CORAM: SEXTON J.A.
           SHARLOW J.A.
           PELLETIER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

MICHELLE ROMANO

Respondent

Heard at Toronto, Ontario, on April 1, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on April 1, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: SEXTON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on April 1, 2008)

SEXTON J.A.

[1]   On April 22, 2005, Michelle Romano (the "respondent") applied for maternity and parental benefits pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act"). She had a record of employment which indicated that she worked from August 1, 2004 to November 6, 2004. During that period she accumulated 221 hours of work, as found by the Canada Employment Insurance Commission (the "Commission"). She did not work after November 6, 2004 because she was involved in a motor vehicle accident.

[2]   As a result of her accident the respondent received income replacement benefits provided by her insurance company from November 21, 2004 to January 24, 2005. The respondent submitted that she intended to work long enough to qualify for maternity benefits, but that she could not due to her motor vehicle accident.

[3]   In a unanimous decision, the Board of Referees found that the respondent did not meet the minimum requirement of insured hours of employment to establish a claim for benefits.

[4]   Nevertheless, before the Umpire, the respondent argued that the insurance payments should have been considered insurable earnings for the purposes of the Act. The Umpire agreed with the respondent's argument and overruled the Board of Referees in his decision dated June 26, 2006, numbered CUB 66224. The Attorney General of Canada (the "applicant") has applied for judicial review of this decision.

[5]   The Umpire was concerned by the possibility that Employment Insurance ("EI") premiums were being deducted from the respondent's income replacement benefits. He assumed that if such deductions were being made, then the federal government was unfairly collecting EI premiums on the one hand, but not counting her income replacement benefits as employable income or otherwise for the purposes of the Act, on the other. He stated, at page 3 of his decision,

> When this matter came before me, I was surprised to learn that employment insurance deductions have been taken from this claimant's income replacement benefits. […] By accepting these payments of premiums, surely such income should be considered insurable income, otherwise EI would not be entitled to these premiums.

It is my opinion that Employment Insurance have to either return the employment insurance premiums to the claimant as they are not considered to be payable as this is not insurable hours under the Act or they should be estopped from denying that the earnings received by the claimant by way of income replacement benefits are not insurable earnings. I do not believe that the employment insurance scheme can have it both ways. If they accept premiums, then surely they are obliged to pay the claims.

[6]   The Umpire then concluded, at page 5 of his decision:

For these reasons the appeal of the claimant is allowed with at least the insurance premiums returned to her, which have been paid into the employment insurance fund. If, however, the arrangement was done with the complicity of the employment insurance fund, then these earnings should be considered insured earnings and the hours added to her 221 hours prior to her motor vehicle accident. The appeal is allowed.
.

[7]   The applicant argues that the Umpire exceeded his jurisdiction pursuant to section 90(1) of the Act in supplementing the hours of insurable employment found by the Commission by the number of hours represented by income replacement benefits when it was only open to the Minister of National Revenue to do so. An error of jurisdiction ought to be reviewed on a standard of correctness: *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraph 59.

[8]   The majority's reasons from this Court's decision in *Canada (A.G.). v. Haberman*, (2000) 258 N.R. 150 (F.C.A.) are dispositive of this application for judicial review. In that case the majority of this Court made it clear, at paragraphs 13 to 19, that the Minister of National Revenue has <u>exclusive</u> jurisdiction to make a determination on how many hours of insurable employment a claimant possesses for the purposes of the Act. The Haberman decision has been followed by other decisions in this Court.

Canada (A.G.) v. *Didiodato*, [2002] F.C.J. No. 1321 (FCA)(QL) at p. 2, para. 2
Canada (A.G.) v. *Thiara*, [2001] F.C.J. No. 1881 (FCA)(QL) at p. 1, para. 1
Canada (A.G.) v. *Tuomi*, [2000] F.C.J. No. 1570 (FCA)(QL) at pp. 1-2, para. 3-4
Canada (A.G.) v. *Hawryluk*, [2000] F.C.J. No. 071(FCA)(QL) at p. 4, para. 8

[9]   We are therefore of the view that the Umpire exceeded his jurisdiction in making a

determination on this issue.

[10]   For the reasons above we would allow the application for judicial review, set aside the

Umpire's decision and remit the matter to the Chief Umpire or another Umpire designated by him

for redetermination on the basis that the Umpire exceeded his jurisdiction, and should have

dismissed the appeals.

<div align="right">

"J. Edgar Sexton"
J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-368-06

STYLE OF CAUSE: ATTORNEY GENERAL OF
                                                        CANADA v. MICHELLE ROMANO

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 1, 2008

REASONS FOR JUDGMENT OF THE COURT BY: SEXTON, SHARLOW, PELLETIER
                                                                                      JJ.A.

DELIVERED FROM THE BENCH BY: SEXTON J.A.

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