

**Date: 20080527**

**Docket: T-1268-07**

**Citation: 2008 FC 672**

**Ottawa, Ontario, May 27, 2008**

**PRESENT: The Honourable Mr. Justice Blanchard**

**BETWEEN:**

**RICHARD CLAVEAU ET AL<sup>1</sup>**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review of a decision dated June 15, 2007, by the Employment Insurance Commission (the Commission), which denied the applicants' request for a write off submitted on May 23, 2007.

II. Background

[2] The principal applicant, Richard Claveau, was employed by the Coopérative Forestière Laterrière (the Coopérative) from November 24, 1986 to May 9, 2003, when he was laid off.

[3] On May 20, 2003, the applicant submitted his initial claim for employment insurance benefits. A benefit period was established for him beginning May 11, 2003, and benefits were paid to him for about a year.

[4] Because the applicant was experiencing serious financial difficulties and was unable to file a viable proposal within the six-month deadline, he submitted an application to continue restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

[5] Pursuant to the *Companies' Creditors Arrangement Act*, Ernst & Young Inc. was appointed as the monitor on October 23, 2003.

[6] On April 14, 2004, the monitor sent to the Coopérative's creditors, including the applicants, a notice of meeting of creditors, a letter from the president of the Coopérative, a copy of the proposed plan of compromise or arrangement (the Plan) along with the monitor's report (the Report) for the meeting scheduled for April 23, 2004.

[7] On April 23, 2004, the creditors-members of the Coopérative voted and approved the Plan, which was homologated by the Québec Superior Court on April 27, 2004.

[8] On May 5, 2004, in response to the notice of April 14, 2004, the Commission reminded the monitor of its obligation to deduct monies payable to the Receiver General under subsection 46(1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The Commission also asked the monitor to contact it prior to paying any dividends to the employees.

[9] On May 13, 2004, the monitor sent to the Commission a notice requesting the creditors to prove their claims, along with the relevant documentation for submitting a proof of claim.

[10] On May 14, 2004, the monitor asked the Commission to relieve it of its responsibilities under subsection 46(1) of the Act, given that the monitor had to analyze all these files for the Commission and was uncertain about the exact amounts it would be paying to each employee. The monitor also informed the Commission of the following:

- (1) The Coopérative owed approximately 1.8 million dollars to 439 employees (floating holidays, unpaid holidays, pay in lieu of notice;
- (2) As of that date, the monitor had received proofs of claim from 271 employees out of a possible 439;
- (3) All the creditors, including the employees, could file a proof of claim at any time up to July 18, 2004, the deadline for paying the dividend; and
- (4) An estimate of the dividend had been completed, and it would be paid on or before July 18, 2004.

[11] On June 8, 2004, the Commission agreed to the monitor's request because it could not provide the amount of the payments due within the time period set out in the Plan. The Commission also informed the monitor that it would apply section 45, not subsection 46(1), of the Act to recover the overpayment from the claimants.

[12] On or about July 16, 2004, the monitor sent a notice of dividend to the creditors along with a copy of the letter from the Commission dated June 8, 2004.

[13] On or about July 18, 2004, the applicant received a dividend of \$2,317.31 from the monitor as payment in lieu of notice, thus creating an overpayment.

[14] On July 29, 2004, the Commission informed the Coopérative that it would review its employees' claims for employment insurance once the last dividend was paid, which was expected to be in September 2004.

[15] On June 7, 2005, the Commission provided the Coopérative with explanations about the allocation of the first dividend paid by the monitor in July 2004 and indicated that the calculations were based on the information from the monitor that the date for the second payment had not yet been set.

[16] On June 23, 2005, the Commission advised the applicant that it had allocated the dividend payments that he had received as vacation and pay in lieu of notice. A notice of overpayment totalling \$925 was also sent to the applicant.

[17] On or about July 15, 2005, a representative appeal was filed with the Board of Referees of the Employment Insurance Commission.

[18] On July 16, 2005, the Commission calculated the overpayment.

[19] On February 2, 2006, when the case was ready to be heard, a formal request for a write-off based on section 56 of the *Employment Insurance Regulations*, S.O.R./96-332 (the Regulations) was made to the Commission.

[20] On August 24, 2006, the Board of Referees rendered a decision confirming that the monies received by the applicant constituted remuneration, and the applicant agreed with this. However, the Board stated that it was not up to it to decide whether the Commission had made an error that could warrant a write-off.

[21] On January 3, 2007, the Federal Court (*Claveau v. Canada (Minister of Human Resources and Skills Development*, 2007 FC 3) ruled that the write-off request was premature because the Umpire had not yet rendered a decision.

[22] On April 20, 2007, the Umpire upheld the decision of the Board of Referees and noted that the applicant could apply to the Federal Court for a determination as to whether the Commission had exercised its discretion unfairly.

[23] Once the Umpire's decision was rendered, a second request for a write-off based on subparagraph 56(2)(b)(i) of the Regulations was filed with the Commission on May 23, 2007.

[24] On June 15, 2007, the Commission denied the second write-off request on the ground that there was no error on its part in processing the claims for benefits.

[25] On July 11, 2007, this application for judicial review of the June 15, 2007 decision was filed.

### III. Impugned decision

[26] By letter dated June 15, 2007, the respondent advised the applicant that it was denying his request for a write-off. The applicant had submitted that request under subparagraph 56(2)(b)(i) of the Regulations on the ground that the overpayments were attributable to an error by the Commission in processing the applications for benefits.

[27] The respondent based its refusal on the following factors:

- (1) There was no error on the part of the Commission in processing the applications for benefits;
- (2) Apart from section 46, section 45 of the Act applies in accordance with the principle that a claimant cannot receive income from two sources for the same time period. There was an overpayment against the claimant because he received benefits covering the same period in which he received dividends. Normally, the monitor would have withheld the dividends, and the claimant would not have received those monies if section 46 had been applied;
- (3) The Commission has discretion to decide whether to grant or refuse a write-off request, and neither the Board of Referees nor the Umpire had the jurisdiction or the power to compel the Commission to exercise its discretion to write off an overpayment.

[28] The respondent concluded his letter by reminding the applicant that collection of overpayments is not suspended pending an application for judicial review in which the Commission's decision to exercise its discretion to write off an overpayment is being challenged.

IV. Issue

[29] The only issue is whether the Commission erred in denying the write-off request in the exercise of its discretion under section 56 of the Regulations.

V. Standard of review

[30] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there ought to be only two standards of review, correctness and reasonableness. The Court indicated that the correctness standard should continue to apply to jurisdictional questions and some other questions of law (see *Dunsmuir* at paragraph 50). When applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process. The court will rather undertake its own analysis, which will bring the court to decide whether it agrees with the determination of the decision-maker.

[31] The Supreme Court also stated that in judicial review, the reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. Reasonableness is also concerned with whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law (see *Dunsmuir* at paragraph 47).

[32] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law (see *Dunsmuir* at paragraph 54). Whether the decision-maker should be given deference depends on the following factors: the presence of a privative clause, the

special expertise of the decision-maker in a discrete and special administrative regime, and the nature of the question at issue (see *Dunsmuir* at paragraph 55).

[33] In *Allard v. Canada (Attorney General)*, 2001 FCT 789, [2001] F.C.J. No. 1148 (Lexis), Mr. Justice Lemieux applied the pragmatic and functional approach to determine the appropriate standard of review for decisions made by the Commission regarding write-offs. At paragraphs 43 and 44, the learned judge found that the appropriate standard of review on the merits of the Commission's decision to write off or not to write off is reasonableness *simpliciter* (see also *Girard v. Canada (Attorney General of Canada)*, 2004 FC 882; [2004] F.C.J. No. 1107 (Lexis)).

[34] In this case, the Act does not contain a privative clause, the Commission has a degree of expertise in issues involving write-offs and the nature of the question is essentially discretionary. Consequently, in this case, a certain deference is in order.

[35] For these reasons, I am of the view that the appropriate standard of review in this case is reasonableness.

## VI. Analysis

[36] The applicant essentially maintains that the Commission erred in processing the claim for benefits under subparagraph 56(2)(b)(i) of the Regulations because it had no right to exempt the monitor from a mandatory provision of the Act, i.e., subsection 46(1).

[37] The respondent asserts that the overpayment of benefits did not arise as a result of an error made by the Commission, given that it paid the benefits in accordance with the information that it had at the time. In fact, the overpayment resulted from the review that the Commission was required to conduct as a result of the monitor paying the dividends after the Commission had paid the benefits. The respondent notes that under the Plan homologated by the Québec Superior Court, the Commission had to comply with the provisions of the Plan. It provided that the monitor had to pay the first dividend on or before July 18, 2004, and since the amount to be paid by the monitor could fluctuate until that date, the Commission could not specify the overpayment for that date. In short, the Commission had no choice but to apply section 45 of the Act to recover the overpayments.

[38] Section 56 of the Regulations states that the Commission may write off in its discretion a penalty or an amount payable if one of the criteria listed therein is met. In other words, the Commission may only exercise its discretion where the facts of a given case apply to one of the criteria set out in this section of the Regulations (*Desrosiers v. Canada (Attorney General)*, 2007 FC 769 at paragraph 21). In this case, the applicants contend that the write-off should have been authorized because the overpayment is attributable to an error by the Commission, and they rely on subparagraph 56(2)(b)(i) of the Regulations.

[39] A careful reading of subparagraph 56(2)(b)(i) of the Regulations shows that the Commission may write off the overpayment if there has been a delay or error made by the Commission in

“processing a claim for benefits”. The provision in question is reproduced below:

56. (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

...

(b) the overpayment arises as a result of

(i) a delay or error made by the Commission in processing a claim for benefits, [My emphasis.]

...

56. (2) The 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:

[...]

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

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

[...]

The documentary evidence indicates that the principal applicant was laid off on May 9, 2003, and applied for employment insurance benefits via the Internet on May 20, 2003. A payment period was established for him beginning May 11, 2003, and benefits were paid to him for about a year.

However, in his request for a write-off dated May 23, 2007, the applicant alleged that:

[TRANSLATION]

... HRSDC could therefore not agree with the trustee [monitor] that section 46(1) would not apply because it is a mandatory provision of the Act, and there is no provision in the Act allowing the Commission to release someone from a mandatory provision. In so doing, HRSDC committed an error in processing a claim for benefits by permitting payments to be made in error.

In other words, the applicant alleges that the Commission made an error in granting the monitor an [TRANSLATION] “exemption” from subsection 46(1) of the Act and that this resulted in an overpayment. I do not accept this argument. The alleged error is not connected in any way to the applicant’s claim for benefits filed on May 20, 2003. The documentary evidence indicates that the claim for benefits was received and duly processed by the Commission for the benefit of the applicant. Consequently, subparagraph 56(2)(b)(i) of the Regulations does not apply in this case. Since the applicant was unable to demonstrate that the facts of his case applied to any of the criteria in subparagraph 56(2)(b)(i) of the Regulations, i.e., that there was a delay or error made by the Commission in processing a claim for benefits, I am of the view that the Commission was unable to exercise its discretion to write off the amounts claimed by the applicant.

[40] It should be noted that the applicant’s employer was facing serious financial difficulties. On April 23, 2004, at the meeting of the creditors, the Plan was approved and was homologated by the Québec Superior Court on April 27, 2004. The Plan provided that the monitor was to pay the first dividend on or before July 18, 2004, whereas the benefits had already been paid. Given that the amount to be paid by the monitor could fluctuate until July 18, 2004, the Commission was unable to specify the overpayments for that date. Accordingly, on May 14, 2004, the monitor asked the Commission to relieve it of its responsibilities under section 46 of the Act,

since the monitor was uncertain about the exact amounts that it was going to pay to each employee. The Commission granted this request by letter dated June 8, 2004. I note that the notice of dividend sent to the creditors, including the applicant, enclosed the June 8, 2004, letter, as an attachment. This letter expressly stated that the claimant would be required to pay back any overpayment. The excerpt in question is reproduced below:

[TRANSLATION]

. . . you can proceed with paying all the monies due to the employees. On the other hand, in accordance with section 45 of the Employment Insurance Act, we [the Commission] will allocate the monies that you will pay. The resulting overpayment will be imputed to the claimant. For your information, this section specifies that:

. . . 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. [My emphasis.]

Thus, the applicant was informed that although the monitor was authorized to pay the entire amount to the claimants, the Commission could require that any overpayment be reimbursed. This approach by the Commission was consistent with the uncertainty about the exact amounts to be paid to the claimant. The Commission had no choice but to apply section 45 of the Act to recover the overpayments once the monitor established the exact amount of the payment.

[41] Sections 45 and 46 of the Act refer to two separate situations and apply to their mutual exclusion, based on the circumstances (*Lauzon v. Canada (Employment and Immigration Commission)*), [1998] F.C.J. No. 944 (Lexis) at paragraph 9). In this case, section 45 of the Act

applies, and the claimant received money at government expense. The Commission is entitled to claim reimbursement of the overpayment under section 45 of the Act.

VII. Conclusion

[42] Having considered all the evidence and for the reasons discussed above, I am of the view that by denying the applicant's request to write off the overpayment, the respondent did not make an error warranting the intervention of the Court.

[43] Since the respondent waived his claim for costs by letter dated April 25, 2008, the application for judicial review will be dismissed without costs.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is dismissed without costs.

“Edmond P. Blanchard”

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Judge

Certified true translation  
Mary Jo Egan, LLB

## Appendix

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

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.

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 General as repayment of an overpayment of benefits.

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.

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 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

(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.

versement excédentaire de prestations.

(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.

*Employment Insurance Regulations, S.O.R./96-332:*

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

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

(b) the debtor is deceased;

(c) the debtor is a discharged bankrupt;

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

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

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

b) le débiteur est décédé;

c) le débiteur est un failli libéré;

d) le débiteur est un failli non libéré à l'égard duquel le dernier dividend a été payé et le

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

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

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

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

(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

(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

(b) the overpayment arises as a result of

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

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

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

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

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

(2) The 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) 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) le versement excédentaire est attribuable à l'un des facteurs suivants:

(i) un retard ou une erreur de la part de the 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 the 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'asee assuré par erreur l'emploi ou une autre activité du débiteur.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1268-07

**STYLE OF CAUSE:** RICHARD CLAVEAU ET AL v. ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** Québec, Quebec

**DATE OF HEARING:** April 23, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MR. JUSTICE BLANCHARD

**DATED:** May 27, 2008

**APPEARANCES:**

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