945.00.

[2] The decision of the Appeal Division (*Michel Faullem v. Canada Employment Insurance Commission* (July 3, 2019), AD-18-302) and the decision of the General Division (*Michel Faullem v. Canada Employment Insurance Commission* (March 28, 2018), GE-17-3246/GE-17-3248/GE-17-3249/GE-17-3250) involve four different files (AD-18-302, AD-18-303, AD-18-304 and AD-18-306) covering four different benefit periods under the *Employment Insurance Act*, S.C. 1996, c. 23 (the *Act*), beginning May 19, 2013 and ending December 11, 2016.

[3] In 2013, the applicant's employment ended after he was psychologically harassed, as confirmed in two Tribunal administratif du travail (TAT) of Quebec decisions dated June 3 and November 8, 2016. Following the November 8 decision, the CNESST paid him, for the period from May 16, 2013 to January 1, 2017, a daily amount as an income replacement benefit.

[4] After the applicant informed the Commission that these amounts had been received in 2017, the Commission notified him that this information would have an impact on the benefits that he had received and that there would be an overpayment to be repaid for each of the benefit periods that would be confirmed by notices of debt.

[5] The position of the applicant, who is not represented by counsel, has evolved considerably since his first appeal to the General Division. It is clear that he has put a good deal

of time and effort into presenting his case. He spent months refining his written submissions to the Appeal Division (see para. 9 of the decision); he filed these submissions through numerous overlapping appendices containing countless references that are difficult to locate in the records of the parties before this Court.

[6] Although the Appeal Division explained to him that its powers were limited to the issues described in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (*DESDA*) and that the appeal did not constitute a *de novo* hearing, the applicant was expecting a detailed analysis of each and every point that he had raised in his written submissions, even those points that he considered were implicit or not apparent.

[7] Before undertaking the analysis of the issues before this Court, it is important to point out, as this Court did at the hearing, that an application for judicial review is subject to strict standards of review, and that it does not allow this Court to substitute its own discretion or its interpretation of the statutory provisions for those of the administrative decision-maker to which Parliament has entrusted this task. An application for judicial review is not an action for damages for negligence or even misconduct in the administration of the *Act*.

[8] The complexity of social legislation is a harsh reality for self-represented litigants. However, the multi-level administrative justice system established by Parliament in the *Act* cannot be considered a learning period that allows parties to perfect the analysis of their file and of the legislation so as to be able to raise new issues at any time. This system also cannot be used

to obtain legal opinions on issues that may arise later or to explain provisions that do not apply in the case at hand.

[9] That said, after a thorough review of this case, and for the reasons that follow, I find that the decision before this Court does not contain any reviewable error that could warrant the intervention of this Court, except with respect to an amount of $1,103.60 that the applicant repaid to the Canada Revenue Agency (CRA) for the 2016 taxation year.

I. The Facts

[10] I have highlighted a few facts in my introduction, but further details are needed to better contextualize the issues raised before this Court. Naturally, I do not intend here to provide details with respect to all the facts that the applicant included in his 40-page memorandum or in his application record.

[11] I have reproduced below a part of the summary table included at page 151 of the applicant's record in order to show the benefit periods at issue, the date on which the applicant was informed of the allocation of the amounts received, the dates of the notices of debt, and the overpayment amounts calculated by the Commission.

[TRANSLATION]

Appeal Division	Date:		Date of CEIC eligibility	Date of initial application	Allocation of sums by the CEIC	End of 36-month period set out in section 52	Date of statement of notice of debt	Calculated amount	
	Start	End						Initial letter	Notice of debt
AD-18-303	19-May-13	29-Sept-13	19-May-13	21-May-13	06-June-17	19-May-16	28-June-17	$7,515	$7,515
AD-18-302	29-June-14	29-Mar-15	22-June-14	25-June-14	06-June-17	22-June-17	10-June-17	$5,460	$5,460
AD-18-304	05-Apr-15	23-Aug-15	05-Apr-15	12-Mar-15	06-June-17	23-Aug-18	10-June-17	$5,929	$5,929
AD-18-306	22-May-16	11-Dec-16	22-May-16	16-June-16	06-June-17	[redacted]	03-June-17	$11,126	$11,126

[12] After having received the notices of debt, the applicant made a request to the Commission for a reconsideration pursuant to section 112 of the *Act*. It is the decisions confirming the amounts to be repaid that the applicant challenged before the General Division. The Commission's September 1, 2017 decision regarding period 4 (AD-18-306 above) indicates that the amount of the overpayment was $8,041.00, being the $11,126.00 amount shown in the table above less a $3,085.00 tax adjustment amount collected by the CRA (page 472 of the respondent's record).

[13] As it appears from the General Division's March 28, 2018 decision, what the applicant was essentially questioning was the accuracy of the calculations and of the tables provided to him, as well as the poor quality of the service received from Commission officers. This allegedly made it significantly more difficult for the applicant to understand the situation and the amounts that he was being asked to repay, especially considering that he was undergoing a psychological assessment at the time.

[14] I also note that the General Division specified that if adjustments to the amounts reported by the applicant as earnings in the past were necessary, the Commission had to be contacted directly. Similarly, any issue regarding the impact of tax deductions, the possibility of being reimbursed for the income tax that was deducted from the Employment Insurance benefits, and any issue relating to a tax adjustment for the 2016 taxation year had to be addressed to the CRA since these issues fell outside the Tribunal's jurisdiction.

[15] The tax adjustment issue referred to above was to determine why the Commission had not deducted the full $4,188.00 amount that was actually collected by the CRA rather than only the $3,085.00 amount that was apparently received by the Commission.

[16] The debate became more intense before the Appeal Division. To avoid repetition, I will address the relevant findings of the General Division and of the Appeal Division in greater detail in my analysis.

[17] The most relevant statutory provisions have been reproduced in the Appendix to these reasons.

II. Issues

[18] The Appeal Division summarized what it considered to be the seven main issues raised before it as follows:

Issue 1: Did the General Division err by finding that the amounts the Claimant received from the CNESST as income replacement benefits constituted earnings under section 35(2)(b) of the EI Regulations and that those earnings had been allocated in accordance with section 36(12)(d) of the EI Regulations?

Issue 2: Did the General Division err by failing to consider how the Commission treated the Claimant?

Issue 3: Did the General Division err by failing to consider the calculation errors in the allocation of the Claimant's earnings?

Issue 4: Did the General Division err by ignoring that the Claimant repaid benefits through a tax adjustment for the May to December 2016 period?

Issue 5: Did the General Division err by ignoring section 145(2) of the EI Act?

Issue 6: Did the General Division err by failing to apply the 36-month limitation period set out in section 52 of the EI Act or, alternatively, by failing to apply section 46.01 of the EI Act?

Issue 7: Did the General Division err by failing to write off the Claimant's debt?

[19] The applicant pressed these issues before this Court (except for issue 5, which he abandoned) because he submits that the Appeal Division's answers were all unreasonable (memorandum of the applicant at para. 63). He argues that the Appeal Division did not sufficiently justify its decision in several respects, particularly with regard to issue 6. To make things easier to understand, I have used the numbering of the issues before the Appeal Division in my analysis.

[20] The applicant also adds that the Appeal Division should have addressed section 56.1 of the *Employment Insurance Regulations*, SOR/96-332 (the *Regulations*), which places certain limitations on the Commission's power to assess penalties or interest against a claimant. According to him, this was necessary because he suspects that the $1,103.60 amount ($4,188.00 – $3,085.00), which is as yet unjustified, was probably collected as interest or a penalty (see summary table on page 16 of the memorandum of the applicant and para. 185 of the memorandum) and that it could not do so at this stage.

[21] The applicant submitted new arguments before this Court, such as the possible application of subparagraph 35(10)(a)(ii) of the *Regulations* (summary table mentioned above and para. 185 of the memorandum). According to him, this provision is relevant because it allows his expenses to be deducted if the benefits received from the CNESST constitute earnings. In my view, there is no need to exercise this Court's discretion to reply to these new arguments in the context of this application for judicial review because there are no exceptional circumstances in this case that warrant an exception to the general principle to be applied and because there is a lack of evidence in the record that would make it possible to apply

subparagraph 35(10)(a)(ii) or to determine, as he also requested, the nature of the administrative costs within the meaning of section 46.01 of the *Act* (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] S.C.J. No. 61, cited in *Merck Canada Inc. v. Canada (Health)*, 2021 FCA 224, [2021] F.C.J. No. 1906 at para. 63; *Tsleil-Waututh Nation v. Canada (National Energy Board)*, 2016 FCA 219 at para. 78).

[22] At the risk of repeating myself, this Court's role in this application for judicial review is limited. The standard of reasonableness applies to all the issues raised before this Court, including to the alleged errors of law (interpretation of the Act and the *Regulations*). Indeed, even though the applicant sometimes used expressions such as [TRANSLATION] "breach of the principle of natural justice" or [TRANSLATION] "violation" of this principle, what he is actually challenging is the impact of the interpretation adopted by the Appeal Division (see, for example, Appendix 16, entitled [TRANSLATION] "Natural Justice", which was submitted to the Appeal Division; pages 124–126 of the applicant's record; pages 979, 980, 990, 1031, 1555, 1556, 1572 and 1573 of the respondent's record; and para. 59 of the memorandum of the applicant). There is no situation before this Court that could remotely constitute a breach of procedural fairness or of the principles of natural justice pursuant to subsection 58(1) of the *DESDA*.

III. Analysis

[23] I would like to begin by pointing out that the principle of transparency and justification does not require the decision-maker to state its position regarding each issue raised by a party and to address each and every argument that a party has advanced to support a position. I therefore do not intend to attempt to summarize the lengthy submissions made by the applicant,

which are not always very clear. It must be said that the applicable statutory provisions cannot be faulted for lack of clarity. I have therefore read and reread several times the arguments put forward by the applicant to ensure that I understand them and grasp their meaning, and I have provided commentary only where I believe that it is essential. Any other argument or submission must be deemed to have been rejected as unfounded.

Issue 1: Do the amounts received from the CNESST constitute earnings subject to allocation?

[24] The General Division and the Appeal Division both found that the amounts received from the CNESST were earnings for the purposes of section 45 of the *Act*, which concerns repayments by claimants of benefit overpayments.

[25] In paragraphs 29 to 35 of its decision, the General Division first considered the nature of the amounts received by the applicant. In addition to the application of sections 35 and 36 of the *Regulations*, the General Division considered the case law stating that earnings within the meaning of the *Act* include any receipt or consideration received for the work done. To be considered earnings, income must arise out of employment, or there must be a sufficient connection between the claimant's employment and the sum received (*Canada (Attorney General) v. Roch*, 2003 FCA 356, [2003] F.C.J. No. 1429 (*Roch*)).

[26] The General Division then reviewed the evidence in the record to determine the nature of the amounts received and referred to the letters issued by the CNESST, which clearly showed that the disputed amounts paid to the applicant retroactively were paid as income replacement

benefits for the period from May 16, 2013 to January 1, 2017. It then noted that pursuant to paragraph 35(2)(b) of the *Regulations*, workers' compensation payments of this nature received by a claimant constitute earnings. Relying on case law in which the facts were similar, the General Division found that the amounts received in this case constituted earnings to be allocated in accordance with the regulatory requirements.

[27] In its decision, the Appeal Division first confirmed that the evidence in the record (i.e. the letters from the CNESST) made it possible for the General Division to find that the amounts at issue were paid as income replacement benefits. It then confirmed that the General Division's determination to the effect that these were earnings subject to allocation was in accordance with the R*egulations* and was supported by settled case law.

[28] The applicant is not challenging the validity of paragraph 35(2)(b) of the *Regulations*, which provides for earnings for benefit purposes, particularly with respect to the application of sections 45 and 46 of the *Act*.

[29] Rather, he is challenging its application in this case on the basis of two submissions. Firstly, according to him, there is no sufficient connection between these amounts and his employment, as required in *Roch* (see, *a contrario*, at the bottom of page 991 of the respondent's record). In his opinion, his case is unique. He adds that this issue has never been decided by a higher court.

[30] Secondly, the applicant states that this provision of the *Regulations* has been misinterpreted because of a misconception of section 45, to which this provision refers and which, in his view, does not apply to his case.

[31] At the hearing before this Court, the applicant added that the concept of entire income is not the same as the concept of earnings within the meaning of the *Act*.

[32] In *Roch*, this Court clearly indicated at paragraphs 35 and 38 that the Commission may, by regulation, add to the usual definition of the word “earnings” (“rémunération” in French) gains or income that, in reality, are not earnings but resemble them in certain respects. This is exactly what the Commission did in paragraph 35(2)(b).

[33] The issue of connection with employment only serves to delineate the Commission’s regulatory power set out in section 54 of the *Act* and to ensure that income that has no connection with employment, such as family allowances, is not included by regulation in the concept of earnings for benefit purposes. It is also used to interpret regulations when their application to a given situation is not clear, as in *Roch*. The fact remains that in the absence of a challenge to the validity of a clear provision, the Tribunal must apply the provision.

[34] In this case, as noted in *Rock*, this Court had already stated as early as 1986 in *Côté v. Canada (Employment and Immigration Commission)* (1986), 69 N.R. 126 (F.C.A.), [1986] F.C.J. No. 447 (F.C.A.) (QL), that income replacement benefits received as workers’ compensation

were clearly earnings that could validly be compared to earnings by regulation because the connection between such earnings and the past or present employment was obvious.

[35] It was therefore reasonable for the Appeal Division to find that the General Division had not erred in applying the clear wording of paragraph 35(2)(b) of the *Regulations* to the applicant's situation because the payments received by the applicant were related to the occupational injury or disease that he had experienced in the course of his employment (see the TAT's November 8, 2016 decision).

[36] The determination regarding the nature of the amounts received was, as the Appeal Division stated, supported by the evidence in the record before the General Division. This determination regarding this question of fact was therefore reasonable.

[37] In this respect, it should be noted, as the respondent did, that the regulatory impact analysis statement for the *Unemployment Insurance Regulations, amendment* (Regulatory Impact Analysis Statement), *Canada Gazette*, Part II (1947–1997), vol. 123, No. 7 (March 29, 1989) at page 1918 (RIAS), which accompanied the first draft of what became paragraph 35(2)(b) of the *Regulations*, referred specifically to income replacement indemnities received pursuant to provincial legislation such as that in effect at the time in Quebec in order to prevent double indemnification during benefit periods.

[38] I also note that the fact that a claimant must challenge the denial of his or her benefits claim by organizations such as the CNESST (in which the CSST's jurisdiction has been vested)

by making a request for reconsideration and filing an appeal is not unique either. For example, in *Canada Employment Insurance Commission v. A.D.*, 2017 SSTADEI 179 (*A.D.*), the claimant had to make similar efforts and wait two years before receiving a retroactive payment of income replacement benefits as workers' compensation. I further note in this regard that *Lacasse v. Canada (Employment Insurance Commission)*, 1998 CanLII 7512, [1998] F.C.J. No. 319 (F.C.A.), which was applied in *A.D.*, had already dealt with income replacement benefits received over a long period of time pursuant to the *Act respecting industrial accidents and occupational diseases*, confirming that such benefits were subject to allocation.

[39] I will address the issue of whether paragraph 35(2)(b) applies, given the applicant's proposed interpretation of section 45, under issue 6. However, as I will explain below, there is nothing to support a finding that the Appeal Division's interpretation of paragraph 35(2)(b) is unreasonable. In addition, the reasons provided in this respect, although brief, are sufficient to understand the Appeal Division's reasoning.

[40] Before turning to the second issue, I should mention that the applicant has yet to submit any evidence to any administrative decision-maker involved in his files to support his position that he was entitled to deductions for the time that he spent and the expenses that he incurred in obtaining decisions from the TAT in order to force the CNESST to pay him the income replacement benefits. As I stated, the argument based on subsection 35(10) of the *Regulations* is new. The applicant submits that it was up to the Commission and to the other administrative decision-makers to raise this issue themselves. I disagree.

[41] The Commission did not include in the earnings subject to allocation the $2,000.00 amount received from the applicant's former employer as compensation for his legal fees (second agreement of November 2016, at page 917 of the respondent's record). The Commission could not have known that this amount did not cover the fees that were actually incurred. Although it is logical to think that the legal fees incurred to obtain the income replacement benefits constituted expenses for the purposes of earning this income, this is not the case with regard to compensation for the time that the claimant himself invested. It appears from the notice of application for judicial review that the applicant was well aware of the existence of the *Digest of Benefit Entitlement Principles* (see page 8 of the notice of application). This digest, which is published by the government and available online, deals with eligible expense deductions, including certain legal fees, in the calculation of earnings. It was the applicant who had to provide evidence that he was entitled to a deduction.

[42] Given the standard of review that applies to the interpretation of subsection 35(10), this Court must refrain from giving its own interpretation because the administrative decision-makers to whom Parliament gave this mandate did not have the opportunity to consider this provision.

Issue 2: The Tribunal's jurisdiction with respect to the Commission officers' conduct

[43] The General Division stated that the difficulties created by the clerical errors and the complex tables provided to the applicant may have had an impact on his understanding of the amounts involved and may have been a source of frustration for him. However, it stated that it was unable to rectify this situation or address the appellant's dissatisfaction with the overall quality of the service received from the Commission officers. It also pointed out that the

Commission does not seem to have questioned the applicant's good faith because it did not assess a penalty.

[44] The Appeal Division confirmed that the General Division did not have the jurisdiction to address the many allegations against the Commission about the way its officers treated the applicant (as a fraudster, according to him).

[45] The applicant wanted these divisions to intervene in order to penalize the Commission officers for the way that they treated him. He noted the Commission officers' lack of reasonable effort to answer his questions, the calculation errors which created unnecessary confusion, the fact that they did not seek to apply the provisions of subsection 35(10) of the *Regulations* and that they treated him like a fraudster despite his good faith, his constant cooperation and the fact that he was a vulnerable person.

[46] As mentioned from the outset, the Appeal Division's jurisdiction is limited to what is provided for in subsection 58(1) of the *DESDA*; neither the Appeal Division nor the General Division has the jurisdiction to penalize Commission officers for inappropriate conduct. Nor do these decision-makers have the jurisdiction to award damages or to write off amounts for punitive purposes, as I will explain in my analysis of issue 7.

[47] The Appeal Division therefore committed no reviewable error and, similarly, this Court does not have the jurisdiction in the context of an application for judicial review of an Appeal Division decision to assess the penalties requested.

[48] The lack of accountability alleged by the applicant is a matter that he can bring to the attention of governmental or political authorities who have the power to make changes in the public service.

[49] However, it should be noted that the tools made available to citizens, such as the Digest, would benefit from being updated and from including more details on situations like that of the applicant.

[50] In addition, even if claimants' arguments are not always clear, the Commission's representatives should make more of an effort than they did in the present matter to facilitate understanding of the case. As I state in dealing with issue 4, and despite the Appeal Division's clear recommendation (see para. 56 below), neither the Commission nor its counsel made reasonable efforts before February 2, 2022 to clarify how an amount of $1,103.60 was charged. This is certainly not acceptable. I also note in passing that the Commission and its representatives continue to rely on case law without really ensuring that it is relevant, probably because the Digest is not always up to date. For example, the Commission, in its very brief written submissions before the Appeal Division, relied on a decision described as emanating from [TRANSLATION] "the Federal Court of Appeal decision in *Claveau v. Canada (AG)*, #T-1268-07, in support of its position that there is no time limit pursuant to section 45, in contrast with section 52 of the *Act*" (see respondent's record at page 787). However, the Appeal Division had already made it clear in 2015 (*M.L. v. Canada Employment Insurance Commission*, 2015 SSTAD 587 at paras. 20–21) that this decision (which was actually rendered by the Federal

Court, 2008 FC 672) did not deal with this issue and that it was this Court's decision in *Chartier* that was relevant.

Issue 3: The allocation of earnings / calculation errors

[51] The General Division reviewed the allocation and the calculations made by the Commission. In response to the arguments presented by the applicant, the General Division indicated that it reviewed the allocation of the amounts at issue for each of the benefit periods concerned. The General Division stated that it would not mention certain points that the appellant had raised or certain clerical errors that it noted that had no bearing on the issue before it.

[52] For the periods beginning May 19, 2013 and April 5, 2015, the General Division did not identify any errors in the allocation of the amounts received that could have an impact on the overpayment owed by the appellant. With respect to the periods beginning on June 25, 2014 and May 22, 2016, the General Division noted several errors that it characterized as clerical errors because the amounts that appeared to have been entered in the wrong places, or incorrectly added to the table, had no bearing on the calculations redone by the General Division regarding the total amount of the overpayment for each of these benefit periods (Reasons at paras. 40–41, 43).

[53] The General Division then turned to the issue raised by the appellant of the rounding of the amounts received from the CNESST. It stated that subsection 36(20) of the *Regulations* provides that a fraction of a dollar that is equal to or greater than one half shall be taken as a

dollar and a fraction that is less than one half shall be disregarded. It found that there was therefore no reviewable error in this respect.

[54] In its decision, the Appeal Division recalled how the calculations are performed, and it noted that with regard to sickness benefits (period 1), 100% of the amounts received must be deducted. I understand here that because the benefits paid by the CNESST in this case exceed the amount of the benefits received by the applicant, the overpayment does not need to be calculated and all the benefits received from the Commission must be repaid.

[55] After having redone the calculations, the Appeal Division confirmed that it could find no error that would have the effect of changing the amount established from the overpayment for each period.

[56] Regarding the $4,188.60 amount that the applicant repaid to the CRA in May 2016, the Appeal Division asked the Commission to explain why only $3,085.00 was deducted from the required overpayment (i.e. the amount that the Commission stated that it had received from the CRA). The Appeal Division recommended that the applicant be provided with a clear and detailed statement of account within 30 days of its decision.

[57] The applicant argues that he still cannot understand some of the calculations. It seems that he still does not understand why the calculations for period 1 are not similar to those in the tables that apply to the other periods. He would like more explanations regarding the waiting period weeks, for which no overpayment has been claimed because the Commission did not pay

him any benefits. He also does not understand how it is possible that the errors described in paragraphs 40, 41 and 43 of the General Division's reasons did not affect the total overpayment for the periods at issue.

[58] However, he did not provide any details in his memorandum enabling this Court to determine that the Appeal Division committed a reviewable error in finding, on the basis of the tables that were corrected following the General Division's comments, that the total of the overpayment for each period was indeed not wrong.

[59] Even though the applicant is self-represented, he bears the burden of convincing this Court that the Appeal Division made a reviewable error. He failed to do so.

[60] As for the calculations for period 1, as I have already stated at paragraph 54 above, it appears both from the Commission's decision which deals with this period and from paragraph 27 of the Appeal Division's reasons that 100% of the sickness benefits (the only ones paid during this period) must be repaid because the income replacement indemnities received exceed the amount of benefits received. As a result, no calculations are required. With respect, I fail to see how this situation was complicated. The amounts allocated during the waiting period weeks cannot have an impact on the amounts claimed for this period because no benefits were paid or payable.

[61] With regard to the impact of the benefits received from the CNESST and allocated during other periods that include waiting period weeks, the rules that the Commission followed were

explained in its decisions following the request for reconsideration (pages 453 and 472 of the respondent's record and para. 44 of the General Division's decision). The applicant did not raise any errors in this respect, and it is not the role of this Court to redo the Commission's calculations.

[62] Finally, the applicant suggests that periods 1 and 2 should be treated as one and the same period. As I mentioned, each period was the subject of a separate request for reconsideration before the Commission and a separate appeal before the Tribunal even though the cases with respect to these periods were heard together. I therefore cannot consider such an argument at this stage, the ultimate purpose of which is simply to allow the applicant to argue that section 52, which prohibits any reconsideration of a claim for benefits beyond a 36-month period, also applies to period 2.

[63] I find on this issue that the applicant has not established that the Appeal Division made an error that would warrant this Court's intervention. However, as I mentioned above, I will deal with the issue of the repayment made to the CRA under issue 4.

> *Issue 4: Did the Tribunal err by ignoring the partial repayment of the overpayment through a tax adjustment for the May to December 2016 period?*

[64] The General Division did not address this issue, which it considered to be outside its jurisdiction (see paragraphs 14 and 15 above). The Appeal Division confirmed that it did not have jurisdiction in the matter but recommended that a detailed explanation be provided to the

applicant. I understand from this that it could not shed light on this issue based on the documents before it.

[65] The Commission argued before the Appeal Division that section 145, which is in Part VII of the *Act*, did not apply because the applicant was not working (despite the notice of assessment in the record). According to the Commission, any issue relating to the repayment that the applicant made to the CRA was therefore not within the Tribunal's jurisdiction, and the claimant had to contact the CRA to understand why only $3,085.00 had been deducted instead of $4,188.60 as the overpayment claimed for that period. The Appeal Division found that even though it did not have the jurisdiction to decide this issue, it was still important that the Commission provide a detailed explanation to the claimant in this respect.

[66] Unfortunately, it appears that the Commission chose to laconically reiterate the information already provided to the applicant; this information did not in any way explain what became of the $1,103.60 amount collected by the CRA. Furthermore, these explanations still contained the errors noted by the General Division for the weeks of June 5 and June 12, 2016.

[67] Although the CRA's exercise of its power pursuant to section 145 of the *Act* is subject to the exclusive jurisdiction of the Tax Court of Canada, Parliament has clearly chosen to avoid claimants having to request a repayment from the CRA when section 45 applies.

[68] Indeed, pursuant to section 45 of the *Act*, only overpayments of benefits as defined in the *Act* must be repaid. In section 2, this expression does not include amounts collected by the CRA

pursuant to section 145 of the *Act* (Part VII). In this respect, the Tribunal therefore had the jurisdiction to ensure that the Commission required only the amount of the overpayment of benefits, as defined in the *Act*. The Commission had to deduct the amounts collected pursuant to section 145 in order to calculate the amount of the debt pursuant to section 45.

[69] The Commission's position on the non-application of section 145 was not corrected or explained before this Court at the hearing. It was only after the issuance of a Court direction aimed at clarifying under which other power the CRA could claim a repayment even before a notice of debt was sent that the Commission and its counsel really looked into the matter and at last attempted to sort out what happened to the $1,103.60 amount.

[70] I note here that the lack of effort to clear up this issue had other impacts, as it seems that it is because of erroneous information received from a Commission officer that the applicant began to suspect that the Commission had imposed a penalty or interest on him pursuant to section 56.1 of the *Regulations*. This led him to argue that the General Division had refused to exercise its jurisdiction in respect of this [TRANSLATION] "error", and to ask this Court to interpret this provision.

[71] After having reviewed the record, and given that this Court's role is not to speculate or to provide a statutory interpretation in the absence of specific facts warranting it, I did not intend to deal with section 56.1. The fact remains that the Commission's lack of transparency caused delays and wasted time for both the applicant and the Court.

[72] That said, I now understand from the respondent's additional submissions in his February 2, 2022 letter that it was indeed pursuant to section 145 that the CRA collected the amount of $4,188.60 from the applicant, based on a T4E issued by the Commission for the 2016 taxation year. There is no indication that an amended T4E was subsequently issued. When the CRA received the repayment, the Commission had not yet calculated the impact of the CNESST benefits paid in 2017 for the weeks of benefits paid during the 2016 taxation year. In the absence of further explanations and evidence, the amount collected by the CRA had to be deducted.

[73] The respondent now explains that after the June 2016 allocation, the applicant remained eligible for $3,678.00 of Employment Insurance benefits in 2016 (this amount does not appear in the tables produced before the Appeal Division). He adds that the CRA was therefore entitled to collect 30% of this amount—namely, $1,103.40—pursuant to section 145. According to the respondent, this amount therefore did not have to be deducted in order to establish the overpayment of benefits for this period.

[74] Just as the applicant cannot ask this Court to rewrite history in these cases, the respondent cannot now attempt to justify a position that he never put forward up until now, especially when he himself has confirmed that the supporting document was not before the Tribunal. As I stated, the General Division and the Appeal Division had the jurisdiction to ensure that the calculation of the amount of the overpayment of benefits set out in section 45 was made according to the rules. The issue was not whether the CRA had properly exercised its power, nor was the issue simply to deduct what the Commission had received from the CRA in June 2017 (respondent's

record at page 319); rather, the issue was to deduct what was collected from the applicant pursuant to Part VII of the *Act*.

[75] Given the evidence in the record, which clearly indicated the amount collected pursuant to Part VII of the *Act*, I find that the Appeal Division's decision on this issue is unreasonable. It had the jurisdiction to examine this issue.

[76] In view of the evidence and the lack of explanations from the Commission before the Appeal Division, the Appeal Division could only find that the full amount of $4,188.60 should be excluded from the calculation for period 4. In the very specific circumstances of this case, including the time elapsed and the fact that there are no other reviewable errors in these cases, the matter should not be remitted back to the Appeal Division; rather, it is appropriate to render the decision that the Appeal Division should have rendered on this issue (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 142).

Issue 6: Application of sections 45 and 52, and alternatively of section 46.01 of the Act

[77] The General Division did not deal with the issues raised for the first time before the Appeal Division regarding the application of sections 52 and 46.01 of the *Act*. According to the applicant, it still should have done so.

[78] The Appeal Division discussed the application of these provisions at paragraphs 36 to 54 of its decision. The Appeal Division first noted that the application of section 52 is relevant only with respect to the repayment of sickness benefits paid during the first period (see table in

para. 11 above). It pointed out that it is section 45 of the *Act* that requires a claimant to repay the overpayment of benefits that would not have been provided if the amounts received from the CNESST had been paid or if they were to be paid at the time that the Commission had provided the Employment Insurance benefits.

[79] The Appeal Division confirmed that this ground was not raised before the General Division but that in any event, it was of the opinion that the General Division had not erred in this respect because section 52 does not apply to recovering amounts due pursuant to section 45 of the *Act*. It mentioned that on November 2, 2016, the applicant and the CNESST had recognized that he had the right to retroactively receive compensation payments for the psychological harassment that he had experienced through his work. It found that the calculations of the amounts due pursuant to section 45 could be performed at any time. However, the *Act* (subsection 47(3)) sets out a 72-month limitation period for the recovery of such debts. According to the Appeal Division, this provision takes into account the long delays in court proceedings and out-of-court discussions. Moreover, it noted that "[d]espite a very able argument", it was not convinced that it should not follow the Federal Court of Appeal's teachings in *Chartier v. Canada (Attorney General)*, 2010 FCA 150, [2011] 4 F.C.R. 327 (*Chartier*) (Reasons at para. 44, footnote 6).

[80] With respect to the alternative argument relating to the application of section 46.01, the Appeal Division noted that it was not able to benefit from an analysis by the General Division as to whether the Commission had in fact exercised its discretion. It further noted that the applicant had recognized that essential information was missing from the record to decide on the possible

application of this section. I understand from the applicant that the information on the costs related to the recovery of the overpayment by the Commission was indeed not in the record (see section 46.01 in Appendix 1).

[81] The applicant placed considerable emphasis on the error that the Appeal Division allegedly made in applying section 45 of the *Act* and in refusing to apply the 36-month limitation period set out in section 52.

[82] He is asking this Court to clarify the interpretation to be given to sections 43, 44, 45, 46 and 52, and alternatively, to section 46.01. In this regard, he has provided this Court with what he states are all the decisions in which these sections have been cited for some reason. In other words, he would like this Court to [TRANSLATION] "weed through" everything in order to provide him with a better understanding of the *Act*.

[83] The Appeal Division had to determine whether the General Division had erred in applying section 45, which alone seems to apply to eligible and non-excluded persons for the given periods regardless of the nature of the benefits paid (special or regular). In fact, the applicant did not take a formal position in this respect before the Appeal Division (see, for example, pages 991, 1012 and 1013 of the respondent's record); rather, he left this determination to the discretion of the administrative decision-maker. He now argues before this Court that it is section 44 that the Appeal Division should have applied because the first period involved only sickness benefits (special benefits rather than regular benefits). Yet he did not claim that he was

not eligible to receive the full amount of these sickness benefits at the time that they were paid to him.

[84] He also argues that the CNESST is not an employer and was not acting on behalf of his employer, that the amounts paid did not come from the property of his employer (the employer was not yet bankrupt) and that they were not damages for wrongful dismissal. According to him, therefore, none of the specific situations described in section 45 applies to his case.

[85] However, he is not disputing that it was indeed following a decision by the TAT confirming an agreement reached on November 2, 2016 and setting aside the CNESST's February 18, 2014 decision denying his claim for benefits on account of an occupational disease pursuant to the Quebec *Act respecting industrial accidents and occupational diseases* that the CNESST paid him the income replacement benefits. The CNESST was an intervener in that decision because it was the CNESST's decision that was the subject of the motion before the TAT.

[86] The purpose of section 45 and of the *Act* is discussed at paragraph 31 of this Court's decision in *Chartier*, cited by the Appeal Division. I quote a relevant excerpt from that decision:

> [31] Sections 45, 46 and 47 respect the goal and objectives of the Act: to offer material support to those affected by the loss of their employment. The Act provides for a contributory insurance plan. It does not seek to, allow, or encourage the receiving or withholding of overpayments of benefits. It must be kept in mind that workers and employers bear the cost of the employment insurance system. The program is neither intended to nor administered in such a manner as to enrich certain claimants to the detriment of other claimants and the workers and employers financing it. ...

[87] The situation before the Appeal Division and before this Court is analogous to the situation specifically provided for in section 45, and there is nothing in the context or purpose of that provision and of the *Act* in general that makes it possible to interpret the words “or for any other reason” and “or any other person” to exclude the current scenario.

[88] The applicant maintains that he did not enrich himself and that he continues to suffer a loss as a result of the occupational injury or disease that he experienced. He was never compensated for the full salary that he lost. As a result, there was no double indemnification.

[89] This is to misunderstand the *Act*, the purpose of which is not to provide compensation for the full salary that a claimant has lost. The *Act* and the *Regulations* set the parameters of the amounts insured under the *Act*. Beyond these amounts, it provides for the obligation to repay a certain percentage, which involves the complex calculations found in the tables applicable to periods 2 to 4. There is never any question of limiting the application of section 45 to cases where a claimant receives compensation for his or her full salary.

[90] Apart from a challenge to the constitutionality of the provisions before this Court, the Appeal Division and this Court are bound to apply these choices made by Parliament even though the applicant described them as unfair and discriminatory to people in his situation. As I have already stated, the earnings referred to in section 45 are defined in paragraph 35(2)(b) of the *Regulations* and include the entire income set out therein. Nothing in the wording of section 45 limits this definition. Indeed, the use of the word “including” confirms that the examples that

follow, such as damages for wrongful dismissal, or proceeds realized from the property of a bankrupt, are not exhaustive.

[91] I therefore find that the Appeal Division's decision to apply section 45 to the facts of this case is reasonable.

[92] With respect to the application of section 52, the applicant argues that the Appeal Division was wrong to apply this Court's decision in *Chartier*. According to the applicant, this decision is wrong insofar as it establishes that section 52 does not apply to the repayment of an overpayment of benefits pursuant to section 45, or to the deductions to be made pursuant to section 46. He submits that although this Court dealt with *Braga v. Canada (Attorney General)*, 2009 FCA 167, [2009] F.C.J. No. 628 in *Chartier*, it did not give sufficient consideration to this decision or to other decisions such as *Blais v. Canada (Attorney General)*, 2011 FCA 320, [2011] F.C.J. No. 1628, and the decisions cited therein. According to him, the introduction of concepts such as "administrative provision" and "adjudicative function" in *Chartier* results in an asymmetrical treatment and creates restrictions that the *Act* does not provide for.

[93] It is not helpful to attempt to describe in greater detail the numerous arguments presented by the applicant in his memorandum (see paras. 81 to 136 and 138 of the memorandum of the applicant). The interpretation that he proposed is certainly plausible, but it is not the only possible interpretation, as evidenced by the interpretation adopted in *Chartier*, a decision rendered by a particularly experienced panel of this Court in Employment Insurance matters.

[94] This decision put an end to the confusion resulting from the different opinions adopted by various boards of referees. The interpretation adopted in *Chartier* has since been applied by administrative decision-makers. It has stabilized the state of the law and allowed for a consistent application of the *Act* in the thousands of cases that the Commission processes each year, which are not the subject of published case law.

[95] The respondent submits that none of the exceptional circumstances referred to in this Court's judgment in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 exist in this case and that setting aside the precedent established in *Chartier* would therefore not be justified. I agree in principle.

[96] However, what is important to note here is that Parliament is presumed to be aware of the case law and that it regularly intervenes by way of amendment when it considers that this case law does not reflect the policy that it wishes to maintain. This is a form of dialogue between the courts and Parliament.

[97] In this case, Parliament did not amend section 52 to underscore its intention to have it apply to the recovery of benefit overpayments provided for in section 45. On the contrary, in 2012, it enacted a new provision—section 46.01—that applies only to repayments pursuant to section 45 or to deductions pursuant to section 46 as per the provisions at issue in *Chartier*.

[98] In this section, Parliament specifies that no overpayment or deduction is payable if "more than 36 months have elapsed since the lay-off or separation from the employment in relation to

which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment." I note here that this 36-month period is different from the period that is provided for in section 52, which deals with the 36 months after the benefits have been paid or would have been payable. The importance of the second condition is confirmed by the fact that Parliament took the trouble of suspending its application in 2021 until September 2022 because of the pandemic (*Budget Implementation Act, 2021, No. 1*, S.C. 2021, c. 23, subsections 317(1), 317(2), 339(1), 339(2)).

[99] The addition of section 46.01 confirms that the time limit in section 52 does not apply in the cases provided for in section 45 and that Parliament endorsed the interpretation adopted in *Chartier*.

[100] I find that the interpretation adopted by the Appeal Division was reasonable and did not require further development in the circumstances of this case. The Court fully understands that the Appeal Division based its interpretation on the interpretation set out in *Chartier*.

[101] I therefore turn to the applicant's argument that the Appeal Division had to apply section 46.01, or at least interpret it, so as to enable him to decide whether he could mount a new defence on this basis.

[102] Like the Appeal Division, I confirm that the absence of evidence in the record did not make it possible to determine whether the second condition of section 46.01 was satisfied and that this issue was not submitted before the General Division (subsection 58(1) of the *DESDA*).

In the absence of evidence and arguments, it could not have been an error of law on the part of the General Division as the applicant claimed.

[103] Especially since the applicant's position before the Appeal Division was not clear. On the one hand, he states that the Appeal Division could have relied on the evidence presented in another case (*G.K. v. Canada Employment Insurance Commission*, 2017 SSTADEI 348) before the same member of the Appeal Division, in which the Commission had found that the average administrative cost was $329.00. On the other hand, he submits that pursuant to section 46.01, the Commission's legal fees to defend its position on appeal must be added to this and that the language of section 46.01, and particularly the word "determining", had to be interpreted.

[104] The applicant acknowledges that there is very little case law on the interpretation and application of section 46.01. He is asking this Court to make up for this shortcoming, which, again, is not this Court's role, as frustrating as it may be for the applicant.

[105] I can therefore only find that the Appeal Division's decision, namely, that it did not have to rule on this issue in this case, is reasonable.

[106] Nevertheless, I would mention that the Tribunal and the Commission would do well to examine this issue more closely in the future. It is far from obvious, in view of the legislative evolution of section 46.01, that Parliament wanted to limit its application solely to cases where the repayment is less than $329.00. If the intention was to set a general cap regardless of the

particular circumstances of a case, it was easy to do so by doing as it did in paragraph 56(1)(a) of the *Regulations*.

Issue 7: Write-off (subsection 56(1) of the Regulations)

[107] With respect to this final issue, the Appeal Division pointed out that it had found on several occasions that it did not have the jurisdiction to deal with such issues.

[108] The applicant never asked the Commission to use its power under subsection 56(1) of the *Regulations* to write off all or part of the overpayment described in the notices of debt.

[109] Before the Appeal Division, he argued that the General Division had erred in not writing off his debt. The Appeal Division correctly confirmed that only the Commission has the power to write off in accordance with subsection 56(1) of the *Regulations*. Furthermore, such decisions of the Commission are not subject to review. Section 112.1 is perfectly clear in this respect. Only decisions made pursuant to section 112 can be appealed to the General Division.

[110] The adoption of section 112.1 in 2014 is, in my view, another example of the dialogue between the courts and Parliament to which I alluded in discussing *Chartier*. It appears that the concurring reasons of Justice Stratas in *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2011] F.C.J. No. 657 (QL) (*Steel*) had raised some doubts as to whether a claimant could make a request for a reconsideration of a decision rendered in accordance with subsection 56(1) of the *Regulations* and therefore make an appeal to the Tribunal pursuant to section 113 of the *Act*. Parliament saw fit to put an end to this uncertainty by enacting section 112.1.

[111] I am therefore satisfied that the Appeal Division's finding in this respect is reasonable.

IV. Conclusion

[112] I conclude from the foregoing that the Appeal Division's decision is reasonable, except with respect to the issue of the amount of the benefits overpayment for period 4, from which the amount collected under Part VII in May 2017 should have been deducted in June 2017. I would therefore dismiss the application for review except with respect to this aspect and render the decision that should have been made in file AD-18-306 by ordering the deduction of an additional $1,103.60 amount from the $8,041.00 overpayment confirmed by the Commission in its September 1, 2017 decision.

[113] The applicant seeks costs like those awarded in *Steel*, where, in that case, the applicant was unsuccessful before this Court. I note that in that case, the applicant was represented by counsel, which generally entitled him to certain amounts set out in Tariff B of the *Federal Courts Rules*, SOR/98-106, and that the parties had agreed to an amount of $5,000.00 if his application for review was allowed. The Court seldom awards costs to self-represented litigants other than to reimburse the amounts actually paid in connection with the application for review. However, as I mentioned, in this case, the conduct of the Commission and its counsel created

confusion, wasted time, and caused delays. I would therefore award costs in the amount of $1,000.00 to the applicant.

"Johanne Gauthier"

J.A.

"I agree.
Yves de Montigny, J.A."

"I agree.
René LeBlanc, J.A."

APPENDIX

Department of Employment and Social Development Act
S.C. 2005, c. 34

…

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[…]

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

Employment Insurance Regulations (SOR/96-332)

…	[…]
Determination of Earnings for Benefit Purposes	**Détermination de la rémunération aux fins du bénéfice des prestations**
…	[…]
35 (2)(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;	**35 (2)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;
…	[…]
35 (10) For the purposes of subsection (2), ***income*** includes	**35 (10)** Pour l'application du paragraphe (2), revenu vise notamment :
(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting	**a)** dans le cas d'un prestataire qui n'est pas un travailleur indépendant, le montant qui reste de son revenu après déduction des sommes suivantes :
(i) expenses incurred by the claimant for the direct purpose of earning that income, and	**(i)** les dépenses qu'il a engagées directement dans le but de gagner ce revenu,
(ii) the value of any consideration supplied by the claimant; and	**(ii)** la valeur des éléments fournis par lui, le cas échéant;
…	[…]
Allocation of Earnings for Benefit Purposes	**Répartition de la rémunération aux fins du bénéfice des prestations**
…	[…]
36 (20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.	**36 (20)** Pour l'application du présent article, les sommes visées sont arrondies au dollar supérieur si elles comportent une fraction d'un dollar égale ou supérieure à 50 cents et au dollar inférieur si elles comportent une fraction moindre.
…	[…]

Write-off of Amounts Wrongly Paid, Penalties and Interest

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 Employment and Social Development does not exceed $100, 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 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

Défalcation des sommes indûment versées, des pénalités et des intérêts

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 de l'Emploi et du Développement social ne dépasse pas cent 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;

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

relation to benefits paid under section 25 of the Act; or

des prestations versées selon l'article 25 de la Loi;

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

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

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

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

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

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

(iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

(iii) soit les frais administratifs de recouvrement de la pénalité ou de la somme, ou les intérêts, seraient vraisemblablement égaux ou supérieurs à la pénalité, à la somme ou aux intérêts à recouvrer.

(2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if

(2) La Commission peut défalquer la partie de toute somme due aux termes des articles 47 ou 65 de la Loi qui se rapporte à des prestations reçues plus de douze mois avant qu'elle avise le débiteur du versement excédentaire, y compris les intérêts courus, si les conditions suivantes sont réunies :

(a) 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; and

a) 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;

(b) the overpayment arises as a result of

b) le versement excédentaire est attribuable à l'un des facteurs suivants:

(i) a delay or error made by the Commission in processing a claim for benefits,

(i) un retard ou une erreur de la part de la Commission dans le traitement d'une demande de prestations,

(ii) retrospective control procedures or a retrospective review initiated by the Commission,

(iii) an error made on the record of employment by the employer,

(iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment, or

(v) an error in insuring the employment or other activity of the debtor.

(ii) des mesures de contrôle rétrospectives ou un examen rétrospectif entrepris par la Commission,

(iii) une erreur dans le relevé d'emploi établi par l'employeur,

(iv) une erreur dans le calcul, par l'employeur, de la rémunération assurable ou du nombre d'heures d'emploi assurable du débiteur,

(v) le fait d'avoir assuré par erreur l'emploi ou une autre activité du débiteur.

Employment Insurance Act, S.C. 1996, c. 23

…

Interpretation

Definitions

2 (1) In this Act,

overpayment of benefits does not include a benefit repayment as described in Part VII; (*versement excédentaire de prestations*)

…

Liability for overpayments

43 A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

Liability to return overpayment

44 A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

Return of benefits by claimant

[…]

Définitions et interprétation

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

versement excédentaire de prestations En est exclu un remboursement de prestations au sens de la partie VII. (*overpayment of benefits*)

[…]

Obligation de rembourser le versement excédentaire

43 La personne qui a touché des prestations en vertu de la présente loi au titre d'une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n'est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.

Obligation de restituer la partie excédentaire du versement

44 La personne qui a reçu ou obtenu, au titre des prestations, un versement auquel elle n'est pas admissible ou un versement supérieur à celui auquel elle est admissible, doit immédiatement renvoyer le mandat spécial ou en restituer le montant ou la partie excédentaire, selon le cas.

Remboursement de prestations par le prestataire

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.

…

[…]

Return of benefits by employer or other person

46 (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver

Remboursement de prestations par l'employeur ou une autre personne

46 (1) Lorsque, soit en application d'une sentence arbitrale ou d'un jugement d'un tribunal, soit pour toute autre raison, un employeur ou une personne autre que l'employeur — notamment un syndic de faillite — se trouve tenu de verser une rémunération, notamment des dommages-intérêts pour congédiement abusif ou des montants réalisés provenant des biens d'un failli, à un prestataire au titre d'une période et a des motifs de croire que des prestations ont été versées à ce prestataire au titre de la même période, cet employeur ou cette autre personne doit vérifier si un remboursement serait dû en vertu de l'article 45, au cas où le prestataire

General as repayment of an overpayment of benefits.

aurait reçu la rémunération et, dans l'affirmative, il est tenu de retenir le montant du remboursement sur la rémunération qu'il doit payer au prestataire et de le verser au receveur général à titre de remboursement d'un versement excédentaire de prestations.

…

[…]

Limitation

46.01 No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

Restrictions

46.01 Aucune somme n'est à rembourser aux termes de l'article 45 ou à retenir aux termes du paragraphe 46(1), à titre de remboursement d'un versement excédentaire de prestations, s'il s'est écoulé plus de trente-six mois depuis le licenciement ou la cessation d'emploi du prestataire pour lequel la rémunération est payée ou à payer et que, de l'avis de la Commission, le coût administratif pour la détermination du remboursement est vraisemblablement égal ou supérieur à sa valeur.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

Remboursement de prestations par l'employeur

(2) Lorsque le prestataire a reçu 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, la totalité ou une partie de ces prestations est ou a été retenue sur la rémunération, notamment les dommages-intérêts pour congédiement abusif, qu'un employeur de cette personne est tenu de lui verser au titre de la même période, cet employeur est tenu de verser la totalité ou cette partie des prestations au receveur général à titre de remboursement d'un versement excédentaire de prestations.

…

Limitation

47 (3) No amount due under this section may be recovered more than 72 months after the day on which the liability arose.

…

Reconsideration of claim

52 (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

Decision

(2) 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, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

Amount repayable

(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,

[…]

Prescription

47 (3) Le recouvrement des créances visées au présent article se prescrit par soixante-douze mois à compter de la date où elles ont pris naissance.

[…]

Nouvel examen de la demande

52 (1) Malgré l'article 111 mais sous réserve du paragraphe (5), la Commission peut, dans les trente-six mois qui suivent le moment où des prestations ont été payées ou sont devenues payables, examiner de nouveau toute demande au sujet de ces prestations.

Décision

(2) Si elle décide qu'une personne a reçu une somme au titre de prestations pour lesquelles elle ne remplissait pas les conditions requises ou au bénéfice desquelles elle n'était pas admissible, ou n'a pas reçu la somme pour laquelle elle remplissait les conditions requises et au bénéfice de laquelle elle était admissible, la Commission calcule la somme payée ou à payer, selon le cas, et notifie sa décision au prestataire.

Somme remboursable

(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

for the purposes of subsection 47(3), the day on which the liability arises.

cause est, pour l'application du paragraphe 47(3), la date où la créance a pris naissance.

Amount payable

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

Somme payable

(4) Si la Commission décide qu'une personne n'a pas reçu la somme au titre de prestations pour lesquelles elle remplissait les conditions requises et au bénéfice desquelles elle était admissible, la somme calculée au titre du paragraphe (2) est celle qui est payable au prestataire.

Extended time to reconsider claim

(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

Prolongation du délai de réexamen de la demande

(5) Lorsque la Commission estime qu'une déclaration ou affirmation fausse ou trompeuse a été faite relativement à une demande de prestations, elle dispose d'un délai de soixante-douze mois pour réexaminer la demande.

…

[…]

PART VI

Administrative Review

PARTIE VI

Dispositions administratives

Rescission or amendment of decision

Révision administrative

…

[…]

Reconsideration — Commission

112 (1) A claimant or other person who is the subject of a decision of the Commission, or the employer of the claimant, may make a request to the Commission in the prescribed form and manner for a reconsideration of that decision at any time within

Révision — Commission

112 (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, et selon les modalités prévues par règlement, demander à la Commission de réviser sa décision.

(a) 30 days after the day on which a decision is communicated to them; or

(b) any further time that the Commission may allow.

Reconsideration

(2) The Commission must reconsider its decision if a request is made under subsection (1).

Regulations

(3) The Governor in Council may make regulations setting out the circumstances in which the Commission may allow a longer period to make a request under subsection (1).

Decision not reviewable

112.1 A decision of the Commission made under the *Employment Insurance Regulations* respecting the writing off of any penalty owing, amount payable or interest accrued on any penalty owing or amount payable is not subject to review under section 112.

Appeal to Social Security Tribunal

113 A party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*.

…

PART VII

Benefit Repayment

…

Benefit repayment

Nouvel examen

(2) La Commission est tenue d'examiner de nouveau sa décision si une telle demande lui est présentée.

Règlement

(3) Le gouverneur en conseil peut, par règlement, préciser les cas où la Commission peut accorder un délai plus long pour présenter la demande visée au paragraphe (1).

Décisions ne pouvant être révisées

112.1 Les décisions de la Commission rendues en vertu du *Règlement sur l'assurance-emploi* qui concernent la défalcation de pénalités à payer, de sommes dues ou d'intérêts courus sur ces pénalités ou sommes ne peuvent faire l'objet de la révision prévue à l'article 112.

Appel au Tribunal de la sécurité sociale

113 Quiconque se croit lésé par une décision de la Commission rendue en application de l'article 112, notamment une décision relative au délai supplémentaire, peut interjeter appel de la décision devant le Tribunal de la sécurité sociale constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*.

[…]

PARTIE VII

Remboursement de prestations

[…]

Obligation de rembourser des prestations

145 (1) If a claimant's income for a taxation year exceeds 1.25 times the maximum yearly insurable earnings, the claimant shall repay to the Receiver General 30% of the lesser of

(a) the total benefits, other than special benefits and benefits under Part VII.1, paid to the claimant in the taxation year, and

(b) the amount by which the claimant's income for the taxation year exceeds 1.25 times the maximum yearly insurable earnings.

145 (1) Lorsque son revenu pour une année d'imposition dépasse un montant correspondant à 1,25 fois le maximum de la rémunération annuelle assurable, le prestataire paie au receveur général un montant égal à trente pour cent du moins élevé des montants suivants :

a) le montant total des prestations, autres que des prestations spéciales et des prestations prévues par la partie VII.1, qui lui ont été payées pendant l'année d'imposition;

b) le montant duquel le revenu du prestataire pour l'année d'imposition dépasse un montant correspondant à 1,25 fois le maximum de la rémunération annuelle assurable.

Budget Implementation Act, 2021, No. 1
S.C. 2021, c. 23

…

317 (1) Section 46.01 of the Act is replaced by the following:

Limitation

46.01 No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable.

(2) Section 46.01 of the Act is replaced by the following:

Limitation

46.01 No amount is payable under section 45, or deductible under subsection 46(1), as a repayment of

[…]

317 (1) L'article 46.01 de la même loi est remplacé par ce qui suit :

Restrictions

46.01 Aucune somme n'est à rembourser aux termes de l'article 45 ou à retenir aux termes du paragraphe 46(1), à titre de remboursement d'un versement excédentaire de prestations, s'il s'est écoulé plus de trente-six mois depuis le licenciement ou la cessation d'emploi du prestataire pour lequel la rémunération est payée ou à payer.

(2) L'article 46.01 de la même loi est remplacé par ce qui suit :

Restrictions

46.01 Aucune somme n'est à rembourser aux termes de l'article 45 ou à retenir aux termes du

an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

paragraphe 46(1), à titre de remboursement d'un versement excédentaire de prestations, s'il s'est écoulé plus de trente-six mois depuis le licenciement ou la cessation d'emploi du prestataire pour lequel la rémunération est payée ou à payer et que, de l'avis de la Commission, le coût administratif pour la détermination du remboursement est vraisemblablement égal ou supérieur à sa valeur.

…

[…]

Coming into Force

Entrée en vigueur

September 26, 2021

26 septembre 2021

339 (1) Subsections 302(1), 303(1) and (3) and 304(1), section 305, subsections 306(1), 307(1) and (3), 308(1), 309(1), (3) and (5), 310(1), (3), (5), (7), (9), (11) and (13), 311(1), 312(1), 313(1), 314(1), 315(1), 316(1) and (3), 317(1) and 318(1), sections 319 to 321, subsection 322(1), sections 324, 325 and 327, subsection 329(1) and section 330 come into force, or are deemed to have come into force, on September 26, 2021.

339 (1) Les paragraphes 302(1), 303(1) et (3) et 304(1), l'article 305, les paragraphes 306(1), 307(1) et (3), 308(1), 309(1), (3) et (5), 310(1), (3), (5), (7), (9), (11) et (13), 311(1), 312(1), 313(1), 314(1), 315(1), 316(1) et (3), 317(1) et 318(1), les articles 319 à 321, le paragraphe 322(1), les articles 324, 325 et 327, le paragraphe 329(1) et l'article 330 entrent en vigueur ou sont réputés être entrés en vigueur le 26 septembre 2021.

September 25, 2022

25 septembre 2022

(2) Subsections 302(2), 303(2) and (4), 304(2), 306(2), 307(4), 308(2), 309(2), (4) and (6), 310(2), (4), (6), (8), (10), (12) and (14), 311(2), 312(2), 313(2), 314(2), 315(2), 316(2) and (4), 317(2), 318(2), 322(2) and 329(2) come into force, or are deemed to have come into force, on September 25, 2022.

(2) Les paragraphes 302(2), 303(2) et (4), 304(2), 306(2), 307(4), 308(2), 309(2), (4) et (6), 310(2), (4), (6), (8), (10), (12) et (14), 311(2), 312(2), 313(2), 314(2), 315(2), 316(2) et (4), 317(2), 318(2), 322(2) et 329(2) entrent en vigueur ou sont réputés être entrés en vigueur le 25 septembre 2022.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-320-19

APPEAL FROM A DECISION OF PIERRE LAFONTAINE, SSTC, DATED JULY 3, 2019, DOCKET NUMBERS AD-18-302, AD-18-303, AD-18-304 AND AD-18-306.

STYLE OF CAUSE:	MICHEL FAULLEM v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 2, 2021
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
DATED:	FEBRUARY 15, 2022

APPEARANCES:

Michel Faullem	FOR THE APPLICANT REPRESENTING HIMSELF
Attila Hadjirezaie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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