Federal Court of Appeal | Cour d'appel fédérale

Date: 20230804

Dockets: A-278-22
A-279-22

Citation: 2023 FCA 174

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
ROUSSEL J.A.
GOYETTE J.A.

Docket: A-278-22

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

RÉAL GAGNON

Respondent

Docket: A-279-22

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

et

SÉBASTIEN ST-LOUIS

Respondent

Heard by online videoconference hosted by the registry on June 29, 2023.

Judgment delivered at Ottawa, on August 4, 2023.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: ROUSSEL J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] These applications for judicial review relate to two decisions of the Social Security Tribunal's Appeal Division (the Appeal Division) and concern the eligibility of two claimants for the employment insurance emergency response benefit (EI ERB) established on the basis of Part 18 of the *COVID-19 Emergency Response Act*, S.C. 2020, c. 5. To the extent that both of these applications raise the interpretation and scope of section 153.9 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) and were drafted identically by the same member of the Appeal Division, the Court granted a motion by the Attorney General and ordered that the two files be consolidated such that they were heard jointly.

[2] The two claimants, Mr. Gagnon and Mr. St-Louis, did not participate in the appeal and made no representations before us. The Court must therefore rule on the issue, which is a question of statutory interpretation, solely on the basis of the arguments submitted by the Attorney General. That said, the Court has a complete record before it, which includes the original decision of the Canada Employment Insurance Commission (the Commission); the decision of the Social Security Tribunal's General Division (the General Division); and the decision of the Appeal Division, which is the subject of this appeal.

[3] Having carefully considered the Attorney General's position, as well as the Social Security Tribunal's case law on this issue, I am of the view that the applications for judicial review should be dismissed. In other words, I consider the decision of the Appeal Division

reasonable, namely, that to earn more than $1,000 over a four-week period does not disqualify a claimant who otherwise meets the conditions set out in paragraphs 153.9(1)(*a*) and (*b*) of the Act. I will provide an explanation in the following paragraphs.

I. The statutory context

[4] To properly understand the issue raised by the two Appeal Division decisions that are the subject of these applications for judicial review, it is important to first become familiar with the statutory context in which they arose.

[5] Faced with the COVID-19 pandemic's catastrophic consequences on workers and the Canadian economy, the Government of Canada quickly put in place two income replacement programs on March 25, 2020. The first, which is not the subject of this dispute, was created by the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8 (the CERB Act) (as enacted by section 8 of the *COVID-19 Emergency Response Act*). This benefit (the CERB) was intended for workers who were not eligible for employment insurance, and was for all employees and self-employed workers who had ceased working for reasons related to COVID-19 for at least 14 consecutive days, and who had not received employment or self-employment income in excess of $1,000 during the four-week period for which they were applying for the payment (CERB Act, section 2 and subsection 6(1); *Income Support Payment (Excluded Nominal Income) Regulations*, SOR/2020-90, section 1).

[6] The second program temporarily replaced the benefits that a person could have claimed under the Act. This program was the EI ERB, which was added by Part VIII.4 of the Act in

accordance with an interim ministerial order effective April 1, 2020. Part 18 of the *COVID-19 Emergency Response Act* indeed authorized the Minister of Employment and Social Development to make emergency interim orders for the purpose of mitigating the economic effects of the pandemic. In the first interim order (SOR/2020-61), the Minister added section 153.5 and subsections 153.9(1) to (3); this first interim order was followed by a second on April 16, 2020 (SOR/2020-88), which added subsection 153.9(4) to the Act.

[7] Under section 153.8, any "claimant" may make a claim for the EI ERB for any two-week period starting on a Sunday and ending between March 15 and October 3, 2020. Subsection 153.5(2) defines a "claimant" according to different criteria, the most relevant for our purposes being:

- A person who ceases working, whether employed or self-employed, for reasons related to COVID-19;
- A person who could have had a benefit period established on or after March 15, 2020, for an employment insurance benefit under Part I of the Act (i.e., regular employment insurance and sickness benefits).

[8] Eligibility conditions are governed by subsection 153.9(1). The relevant paragraphs for our purposes are the following:

Eligibility	**Admissibilité**
153.9 (1) A claimant is eligible for the employment insurance emergency response benefit	**153.9 (1)** Est admissible à la prestation d'assurance-emploi d'urgence le prestataire suivant :
(a) if they	**a)** celui qui, à la fois
(i) reside in Canada,	**(i)** réside au Canada,
(ii) are at least 15 years of age,	**(ii)** est âgé d'au moins 15 ans,

(iii) have insurable earnings of at least $5,000 in 2019 or in the 52 weeks preceding the day on which they make the claim under section 153.8,	**(iii)** a une rémunération assurable, pour l'année 2019 ou au cours des cinquante deux semaines précédant la date à laquelle il présente une demande en vertu de l'article 153.8, qui s'élève à au moins cinq mille dollars,
(iv) whether employed or self-employed, cease working for at least seven consecutive days within the two-week period in respect of which they claimed the benefit, and	**(iv)** cesse d'exercer son emploi — ou d'exécuter un travail pour son compte — pendant au moins sept jours consécutifs compris dans la période de deux semaines pour laquelle il demande la prestation,
(v) have no income from employment or self-employment in respect of the consecutive days on which they cease working;	**(v)** n'a aucun revenu provenant d'un emploi qu'il exerce — ou d'un travail qu'il exécute pour son compte —, pour les jours consécutifs pendant lesquels il cesse d'exercer son emploi ou d'exécuter un travail pour son compte;
(b) if they are a claimant referred to in paragraph 153.5(2)(b) and they have no income from employment or self-employment for at least seven consecutive days within the two-week period in respect of which they claimed the benefit; or	**b)** celui visé à l'alinéa 153.5(2)b) qui n'a aucun revenu provenant d'un emploi qu'il exerce — ou d'un travail qu'il exécute pour son compte —, pendant au moins sept jours consécutifs compris dans la période de deux semaines pour laquelle il demande la prestation;

[9] Furthermore, subsection 153.9(2) provides that a claimant is not eligible to receive the EI ERB if he or she receives other listed types of benefits. Subsection 153.9(3) excludes a

claimant who leaves his or her employment voluntarily. Subsection 153.9(4) sets out the following exception:

Exception – employment, self--employment and income	**Exception – emploi, travail et revenu**
153.9 (4) If a claimant receives income, whether from employment or self-employment, the total of which does not exceed $1,000 over a period of four weeks that succeed each other in chronological order but not necessarily consecutively and in respect of which the employment insurance emergency response benefit is paid, the claimant is deemed to meet the requirements of subparagraphs (1)(a)(iv) and (v), of paragraph (1)(b) or of subparagraph (1)(c)(iv), as the case may be.	**153.9 (4)** Dans le cas où le total des revenus provenant d'un emploi que le prestataire exerce ou d'un travail qu'il exécute pour son compte est de mille dollars ou moins pour une période de quatre semaines qui se succèdent dans l'ordre chronologique sans nécessairement être consécutives et à l'égard desquelles la prestation d'assurance-emploi d'urgence est versée, le prestataire est réputé satisfaire aux exigences des sous alinéas (1)a)(iv) et (v), de l'alinéa (1)b) ou du sous-alinéa (1)c)(iv), selon le cas.

[10] Finally, subsection 153.6(1) (read in conjunction with sections 43, 44, and 153.1301) states that a claimant must repay without delay the benefits to which he or she was not entitled but that were nevertheless paid by the Commission

II. Applications for benefits of Mr. Gagnon and Mr. St-Louis

A) Mr. Gagnon

[11] Mr. Gagnon submitted an initial application for employment insurance benefits effective March 15, 2020. The benefits claimed were converted to the EI ERB by virtue of section 153.5 and paragraph 153.9(1)(b). Although his last paid day was April 23, 2020, Mr. Gagnon reported no earnings for the period from March 15, 2020, to May 16, 2020.

[12] On April 9, 2020, Mr. Gagnon contacted the Commission and informed it that he had received earnings in the amount of $478.79 from his employer on April 2, 2020. He explained that his employer had decided to continue paying him even though he had not worked. He then contacted the Commission on October 2, 2020, to notify it that his employer had paid him until April 25, 2020. He then asked whether he should repay the benefits already received between March 15 and April 25, 2020.

[13] The Commission reviewed Mr. Gagnon's file and sent him a notice of debt because of the earnings received from his employer between March 15 and April 25, 2020. The initial overpayment for this period was $1,376. It appears that Mr. Gagnon had received $430 per week from his employer for the first four weeks of this period, and $516 for the last two weeks.

[14] Mr. Gagnon requested that the Commission reconsider that decision. After reviewing the file, the Commission concluded that Mr. Gagnon was indeed ineligible for benefits for the entire period from March 15, 2020, to May 9, 2020, as he had earned $1,720 for the first four-week

period (March 15 to April 11, 2020) and $1,032 for the second period (April 12 to May 16, 2020). The following table summarizes Mr. Gagnon's situation:

Week	Réal Gagnon Learning	EI-ERB paid	EI-ERB payable following reconsideration
	FIRST PERIOD		
March 15 – March 21, 2020	$430	$500	$0
March 29 – April 4, 2020	$430	$500	$0
March 22 – March 28, 2020	$430	$500	$0
April 5 – April 11, 2020	$430	$500	$0
	SECOND PERIOD		
April 12 – April 18, 2020	$602	$500	$0
April 19 – April 25, 2020	$430	$500	$0
April 26 – May 2, 2020	$0	$500	$0
May 3 – May 9, 2020	$0	$500	$0
Total	**$2,752**	**$4,000**	**$0**
May 10 to May 16, 2020	$0	$500	$0

[15] On January 20, 2022, Mr. Gagnon again challenged the amount of $1,376 he was being asked to pay, while confirming that the earnings amounts received and specified on his record of employment were correct. After reconsidering his file, the Commission upheld its original decision while amending the amount of the overpayment to $2,752. Again, this calculation was based on the amounts received by Mr. Gagnon from his employer during the two four-week periods from March 15 to May 9, 2020.

[16] Mr. Gagnon appealed the Commission's decision to the General Division. Relying on subsection 153.9(4), the General Division endorsed the Commission's position and concluded that Mr. Gagnon was not eligible to receive the EI ERB between March 15 and May 9, 2020, as he had received an amount greater than $1,000 over the periods of four weeks that succeed each

other between those two dates. Mr. Gagnon applied for leave to appeal this decision, which was granted to him by the Appeal Division.

B) Mr. St-Louis

[17] As for Mr. St-Louis, he filed an initial application for employment insurance benefits on March 23, 2020. This application was converted to an EI ERB claim and took effect on March 22, 2020. Mr. St-Louis received an advance payment of $2,000 (equivalent to four weeks of benefits), which was paid to him on April 6, 2020.

[18] When contacted by the Commission on July 23, 2020, Mr. St-Louis confirmed that he had returned to work on April 28, 2020, and that he had received the advance payment of $2,000. He requested that his reports for the period of March 22 to April 4, 2020 be deleted and that the Commission not process them, so as to avoid having to repay an overpayment. The following table summarizes Mr. St-Louis's situation:

Sébastien St-Louis

Week	Earnings	EI ERB paid	EI ERB payable following reconsideration
March 22 – March 28, 2020	$1,200	$0	$0
March 29 – April 4, 2020	$0	$0	$0
April 5 – April 11, 2020	$0	$2,000 (advance payment)	$0
April 12 – April 18, 2020	$0	$0	$0
April 19 – April 25, 2020	$750	$0	$0
April 26 – May 2, 2020	$925	$0	$0
Total	**$2,875**	**$2,000**	**$0**

[19] In an initial decision dated October 21, 2021, the Commission informed Mr. St-Louis that he was not entitled to the payment of $2,000 and that he had to repay that amount. Mr. St-Louis

requested a reconsideration of that decision on November 5, 2021, and the Commission confirmed its original decision on February 17, 2022. The Commission explained that the advance payment was not an emergency benefit but an advance while waiting for the actual emergency benefits, and was therefore a repayable loan. Considering the possibility that Mr. St-Louis could complete reports for the period he was not working, the Commission explained that he was not entitled to the EI ERB because there was no four-week period in which he had earned $1,000 or less. Although he had received no earnings for the weeks of March 29, April 5, and April 12, 2020, he had earned $1,200 during the week of March 22. He was also ineligible for the second four-week period, as he had received earnings of $750 and $925 for the weeks of April 19 and April 26, 2020.

[20] The General Division dismissed Mr. St-Louis's appeal and upheld the Commission's interpretation by concluding that Mr. St-Louis had to repay the total amount of the advance payment of $2,000, insofar as he had received earnings from his employment of more than $1,000 for each period of four weeks that succeed each other. The Appeal Division allowed his application for leave to appeal this decision.

III. The impugned decisions

[21] As noted above, the same member of the Appeal Division concluded in both cases, and for almost identical reasons, that the General Division had erred in law by misinterpreting the provisions of the Act dealing with eligibility for the EI ERB. Accordingly, it gave the decision

that it considered the General Division should have given, and concluded that both claimants were eligible for the EI ERB.

[22] Before the Appeal Division, as before this Court, the Attorney General argued that subsection 153.9(4) had a dual purpose: (1) to give flexibility in EI ERB eligibility for people earning nominal income; and (2) to set a cap ($1,000) on income beyond which a person would no longer be eligible for the EI ERB. Considering that the previous decision in *Canada Employment Insurance Commission v. JE*, (2022 SST 201 (*JE*)) was persuasive and that it was not given any good reasons to depart from it, the Appeal Division concluded that the wording of subsection 153.9(4) was clear and precise and could have only a single purpose: to consider that some people are eligible for the EI ERB even if they do not meet the stricter criteria in subsection 153.9(1). The Appeal Division considered that "[t]here is no way to read section 153.9(4) of the [Act] as having a second purpose of making a person ineligible for the EI ERB if their income over four weeks is above $1,000" (*RG v. Canada Employment Insurance Commission*, 2022 SST 1207 at para. 36; *SS v. Canada Employment Insurance Commission*, 2022 SST 1459 at para. 39).

[23] The Appeal Division further concluded that Parliament's intent was to get the EI ERB benefit into the hands of as many people as possible, to make it quick and easy to access, and to ensure that it keep recipients connected to the workforce. In its view, the Commission's interpretation was inconsistent with these goals and could lead to many overpayments, since a person could claim benefits every two weeks, but it would not be possible to confirm their eligibility for those benefits until the end of a four-week period. Finally, the Appeal Division

expressed the view that creating an exception that a person who earns less than a certain amount becomes eligible for the EI ERB does not mean that a person would no longer be eligible for the benefit if they were to earn more than that amount.

[24] On the basis of these considerations, the Appeal Division reviewed the files of Mr. Gagnon and Mr. St-Louis. In Mr. Gagnon's case, the Appeal Division considered only the benefit claims for the weeks of April 19 to May 2, 2020, and May 3 to May 16, 2020, as the claimant was no longer claiming to be entitled to benefits for the periods covered by his earlier claims. In this context, the Appeal Division concluded that Mr. Gagnon had received income for only one week during that four-week period, namely, $430 for the week of April 19 to 25, 2020. As a result, he had met the income loss requirements for these two periods since he had had no income for at least seven consecutive days within each of the two two-week periods for which he was claiming a benefit.

[25] With respect to Mr. St-Louis, the Appeal Division considered the two-week periods from the time the claim for benefits was made, that is, on March 22, 2020. Considering he had received $1,200 in that first week but had had no income in the subsequent three weeks, the Appeal Division concluded that there were two two-week periods during which the claimant qualified under subsection 153.9(1), as he had had no income for seven consecutive days within each of the two periods. He was therefore eligible for benefits for these two two-week periods, from March 22 to April 18, 2020, because according to the Appeal Division's interpretation, subsection 153.9(4) was not engaged.

IV. Issue

[26] The only issue in this appeal is whether the Appeal Division's interpretation of subsections 153.9(1) and (4) is reasonable.

V. Analysis

[27] There is no doubt that the Appeal Division's decisions are subject to the standard of reasonableness on judicial review by this Court: see, for example, *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109 at para. 11; *Stojanovic v. Canada (Attorney General)*, 2020 FCA 6 at para. 34; *Canada (Attorney General) v. Johnson*, 2023 FCA 49 at para. 9 (*Johnson*). The role of this Court is thus not to determine how it would have decided the matter had it been brought before it, but to establish whether the applicant has demonstrated that the Appeal Division's decision is unreasonable. Therefore, the question that the Court must ask is whether the decision bears the hallmarks of reasonableness—justification, transparency, and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 99–102; *Canada (Attorney General) v. Hull*, 2022 FCA 82 at para. 12.

[28] The Attorney General attempted to argue that the Appeal Division's intervention in Mr. Gagnon's case was unreasonable because it had not identified the error that the General Division had supposedly made. He distinguishes this decision from that made in Mr. St-Louis's case, where the Appeal Division explicitly stated that the General Division had erred in law by

not giving reasons for its interpretation of the relevant provisions and had not explained why it had departed from a previous decision.

[29] In my view, this argument is without merit. It is clear that the Appeal Division could intervene if it was of the opinion that the General Division had erred in law, as provided for in paragraph 58(1)(*b*) of the *Department of Employment and Social Development Act,* S.C. 2005, c. 34: see in particular *Johnson* at para. 8. It is plain from reading its reasons that the Appeal Division did not simply disagree with the General Division's interpretation; on the contrary, it explained why the General Division had erred, relying in particular on *JE*, mentioned above. It is on this basis, and relying on subsections 59(1) and 64(1) of the *Department of Employment and Social Development Act*, that the Appeal Division rendered the decision that the General Division should have rendered.

[30] The Attorney General also submits that the Appeal Division could not intervene because the General Division had not erred in law when rendering its decision. In support of this claim, the Attorney General makes the same arguments that he made before us against the Appeal Division's decision. If we were to accept this argument, this Court would be indirectly reconsidering the General Division's decision. That is not our role. It is the Appeal Division's decision that is subject to judicial review under section 68 of the *Department of Employment and Social Development Act*, not the General Division's decision. If the Attorney General wanted to challenge the Appeal Division's decision to grant leave to appeal, he should have applied for judicial review of that decision, as appears to be permitted under section 68 through the reference to the decision of the Tribunal [TRANSLATION] "on any application made". Of course, such an

application would have been considered only if it had not been found premature: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61.

[31] In any event, the Attorney General does not dispute that the Appeal Division was justified in intervening in the St-Louis case. Therefore, the issue of the reasonableness of the statutory interpretation of subsections 153.9(1) and (4) arises and must be decided.

[32] In this regard, the Attorney General contends that the interpretation of these two provisions made by the Appeal Division is unreasonable and is inconsistent with the text, context, and Parliament's intent.

[33] The Attorney General first submits that the text of subsection 153.9(4) can be interpreted in several ways. If this provision applies only when the criteria of subsection 153.9(1) are not met, as established by the Appeal Division, why include the words "in respect of which the employment insurance emergency response benefit is paid", which suggest that benefits have already been paid under subsection 153.9(1)?

[34] In view of this ambiguity, the Attorney General contends that the Appeal Division had to give [TRANSLATION] "some weight" to Parliament's intent. This intent, he continues, can be inferred from three elements. First, the CERB provides for an income limit of $1,000; although this program is separate from the EI ERB, in both cases, it was a matter of timely payment of benefits to help workers who had lost their employment income because of the pandemic.

[35] A second contextual element is apparently the explanatory note accompanying the second interim order that introduced subsection 153.9(4). This explanatory note reads (in part) as follows:

> Workers may be eligible for the Employment Insurance Emergency Response Benefit if they cease working for reasons related to COVID-19 or they would otherwise have qualified for Employment Insurance regular or sickness benefits under the normal rules. The objective of this Interim Order is to ensure that these groups of claimants must meet the same income restrictions. It also specifies that claimants can receive nominal income from employment or self-employment, while still being eligible to receive the benefit.
>
> Interim Order No. 2 Amending the Act, cited in para. 6. The note states that it is not part of the Interim Order.

[36] In the Attorney General's view, this explanatory note confirms that Parliament's intention was to limit the income that a claimant could earn while being eligible for the EI ERB and that, conversely, said claimant could not remain eligible for the EI ERB if he or she had income above the allowable limit. Similarly, the Attorney General relies on statements by the Prime Minister and the Minister of Employment, Workforce Development and Disability Inclusion, Carla Qualtrough (the Minister), that individuals who claim emergency benefits (the CERB and the EI ERB) can earn up to $1,000 while remaining eligible for these benefits. By not giving enough weight to these statements and the explanatory note, and by not recognizing that subsection 153.9(4) was intended not only to give some flexibility in EI ERB eligibility for people earning nominal income, but also to set a cap on the amount of income considered "nominal", the Appeal Division apparently erred and arrived at an absurd result.

[37] Unlike the Attorney General, I see no ambiguity in the text of subsections 153.9(1) and (4). The first discusses eligibility conditions, including the income loss requirement. In all

circumstances covered by this provision, a claimant will be eligible if he or she meets a certain number of conditions, including having received no income for at least seven consecutive days within the two-week period in respect of which he or she claimed the benefit. Subsection 153.9(4) provides for an exception to the income loss requirement. If a claimant receives employment income that does not exceed $1,000 over a period of four weeks (the method for calculating this period will be discussed below), the claimant is "deemed" to meet the income loss requirement in subsection 153.9(1). Therefore, this is only a presumption, and if the condition is not met, the presumption does not apply and the requirements of subsection 153.9(1) are therefore engaged.

[38] I do not see how this presumption could be interpreted *a contrario* to make it state that a claimant is no longer eligible if he or she earns more than $1,000 over a four-week period. It is subsection 153.9(1) that sets out the income loss requirements; subsection 153.9(4) exists only to provide for an exception. If a claimant is not captured by this exception, subsection 153.9(1) continues to apply, and the claimant will continue to be eligible if he or she meets the income loss requirement in that subsection. Had Parliament intended to set an income limit beyond which a claimant would no longer be eligible for the EI ERB, it would not have simply set out a presumption that a claimant with an income that does not exceed $1,000 is deemed to meet the eligibility requirements. Rather, it would have made it an ineligibility criterion, as it did for other situations in subsection 153.9(2), or even a ground for exclusion under subsection 153.9(3).

[39] I would add that if any doubt remains as to the interpretation of these provisions, it should be resolved in favour of the claimants. It is well established in Canadian law that social legislation must be given a liberal interpretation so that it can achieve its objectives: see

Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2 at 10; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paras. 36 and 40; *Canada (Attorney General) v. Frye*, 2005 FCA 264 at paras. 14–18; *Ballantyne v. Saskatchewan Government Insurance*, 2015 SKCA 38 at para. 21; *Symons v. Insurance Corporation of British Columbia*, 2016 BCCA 207 at para. 18.

[40] As for the argument based on the CERB, I cannot see how it holds water. Subsection 6(1) of the CERB Act sets out two eligibility conditions: (a) not receiving any income for at least 14 consecutive days within a four-week benefit period; and (b) not receiving income in respect of the consecutive days on which the worker ceased working. Section 1 of the *Income Support Payment (Excluded Nominal Income) Regulations* subsequently clarified that income of $1,000 or less in respect of this period was excluded from the application of this requirement and would therefore not be considered. However, this did not exempt claimants from meeting the first requirement. On the other hand, claimants who earned more than $1,000 did not meet the second requirement of subsection 6(1) and were therefore not eligible for the CERB because both conditions had to be met.

[41] On the contrary, subsection 153.9(4) provides, in connection with the EI ERB, that a claimant with income that does not exceed $1,000 is “deemed to meet” the requirements as regards employment cessation and absence of income, and therefore does not have to meet them. If the claimant earns more than $1,000, the presumption no longer applies, but he or she can still qualify by meeting the conditions set out in subsection 153.9(1). The result differs from one program to another simply because the drafting technique used is not the same: in the case of the CERB, an exception is set out for one of the eligibility conditions (earned income) while

maintaining the first condition (employment cessation), whereas in the case of the EI ERB, it is assumed that meeting a condition (income that does not exceed $1,000) results in meeting the other eligibility conditions (including employment cessation).

[42] The statements of the Prime Minister and the Minister relied on by counsel for the Attorney General, as well as the explanatory note, do not seem to further support the argument that subsection 153.9(4) is intended not only to make persons who do not meet the more restrictive criteria of subsection 153.9(1) eligible for the EI ERB, but also to make persons whose income over four weeks is over $1,000 ineligible. The Prime Minister's and the Minister's statements are part of a debate about how best to expand or relax the eligibility criteria for the EI ERB. The objective was clearly to enable people with low incomes to continue earning employment income and still receive the EI ERB. Discussions in the House of Commons also highlight the objective of making a benefit quick and easy to access while ensuring that it keep recipients connected to the workforce. The interpretation suggested by the Attorney General and the Commission would be inconsistent with this goal and would lead to many overpayments. A person could indeed claim benefits every two weeks but have their eligibility for those benefits confirmed only at the end of a four-week period, resulting in a risk of having to repay the benefits received if the person had income in excess of $1,000 in those four weeks.

[43] Finally, I do not see how the Appeal Division's interpretation would be inconsistent with the objectives of the Act. I agree that the purpose of this contributory insurance scheme is to compensate those who are unemployed and to provide them with some economic and social security while they are trying to return to work. The fact remains that the goal of the EI ERB,

like that of the employment insurance system, is to assist claimants who are involuntarily unemployed, regardless of the claimants' income or wealth: see *Canada (Attorney General) v. Lafrenière*, 2013 FCA 175 at para. 33, citing *Reference re Employment Insurance Act (Can.), s. 22 and 23*, 2005 SCC 56 at para. 48. A claimant who loses their job suffers a loss of income regardless of the overall income he or she will earn (or has earned) in the year or the value of his or her assets. It is this loss of income that the EI ERB compensates for, and it is therefore not incongruous that a person who has otherwise earned $1,000 or more in a four-week period should receive benefits for weeks when he or she was unemployed and without income, provided that he or she also meet all the criteria set out in subsection 153.9(1).

[44] The Attorney General tried to convince us that the Appeal Division's interpretation leads to an absurd result in that a group of claimants could earn any income and continue to receive the EI ERB as long as they are unemployed and without income for at least seven days per two-week period, whereas another group of claimants could be ineligible for benefits if they return to work and earn more than $1,000 over four weeks. I agree that this result may seem unfair. However, the same applies if the position of the Attorney General and the Commission is adopted. Like the Appeal Division in these cases, I adopt in this regard the words of the Appeal Division in *JE*, which stated:

> [59] I appreciate that the Commission is concerned about paying the EI ERB to people "who may not require temporary economic and social security." But neither the EI ERB nor the usual EI scheme is need-based: those who could manage without getting benefits aren't excluded. Rather, the focus is on a loss of employment income.
>
> [60] Instead of the million-dollar-a-week claimant, let's consider a regular person — someone earning the average industrial wage of $1,042 per week in 2020 — who met the requirement of no income for at least seven days in a row in two weeks. They would have lost between $1,042 and $2,084 over two weeks, and

> gained $1,000 in EI ERB. That may be generous if the person lost only $1,042, but it doesn't strike me as absurd.
>
> [61] I recognize that it was mathematically possible for a low-income or part-time worker who was laid off but then worked every second week (thereby meeting the income loss requirement) to get more in EI ERB than they lost. This is not, in and of itself, absurd. The Minister accepted the possibility of overcompensation when she chose a benefit of $500 per week, regardless of average weekly earnings and hours. This was the price to pay for having a simple, flat-rate benefit for all claimants. The risk of overcompensation was mitigated by the reality of COVID-19 lockdowns and the short-term nature of the EI ERB.

[45] I do not disagree that the Appeal Division's interpretation of subsection 153.9(4) may in some cases lead to situations that may appear unfair. However, the same would apply if the interpretation put forward by the Attorney General were adopted, as illustrated in the excerpt from *JE* cited in the preceding paragraph. All social legislation intended to confer benefits must draw arbitrary lines to delineate its application. In this context, the Appeal Division's interpretation of subsection 153.9(4) is not absurd in my view, as the Attorney General contends, especially since it was open to Parliament, if it so wished, to make those who earned more than $1,000 over a four-week period ineligible for the EI ERB using clear terms to that effect.

[46] Therefore, for all the foregoing reasons, I am of the view that the Appeal Division's interpretation of the two cases before us was not unreasonable. It is consistent with the text of section 159, the context in which its subsection (4) was adopted, and Parliament's broader objective not only in the context of the EI ERB, but also in the context of the regular employment insurance benefits system.

[47] The question that remains is how to identify the relevant weeks for the purpose of determining a claimant's eligibility for the EI ERB. The Attorney General contends that the

Appeal Division made an arbitrary choice in this regard, because the two-week periods under subsection 153.9(1) and the four-week periods under subsection 153.9(4) were not calculated in the same way in the files of Mr. Gagnon and Mr. St-Louis. In Mr. Gagnon's case, the Appeal Division applied subsection 153.9(1) only once he had been without income for seven consecutive days within a two-week period (i.e., the weeks of April 19 to May 2), so that it was not necessary for it to apply subsection 153.9(4) and examine the income received over the four-week periods prior to April 19, 2020. In the case of Mr. St-Louis, on the contrary, the Appeal Division calculated the two-week periods from the first week he received a benefit (*i.e.*, the week of March 22 to 28, 2020).

[48] I do not consider it appropriate to decide this issue in the context of the present cases. First, we did not receive submissions in reply to those of the Attorney General, who argued that the four-week periods should be calculated starting from the first week claimed and for which the EI ERB was paid. Moreover, I note that there appear to be discrepancies within the General Division on this issue, and that the Attorney General's position was recently dismissed by the Appeal Division in an as-yet unpublished decision that was courteously sent to us by counsel for the Attorney General the day before the hearing: *Canada Employment Insurance Commission v. H.M.*, AD-23-50, a decision rendered on June 21, 2023.

[49] Second, this issue did not arise in the two cases before us, and the Appeal Division explicitly concluded that both claimants were able to establish their eligibility for the EI ERB under subsection 153.9(1) without the need to resort to subsection 153.9(4). If the Appeal Division considered only the periods of April 19 to May 2 and May 3 to May 16 in

Mr. Gagnon's case, it is only because they were the only benefit claims that were covered by the appeal. The claimant had indeed admitted that he was not entitled to benefits for the periods covered by his earlier claims. The Court's reasons could therefore only constitute *obiter*.

VI. Conclusion

[50] For all the foregoing reasons, I would therefore dismiss the applications for judicial review and uphold both Appeal Division decisions.

"Yves de Montigny"
J.A.

"I agree.
Sylvie E. Roussel J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-278-22 AND A-279-22
DOCKET:	A-278-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. RÉAL GAGNON
AND DOCKET:	A-279-22
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. SÉBASTIEN ST-LOUIS
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 29, 2023
REASONS FOR JUDGMENT:	DE MONTIGNY J.A.
CONCURRED IN BY:	ROUSSEL J.A. GOYETTE J.A.
DATED:	AUGUST 4, 2023

APPEARANCES:

Dani Grandmaître Jessica Grant	FOR THE APPLICANT
Réal Gagnon	FOR THE RESPONDENT (REPRESENTING HIMSELF)
Sébastien St-Louis	FOR THE RESPONDENT (REPRESENTING HIMSELF)

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE APPLICANT