Docket: 2007-2815(IT)I

BETWEEN:

SIMONE SHERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 11, 2008, at Toronto, Ontario

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	David M. Sherman
Counsel for the Respondent:	Bonnie Boucher

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2004 taxation year is allowed, with costs, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with and for the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of September, 2008.

"J.E. Hershfield"

Hershfield J.

Citation: 2008TCC487
Date: 20080905
Docket: 2007-2815(IT)I

BETWEEN:

SIMONE SHERMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] In reporting her income for the 2004 taxation year the Appellant took exception to a T4 information slip issued by her employer, the Canada Revenue Agency ("the CRA"). It showed employment income of $169,891.16. The Appellant reported a lesser amount but noted on her return for the year her reason for doing so. Not accepting her reason, the CRA assessed the full amount shown on the T4.

[2] The amount of the salary inclusion to which the Appellant takes exception is $18,787.30. That is an amount she maintains was never received by her and accordingly should not have been included as employment income.

[3] The amount at issue ($18,787.30) derives from amounts the Appellant received from the Ontario Workplace Safety and Insurance Board ("WSIB") during the period from March 4, 1996 to October 2, 1996. Having suffered a workplace injury, she had been off work prior to that period but had returned to work by March 4, 1996. From that time until October 2, 1996, she admits to having also received compensation from her employer for services rendered as an

employee. Subject to an offsetting claim for medical expenses,[1] she admits she is accountable to WSIB for the overpayment over that period. I accept that the amount of the overpayment was $18,787.30 and that that was the amount withheld from her by the CRA and included in her income ("the WSIB overpayment").[2]

[4] While a full recitation of the factual background leading to the salary payment in issue would read like a personal nightmare lived by the Appellant, suffice to say that in 2004 the CRA withheld the full amount of the WSIB overpayment from amounts payable to her as salary purportedly on the basis of discharging a debt she owed to Her Majesty in right of Canada[3] (variously referred to as well as the federal government or federal Crown.) The Respondent takes the position that such application of the Appellant's wages constituted a receipt for the purposes of the *Income Tax Act* ("*Act*").

[5] The Appellant asserts she had no such debt to Her Majesty in right of Canada, that the CRA had no right to withhold and apply her salary entitlement against an amount (which was subject to offsetting claims) owed to a third party

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[1] Such claim was for past and future medical expenses arising from the workplace injury.

[2] The Appellant was somewhat reluctant in her evidence in regard to her acceptance of the exact amount of WSIB overpayment. I do not find her reluctance sufficient to dispel the assumption made as to the amount of the WSIB overpayment. She alleged she never received a proper accounting from WSIB. It is not a sufficient answer to the assumption made to say "I asked for an accounting from WSIB but they never responded". The Appellant was, or should have been, in a position to make an argument, on the basis of her own calculations or records, that the number was in fact wrong. She provided no such basis for me to find that the assumed amount was wrong. The circumstances here do not relieve her of her burden in this regard. As well, I note that Exhibit A-7, a letter written in September 1997 on the Appellant's behalf, tends to accept the amount in question as that asserted by the Respondent. There is also a suggestion in that letter that an accounting might actually have been provided. Further, there is Exhibit R-2. It is a July 1997 letter from the WSIB responding to a letter asking for an accounting of WSIB overpayment. That letter from the WSIB does explain the computation of WSIB overpayment. There was discussion at the hearing as to the proper identification of this letter and its admissibility. However, the source of the letter (accepted as being from the Appellant's own book of documents in other proceedings) was not in dispute and, as such, I admitted it into evidence. This appeal is, after all, under the Informal Procedure and its admission simply tends to confirm the conclusion, otherwise amply supported, which is that the Appellant has not discharged her burden that the overpayment was other than that which was assumed by the Respondent.

[3] In contrast, subparagraph 12(f) of the Reply to the Notice of Appeal asserts a debt owed to the employer.

(WSIB) and that such action, lawful or not, cannot in any event be regarded as a "receipt" of a salary for the purposes of the *Act*. The Appellant also asserts that the WSIB overpayment was statute barred when the CRA purported to collect it. Accordingly, there was no right to collect the WSIB overpayment by offsetting a salary amount to which she was entitled.

Background

[6] The Appellant, a chartered accountant, started work with the CRA in 1985 as a basic file auditor and soon after was recruited into electronic commerce auditing. She first left the workplace (situated in Ontario where her services were performed) due to a workplace injury (bilateral carpal tunnel tendonitis that progressed to affect her shoulder, back and upper body) in July, 1994. She claimed and was granted workers' compensation benefits from WSIB.

[7] The Appellant returned to work in late 1995 on less than a full time basis and was put in a position the Appellant described as clerical with a supervisor that had a lower grade than her. Consequentially, she sought reinstatement to her former position. In January 1996, a Reinstatement Officer of WSIB determined that the Appellant was fit for her pre-injury job with accommodation but also determined that vocational rehabilitation be re-activated with a gradual return to work program. She did return to her former position but continued to work, as suggested by the Reinstatement Officer's decision, for 4 hours per day. In March 1996 the CRA directed that she go back on workers' compensation benefits (i.e. she was taken "off strength"). She protested and the CRA agreed to put her back "on strength" in December 1996 with full pay retroactive to March 1996. As a result, she was paid by WSIB and by the CRA for the overlapping compensation period (March – October 1996).

[8] This brief summary of events leading the WSIB overpayment just sets the stage for what I have already referred to as a personal nightmare lived by the Appellant. It is merely the beginning of a long history of egregious conduct by the CRA; a history that includes no reasonable attempts being made at accommodation or rehabilitation and no recognition of her full pay entitlements. Further, the CRA, as her employer, was dilatory at best in implementing workplace solutions as directed by WSIB. The CRA, in fact, orchestrated a campaign to drive her from her job and make her attempts to return futile. Her employment was eventually wrongfully

terminated.[4] This whole scenario led to a protracted series of gruelling hearings and appeals starting with the decision of an Independent Third Party Reviewer in late 2003 that was not initially complied with but was nonetheless a decision requiring the CRA to reinstate the Appellant and to make retroactive salary payments. It was from such retroactive pay that the CRA withheld the WSIB overpayment in 2004. Such action was just one of a continuing series of actions and events including: the Appellant seeking and obtaining an order for *mandamus* requiring the CRA to comply with the decision of the Independent Third Party Reviewer; the dismissal of a judicial review sought by the CRA of the Independent Third Party Reviewer's decision; and, a human rights complaint being filed with the Canadian Human Rights Tribunal. The closing chapter to this regrettable series of events, only a small part of which is mentioned here, was a settlement agreement reached in 2006 disposing of all issues.[5]

[9] During all of this, WSIB essentially washed its hands of the matter. While initially it requested a return of the overpayment, it subsequently left the matter for the employer to deal with. It appears that WSIB understood that the parties had agreed to the CRA recovering the overpayments or that, in any event, the federal government was entitled to seek redress in respect of the overpayment as was being clearly asserted by it. [6]

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[4] These were findings of an Independent Third Party Review of the circumstances surrounding the termination of the Appellant's employment with the CRA in 2000.

[5] That is, it disposed of all issues except the tax issue before me. While it might be argued that it was intended to be dispositive of the tax issue before me, such argument is of no concern to me. I am not bound to follow any such understanding between the parties.

[6] There is correspondence (Exhibit R-2) in July 1997 indicating that the WSIB understood that the parties had agreed that the Appellant would redirect the WSIB overpayment to the CRA from her salary. This implies that the CRA had reimbursed the WSIB for the overpayment. In any event, that letter might be seen as advice as to whom the Appellant should pay the amount outstanding. Even taken as a direction to do so (which it is not in my view), that would not, of its own accord, be authority for the CRA to collect it. That authority if it existed must have derived elsewhere. Correspondence from the federal Department of Justice to the Appellant (R-3, dated August 1997, making a formal demand for repayment) clearly advanced the position that the liability to account for the WSIB overpayment was that it was a debt to the federal Crown. There was no assertion such liability derived from any direction from WSIB.

Arguments

[10] The Respondent's position is described in the assumptions set out in paragraph 12 of the Reply. There is an assumption that the WSIB payments to federal government employees is compensation "funded" by the federal government and not by agencies such as WSIB which merely administer the compensation payments. This is to assert that the payer of WSIB compensation is the federal government and the WSIB indebtedness is really a debt to the federal government. This assertion, of course, cannot just be assumed. It is a legal conclusion derived from facts and statutory constructions in respect of which the Appellant has no burden to disprove. Indeed, it appears to me to be incumbent on the Respondent to satisfy me as to the correctness of the "assumption" which, on its face, appears to be wrong.

[11] The Respondent relies on certain provisions of the *Government Employees Compensation Act*, the *Workplace Safety and Insurance Act*, the *Accountable Advances Regulations* and the *Financial Administration Act*. Respondent's references to these enactments are found in paragraphs 12 through 16 of Respondent's counsel's written submission. The submission is as follows:

> 12. Federal government employees who suffer a workplace injury caused by an accident, arising out of and in the course of employment, are entitled to claim such compensation for injured or deceased workmen[7] as is authorized by the law of the province where the employee was usually employed[8].
>
> 13. In Ontario, the WSIB compensates injured federal government employees and then charges back the federal government or agency that employs the injured worker, the amount of compensation awarded plus a small administration charge[9].
>
> 14. Compensation or costs awarded under the *Government Employees Compensation Act* and,

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[7] Respondent's submission cites the following as authority in respect of this submission: *Government Employees Compensation Act*, R.S., c. G-5, s. 2 ("compensation").

[8] Respondent's submission cites the following as authority in respect of this submission: *Government Employees Compensation Act*, R.S., c. G-5, s. 4.

[9] Respondent's submission cites the following as authority in respect of this submission: *Government Employees Compensation Act*, R.S., c. G-5, s. 4(6)(a) and 4(6)(c).

"(*c*) in any province where the general expenses of maintaining the board, officers, authority or court are paid by the province or by contributions from employers, or by both, such portion of the contributions as, in the opinion of the Treasury Board, is fair and reasonable;

(*d*) in any province where the board, officers or authority may make expenditures to aid in getting injured workmen back to work or removing any handicap resulting from their injuries, such portion of those expenditures as, in the opinion of the Treasury Board, is fair and reasonable; and

(*e*) to the board, officers, authority or court, such amount as an accountable advance in respect of any expenses or expenditures that may be paid under paragraph *(c)* or *(d)* as, in the opinion of the Treasury Board, is expedient[10]"

may be paid out of the Consolidated Revenue Fund ("the CRF")[11].

The WSIB "shall return to the employer any amounts remaining after the Board ceases to make payments with respect to the worker or survivor"[12]

Any accountable advance or any portion thereof that is not repaid, accounted for or recovered in accordance with the regulations[13] may be recovered out of any moneys payable by Her Majesty to the person to whom the advance was made or, where the person is deceased, out of any moneys payable by Her Majesty to the estate of that person[14].

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[10] Respondent cites the following as authority in respect of this submission: *Government Employees Compensation Act*, R.S., c. G-5 s. 4(6)(6) (c-e).

[11] *Government Employees Compensation Act*, R.S. c. G-5, s. 4(6)(c-e).

[12] Respondent cites the following as authority in respect of this submission: *Workplace Safety and Insurance Act*, 1997, c.16, Sch. A., s. 90(5).

[13] Respondent cites the following as authority in respect of this submission: *Accountable Advances Regulations*, SOR/86-438.

[14] Respondent cites the following as authority in respect of this submission: *Financial Administration Act, R.S.* 1985, c. F-11, s. 155(1)(a).

15. Where a person is indebted to Her Majesty "the appropriate Minister responsible for the recovery or collection of the amount of the indebtedness may authorize the retention of the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable by Her Majesty to the person or the estate of that person[15]".

16. The Receiver General may recover any over-payment made out of the CRF on account of salary, wages, pay or pay and allowances (by way of an appropriation) out of any sum of money that may be due or payable by Her Majesty to the person to whom the over-payment was made[16].

[12] The assertion then is that the legislative regime contemplates that the recipient of benefit payments, made by WSIB, is the recipient of payments or advances from the federal Crown and is thereby accountable to and indebted to the federal Crown for the purposes of paragraph 155(1)(*a*) of the *Financial Administration Act* ("*FAA*"). The provision relied on is as follows:

> **155.** (1) Where any person is indebted to
>
> (*a*) Her Majesty in right of Canada, or
> …
>
> the appropriate Minister responsible for the recovery or collection of the amount of the indebtedness may authorize the retention of the amount of the indebtedness by way of deduction from or set-off against any sum of money that may be due or payable by Her Majesty in right of Canada to the person or the estate of that person.

[13] To support the assertion that the Appellant is indebted to Her Majesty in right of Canada, the Respondent relies on section 38 of the *FAA* dealing with the recovery of accountable advances and on section 90 of the *Workplace Safety and Insurance Act* ("*WSIA*") dealing with Schedule 2 employers.

[14] Section 38 of the *FAA* reads as follows:

> **38.** (1) The Treasury Board may make regulations

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[15] Respondent cites the following as authority in respect of this submission: *Financial Administration Act*, R.S. 1985, c. F-11, s. 155(1)(a).

[16] Respondent cites the following as authority in respect of this submission: *Financial Administration Act*, R.S. 1985, c. F-11, s. 155(3).

(*a*) authorizing the making of accountable advances chargeable to the appropriation for the service in respect of which the advance is made; and

(*b*) providing for the repayment of, accounting for and recovery of accountable advances.

Recovery

(2) Any accountable advance or any portion thereof that is not repaid, accounted for or recovered in accordance with the regulations may be recovered out of any moneys payable by Her Majesty to the person to whom the advance was made or, where the person is deceased, out of any moneys payable by Her Majesty to the estate of that person.

[15] If the monies received by the Appellant from WSIB are an accountable advance from Her Majesty in right of Canada, section 155 of the *FAA* is brought into play. In such case, the debt was properly collected by the CRA as asserted by the Respondent.

[16] As to section 90 of the *WSIA*, it reads as follows:

Payment of benefits

90. (1) Every Schedule 2 employer is individually liable to pay the benefits under the insurance plan respecting workers employed by the employer on the date of the accident.

Reimbursement

(2) The employer shall reimburse the Board for any payments made by the Board on behalf of the employer under the insurance plan. The amount to be reimbursed is an amount owing to the Board.

Payment of commuted value

(3) The Board may require a Schedule 2 employer to pay to the Board an amount equal to the commuted value of the payments to be made under Part VI (payments for loss of earnings and other losses) with respect to a worker or survivor.

Same

(4) If the amount is insufficient to meet the whole of the payments, the employer is nevertheless liable to pay to the Board such other sum as may be required to meet the payments.

Same

(5) The Board shall return to the employer any amount remaining after the Board ceases to make payments with respect to the worker or survivor.

[17] It seems both parties were under the impression that the federal government is a Schedule 2 employer and that this section 90 applied. It imposes a liability on Schedule 2 employers to pay benefits in respect of its workers. Schedule 2 employers unlike regular employers do not pay premiums into a common pool to fund benefits. Schedule 2 employers just pay actual costs relating to their own employees. The Respondent asserts that subsections 90(1) and (2) support the view that WSIB is a conduit and mere agent of the Schedule 2 employers who are the *providers* of the benefits not just the party financing the benefits. As such, the Appellant is indebted to Her Majesty in right of Canada bringing into play section 155 of the *FAA*. In such case, the debt was properly collected by the CRA as asserted by the Respondent.

[18] Interwoven with this question of whether the Appellant is indebted to the federal Crown are the provisions of the *Government Employees Compensation Act* ("*GECA"*). It sets out a federal government workers' compensation scheme but provides none of its own mechanisms for administering it. Instead, it statutorily delegates everything from compensation rates, conditions, determinations and awards to the provincial workers' compensation authority.[17] In doing so, on its face, the federal government appears to be a mere funding body for provincial authorities to provide benefits to employees of the federal government. However, that it is more than a mere funding body can be seen in subsection 4(5) and paragraph 4(6)(*a*) of the *GECA*. Subsection 4(5) provides that compensation awarded "under the authority of this Act shall be paid to the employee ... as the board … may direct." That a provincial board *directs* the payment does not make it liable to make the payment. As well, paragraph 4(6)(*a*) of the *GECA* prescribes that the benefits funded by the federal government out of the Consolidated Revenue Fund are those "awarded under this Act" even though pursuant to paragraph 4(6)(*b*), the funding passes through WSIB's hands en route to workers.

> **4.** (6) There may be paid out of the Consolidated Revenue Fund,
> (*a*) any compensation or costs awarded under this Act;
> (*b*) to the board, officers, authority or court authorized by the law of any province or under this Act to determine compensation cases, such amount as an accountable advance in respect of compensation or costs that may be awarded under this Act as, in the opinion of the Treasury Board, is expedient;

That is, the awards the Appellant received were, statutorily, not awards payable under or pursuant to the *WSIA* of Ontario. The federal government both awards and

[17] Sections 4(2) and 4(3) of the *GECA*.

funds compensation benefits pursuant to the *GECA*. On the other hand, subsection 4(6) clearly contemplates that the provincial boards do more than direct the payments. Under that provision, it is the boards that are the recipients of the monies from the Consolidated Revenue Fund as *accountable advances* so, in actual fact, it is the provincial boards that make and account for the payments to the employees.

Analysis

[19] I will deal firstly with whether the Appellant can be seen as the recipient of an accountable advance from Her Majesty in right of Canada. Section 38 of the *FAA* and regulations made pursuant to it, provide that accountable advances not accounted for may be recovered as a debt to Her Majesty in right of Canada.

[20] While the Respondent has taken a creative approach to exacting redress for the overpayment received by the Appellant by asserting she has received an accountable advance, it is my view that such approach is without merit. There is no construction of the provisions of the *FAA* and regulations that suggests that the Appellant has received an accountable advance from, and thereby became a debtor of, Her Majesty in right of Canada. The only connection the advances referred to in those enactments have to the payments made to the Appellant is found in paragraph 4(6)(*b*) of the *GECA* which provides for accountable advances being made from the Consolidated Revenue Fund to the provincial authority administering the workers' compensation benefits awarded under the *GECA*. That the WSIB receives accountable advances from the federal Crown does not make the payments WSIB made to the Appellant accountable advances from the Crown to the Appellant. Funding compensation benefits awarded by federal government employers to its employees through WSIB does not necessarily suggest that WSIB does not have an independent role in relation to the receipt of funds which it pays out *as benefits*. That benefits may have been paid in error does not make them advances as contemplated in the regime cited by the Respondent. Even if WSIB is a mere agent of the federal government in respect of the subject payments, that agency relationship could not transform the nature of the payments made by the WSIB to the Appellant from benefits to an *accountable advance* made to her by the federal government. That the *GECA* makes its agent accountable for the funds it administers, does not suggest that the recipient of benefits has received an accountable advance. Any obligation to account to the federal government for advances rests solely with the WSIB which is an agency of the Ontario Ministry of

Labour and quite distinct and autonomous from any agency or department of the federal government.[18]

[21] Concluding that channelling funds through the WSIB to the Appellant does not alter the character of the payments received by the Appellant as benefits is not to say that they are not benefits *awarded by the federal government* to the Appellant. Indeed, it appears to me that they are. However, that does not yet answer the question as to whether the Appellant had an obligation to account to the federal government for monies she received in error from *WSIB*.

[22] That takes me to consider section 90 of the *WSIA*. As noted above, the parties seem to have taken the approach that the federal government is a Schedule 2 employer. On this basis it seems that the Respondent's position, relying on the wording in subsection 90(2), is that WSIB benefits are paid "on behalf" of the federal government. The WSIB is a mere intermediary engaged (statutorily) by the federal government to handle benefit claims for its employees. It is asserted that such intermediary role does not alter the obligations that exist between the provider of the benefits (the federal government) and the recipient of them (the Appellant). A similar argument can be made in respect of the *GECA*, namely pursuant to the *GECA*, WSIB is the mere intermediary engaged (statutorily) by the federal government to handle benefit claims for its employees.

[23] It strikes me that the Respondent relies on the principles of the law of agency in making such an argument. Under the law of agency, where a principal, the federal government, authorizes an agent (WSIB) to deal with another party, the result, subject to certain limitations, is that the principal is regarded as having a direct relationship with the other party. Obligations would, in the normal course, be pursued as between the principal and the other party. That is, in the context of the case at bar, obligations between the employer and the employee would be pursued as between them even though identifying the extent of the obligation (such as an erroneous benefit payment) had been assigned to WSIB as agent for the employer. Where the agent's role has been statutorily imposed, no issue should arise as to the limitations on the law of agency such as whether the employee knew of or should have understood the agency role of the statutorily imposed intermediary. In effect, no issues should arise that limit the right of the principal to collect any overpayments made by the intermediary agent.

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[18] *WSIB* Policy 12-01-04 – Schedules 1 & 2.

[24] The appropriateness of applying principles of the law of agency in a statutory context depends of course on the context of the particular statute. In the context of section 90 of the *WSIA*, I am not convinced that that section goes that far. I draw no necessary inferences from the language of section 90 that employees of Schedule 2 employers would be accountable to their employer for overpayments or that employees could force their employers to fund their benefits. While subsection 90(2) speaks of payments made on behalf of the employer, there is no necessary inference that the employer is the *provider* of the benefits it is liable to fund which is to say that I see no necessary inference of an agency-type relationship. Regardless, I have not accepted that the CRA is a Schedule 2 employer and find arguments relating to the situation concerning them to be of no assistance.

[25] That is, notwithstanding similarities between Schedule 2 employers and the federal government as employer governed by the *GECA*, I have concluded that there is no basis for the assertion that the federal government is a Schedule 2 employer. Schedule 2 employers are listed in the regulations to the *WSIA*. I find no reference there to Her Majesty in right of Canada.[19] Indeed, case law authorities to which I will refer later in these Reasons, confirm that the source of the WSIB's role in respect of the federal government is the *GECA*, not the *WSIA*.

[26] Before reaching any conclusions on the resolution of this matter under the *GECA*, I note that it is inherent in the approach taken by the Respondent that there has been a constructive receipt of the Appellant's withheld salary which must thereby be included in income as "received" pursuant to section 5 of the *Act*. As well, as raised by me at the hearing, there is the question as to whether there was a benefit conferred on the Appellant in retiring a debt owed by her, the value of which would be included in income pursuant to paragraph 6(1)(*a*) of the *Act*.

[27] The theory of constructive receipt is that the payee need not receive the amount in question but need only receive a corresponding benefit if, for example, the payment is paid to the government under a federal or provincial statute.[20] If there is no corresponding benefit such as where the benefit is less than the amount

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[19] As well, I note that in *The Practical Guide to Workers' Compensation Hearings in Ontario* (Toronto: Carswell, 1998) at Chapter 12, heading 12.2, the authors (Richard Anstruther, David P. Craig and Joanne E. Satjos) acknowledge that federal government employees are covered by the *GECA* not Ontario legislation notwithstanding the similarity in treatment of the federal government as an employer and Schedule 2 employers.

[20] See *Jean-Paul Morin v. The Queen*, [1975] C.T.C. 106.

asserted as received, it seems logical that the full amount not be regarded as received. In that sense it appears to me that a benefit received approach under section 6 might be the preferred approach. However, it was not an approach raised in the assessment or in the pleadings or by the parties and it has valuation issues which are obviated, or better dealt with, under other approaches. In the circumstances then, I am satisfied that a paragraph 6(1)(*a*) approach should be abandoned.

[28] Still, some comment on the doctrine of constructive receipt needs to be made to put it in perspective since ultimately the Respondent relies on it. While the doctrine has a long history of being applied in a number of tax cases, in fact, little of that history is of direct assistance to the facts of this case. The most frequent application of the doctrine flows from a particular statutory enactment, namely subsection 56(2) which has been dealt with in cases such as *Neuman v. M.N.R.*[21] Such applications of the doctrine rely on principles, such as the requirement that the payment be made at the direction of the entitled recipient who must have ready access to (control over) the monies in question, which are specific to the requirements of that section. In other contexts applying the common law understanding of the doctrine, the courts have found that monies can be regarded as constructively received if they are available to an entitled recipient who has turned his back on receiving them.[22] Yet another application of the doctrine, as I have already noted, is seen in *Morin* in respect of holdbacks and payments required or authorized under a federal or provincial statute. On the facts of the case at bar, the Respondent can only rely on the latter application of the doctrine since the other applications of it clearly do not apply on the facts of this case.

[29] All that said, I return to the basic question raised by paragraph 4(6)(*a*) of the *GECA*. That provision confirms that benefits to federal government employees are awarded *under* the *GECA* and are thereby awards made by the federal government. The *GECA* is more than a workers' compensation funding scheme. It is a statutory compensation scheme whereby Her Majesty in right of Canada *provides* benefits to federal workers. That is, the legislative scheme for workers' compensation under the *GECA* does suggest that the federal government is the disclosed principal and each province is its administrative agent in this three party regime. In applying any

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[21] [1998] S.C.J. No. 37 (S.C.C.).

[22] See *Assuras v. Canada*, 2003 TCC 524 at paragraph 23. As well there must be evidence of a payment to someone for the benefit of the constructive recipient such as, in this case, a payment from the employer to WSIB. I have no such evidence before me. See *Markmam v. Minister of National Revenue*, 1989 1 C.T.C. 2381 at paragraph 10.

agency type principles to this statutory regime, in my view, requires importing some fairly obvious implied terms as are necessary to make the system work. While it is expressly stated that the provincial boards will receive the funding for compensation benefits from the federal government (which is the provider of such benefits), it is implicit that boards are making benefit payments on behalf of the federal government and that they have authority to collect overpayments on behalf of the federal government. That however does not diminish the federal government's authority to take such action on its own behalf. Nor does the delegation of authority to identify the extent of the obligation (such as an erroneous benefit payment) to the boards diminish the federal government's authority to collect overpayments. Where the board's role, statutorily imposed, is strictly to act as an administrative intermediary of the compensation scheme, there should be no issue as to the authority of the principal provider of the scheme to enforce the outcomes directed by the boards. As such, there is a debt in the case at bar to the federal Crown and section 155 of the *FAA* should apply.

[30] This view of the nature of the compensation scheme for federal government employees is supported by the Supreme Court of Canada as far back as 1943 in the case of *Ching v. Canadian Pacific Railway Co.*[23] In that case a federal employee was injured due to negligence of a railway worker and was paid workers' compensation under the Alberta statutory regime. The worker sued the railway for damages and the railway defended the claim on the grounds that the Alberta legislation barred such claims. The Supreme Court of Canada found that the statutory scheme governing the worker was that provided by enactment of the Dominion of Canada not the province that administered the federal scheme. Accordingly, the worker was not barred from his claim.[24] The Court found in the penultimate paragraph of the judgment that in dealing with the appellant in that

[23] [1943] 3 D.L.R. 737 (S.C.C.) [Alta.].

[24] It appears that there were salary overpayments paid by the federal employer in this case that the Alberta Board charged to the railway and reimbursed the employer. It would appear this collection against a negligent party was done on behalf of, and as administrator of, the federal government compensation scheme. That WSIB might have performed the same role in the case at bar, does not dissuade me from my conclusion, supported by the reasoning in *Ching*, that the debt in the case at bar was to Her Majesty in right of Canada. I add however, the fact that WSIB was relieved of a collection role that it could presumably have performed on behalf of the federal government, illustrates the CRA's continued attempts to frustrate the Appellant. Indeed, not allowing the WSIB to collect the overpayment as agent, required the Appellant to pursue her medical expenses separately as opposed to seeking a set-off – an action only pursuable against WSIB as the administrator of the benefit regime.

case “the Board was acting not under the Provincial Act but as the administrator of the Dominion law”. Similarly, in the case at bar, when WSIB overpaid the Appellant, it was acting under the *GECA* making the overpayment as administrator of a federal compensation scheme. The debt arising from the overpayment is a debt to the federal government, not to the administrator.

[31] A similar conclusion is warranted by reference to the decision of Justice Abella (now of the S.C.C.) in *Canada Post Corp. v. Smith*, [1998] O.J. no 1850[25]. In that case, it was asserted that the delegation under *GECA* to provincial boards created a patchwork of rights inconsistent with a homogeneous federal approach to compensation. Abella J. found that making different administrative arrangements with different provinces simply ensured uniformity in compensation between injured employees in any province whether federally or provincially employed. This rationale for the federal scheme supports rather than distracts from the view that the provider of benefits under the *GECA* is the federal government notwithstanding the administrative role played by Provincial Boards. It follows that overpayments are accountable to the federal government.

[32] Accordingly, I conclude that the Appellant was indebted to Her Majesty in right of Canada in the amount of the WSIB overpayment and that, subject to the Appellant’s alternative argument, it was properly withheld by the CRA pursuant to section 155 of the *FAA* and constructively received by the Appellant as per the reasons in *Morin*. While an argument can be made that the constructive receipt inclusion should, pursuant to the reasons in *Morin*, equal the value of the benefit to the Appellant that might be nil if the debt was unenforceable, no such argument can be made in respect of reducing the inclusion by offsetting claims. If the Appellant had claims for medical expenses, they could have been pursued independently.[26] As to reducing the inclusion to reflect the dubious benefit of paying what is argued to be an unenforceable debt, the parties approached the limitation period issue in a different way, or so it appears. Instead of reducing the inclusion to reflect the value of any benefit, the approach focused on the validity of

[25] At paragraphs 17, 18, 24 and 47.

[26] As it is, it appears that such claims have been abandoned under the settlement agreement which gives rise to an anomalous twist. The WSIB was not a party to the settlement agreement. Would the Appellant be concerned then that WSIB might still go after her for the overpayment? Perhaps her not requiring WSIB to be a party to the settlement agreement underlines her confidence that the CRA had sufficient authority to deal finally with the overpayment as the party entitled to collect it on behalf of the federal government.

the withholding and the impact on the inclusion if the withholding was not lawful. I see no reason not to take that approach as well.

The Statute Barred Issue

[33] Having concluded that the Appellant was indebted to Her Majesty in right of Canada for the WSIB overpayment, the remaining issue is to determine the impact of governing legislation dealing with limitations of actions. In respect of that issue, I have concluded that the Appellant succeeds in her appeal. Enforcement of the debt to the federal Crown for the WSIB overpayment was statute barred after six years.[27] Withholding wages after that period in satisfaction of that debt was not lawful and the amount so withheld cannot be regarded as received for the purposes of section 5 of the *Act*.

[34] The debt arose in October 1996 and formal demand for payment was made in August 1997 (Exhibit R-3 letter from the Department of Justice). Even running from the latter time, action on the debt would have to have been commenced by August 2003. The subject withholding took place well after that. I have no evidence of an acknowledgment of the debt to the federal Crown or any action by the federal Crown that would revive or renew the debt in terms of extending a limitation period. Indeed, collection under the *FAA* should have been out of first available funds at least administratively as testified to by the Respondent's witness. Failure to take any collection action for over six years is quite extraordinary.

[35] The Respondent argued that the cause of action did not arise "otherwise than in a province" which is to say the limitation period on debts to the Crown did not apply. Reliance is placed on a construction of section 32 of the *Crown Liability and Proceedings Act*. Section 32 reads as follows:

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[36] The Respondent in effect wants me to find that the cause of action is neither subject to limitation under the laws of a province (presumably because the debt is

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[27] *Crown Liability and Proceedings Act*, section 32. *Markevich v. Canada*, [2003] S.C.J. No. 8 (S.C.C.).

asserted to be owed to the federal government) nor under the federal legislation because the cause of action arose in a province. This is an unacceptable construction.

[37] If the debt is to Her Majesty in right of Canada, Her Majesty cannot be without limitation to bring a cause of action. If the debt is to Her Majesty in right of Canada, one cannot assert that the cause of action arose in a province unless there is a nexus to the province that affords the debtor the benefit of a limitation period in that province. A cause of action arising in a province must mean a cause of action to which a provincial limitation period applies. No other construction of the subject provision makes any sense at all. The action cannot be without limitations. This is made clear in my view in the decision of the Supreme Court of Canada in *Markevich*. In that case the Supreme Court of Canada noted that whether the proceeding in that case arose in or out of a province was of no consequence because in either case the limitation period ran for six years from when the cause of action arose.[28] The implicit suggestion is that one or the other has to apply. I am satisfied that Ontario affords a creditor no longer than six years to commence an action against a debtor where the debt arises in circumstances akin to those in this appeal. Indeed, absent a special limitation period, the limitation period in Ontario is two years.[29]

[38] Finding that the debt is statute barred makes the collection of it by seizure, or by a set-off amounting to a seizure, ineffective for the purpose of applying the doctrine of constructive receipt. That is, I can envisage no circumstance that any such collection, under section 155 of the *FAA* or otherwise, could be found to constitute a receipt by the Appellant under section 5 of the *Act*. To find otherwise would effectively hold enforcement and collection of Crown debts above the provisions of limitation of actions legislation for the purposes of the *Act*. This result would clearly be contrary to the principles laid out in *Markevich*. On this basis the appeal must be allowed.

The Settlement[30]

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[28] *Markevich v. R.*, [2003] S.C.J. No. 8 (S.C.C.) at paragraphs 8 and 9.

[29] *Ontario Limitations Act, 2002*, S.O. 2002, c. 24. Sch. B, section 4.

[30] The parties requested that the settlement agreement be sealed. I see no pressing social value of such extraordinary importance that would cause me to so curtail the principles of openness and accessibility that prevail in our system of justice.

[39] In light of the litigious actions and reactions of the parties to this regrettable series of events, it is not surprising, albeit surprisingly late, that the CRA and the Appellant finally came to an agreement whereby all issues would be dealt with. This agreement was entered into in late 2006, well after the CRA withheld the overpayment amount from the Appellant's wages. The settlement agreement makes no mention of the overpayment or any indebtedness to WSIB or the federal Crown. While the Appellant covenanted not to pursue any claims, there is no suggestion in the agreement that the Appellant recovered the overpayment asserted as wrongfully withheld.[31] I draw no inferences from these later events although it might be possible that the Appellant's pursuit of this appeal is contrary to the terms of the agreement. That, however, has no bearing on its outcome.

[31] Respondent's counsel asserted that the parties discussed the $18,787.30 in the settlement negotiations. She suggested that the CRA refused to accept that the set-off was improper so no acknowledgement was made that the settlement included the $18,787.30. Indeed the settlement amount was said to be for lost wages not unpaid wages. Still, the settlement agreement cannot be seen as an admission that the overpayment was "received" when held back in 2004. I draw no inferences from the agreement as to whether the settlement amount was inclusive of the disputed amount. The settlement was to forgo claims on all issues, grievances and complaints including those against the WSIB. A myriad of potentially expensive claims and proceedings against the CRA were abandoned in consideration of the terms of the settlement. Attributing settlement amounts is neither possible nor, in any event, necessary.

Conclusion

[40] For all these reasons, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 5th day of September, 2008.

"J.E. Hershfield"

Hershfield J.

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