

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100610**

**Dockets: A-353-09  
A-354-09  
A-355-09**

**Citation: 2010 FCA 150**

**CORAM: LÉTOURNEAU J.A.  
NADON J.A.  
PELLETIER J.A.**

**BETWEEN:**

**RODRIGUE CHARTIER ET AL.**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Montréal, Quebec, on May 19, 2010.

Judgment delivered at Ottawa, Ontario, on June 10, 2010.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
PELLETIER J.A.**

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issues**

[1] The three applications for judicial review in dockets A-353-09, A-354-09 and A-355-09 raise the following three questions:

- a) did the Umpire err in concluding that the 36-month limitation period prescribed by section 52 of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act), does not apply to repayments of overpayments of benefits under section 46 of that Act;
- b) did the Umpire err in law in not rescinding the notice issued by the Employment and Immigration Commission (Commission) under section 46 of the Act for an allocation of earnings beginning on October 7, 2002, even though he determined that the allocation had to be made beginning the week of December 20, 2004; and
- c) did the Umpire err in intervening to restore the Commission's decision that the \$1,000 paid for the loss or reduction of benefits constituted earnings within the meaning of subsection 35(2) of the *Employment Insurance Regulations*, SOR/96-332?

[2] The first two questions are common to all three cases. The third arises only in docket A-354-09. To avoid repetition, I will address the three questions in these reasons and place a copy in each of the files in support of the formal judgment to be rendered.

[3] The applicant, Mr. Chartier, is seeking a remedy for himself and a number of his colleagues, all affected by the collapse of their employer, Mine Jeffrey Inc. (the company).

**Relevant legislation**

[4] I reproduce sections 7, 18, 45, 46, 47 and 52 of the Act:

Qualifying for Benefits	Conditions requises pour recevoir des prestations
Benefits payable to persons who qualify	Versement des prestations
7. (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.	7. (1) Les prestations de chômage sont payables, ainsi que le prévoit la présente partie, à un assuré qui remplit les conditions requises pour les recevoir.
Qualification requirement	Conditions requises
(2) An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person (a) has had an interruption of earnings from employment; and (b) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.	(2) L'assuré autre qu'une personne qui devient ou redevient membre de la population active remplit les conditions requises si, à la fois : a) il y a eu arrêt de la rémunération provenant de son emploi; b) il a, au cours de sa période de référence, exercé un emploi assurable pendant au moins le nombre d'heures indiqué au tableau qui suit en fonction du taux régional de chômage qui lui est applicable.
(Table not reproduced.)	(Tableau non reproduit.)
Qualification requirement for new entrants and re-entrants	Conditions différentes à l'égard de la personne qui devient ou redevient membre de la population active
(3) An insured person who is a new entrant or a re-entrant to the labour force qualifies if the person (a) has had an interruption of earnings from employment; and (b) has had 910 or more hours of insurable employment in their qualifying period.	(3) L'assuré qui est une personne qui devient ou redevient membre de la population active remplit les conditions requises si, à la fois : a) il y a eu arrêt de la rémunération provenant de son emploi; b) il a, au cours de sa période de référence, exercé un emploi assurable pendant au moins neuf cent dix heures.
New entrants and re-entrants	Personne qui devient ou redevient membre de la population active

(4) An insured person is a new entrant or a re-entrant to the labour force if, in the last 52 weeks before their qualifying period, the person has had fewer than 490  
 (a) hours of insurable employment;  
 (b) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;  
 (c) prescribed hours that relate to employment in the labour force; or  
 (d) hours comprised of any combination of those hours.

...

Disentitlement to Benefits  
 Availability for work, etc.

**18.** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was  
 (a) capable of and available for work and unable to obtain suitable employment;  
 (b) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or  
 (c) engaged in jury service.

Return of benefits by claimant

**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

(4) La personne qui devient ou redevient membre de la population active est celle qui, au cours de la période de cinquante-deux semaines qui précède le début de sa période de référence, a cumulé, selon le cas :  
 a) moins de quatre cent quatre-vingt-dix heures d'emploi assurable;  
 b) moins de quatre cent quatre-vingt-dix heures au cours desquelles des prestations lui ont été payées ou lui étaient payables, chaque semaine de prestations se composant de trente-cinq heures;  
 c) moins de quatre cent quatre-vingt-dix heures reliées à un emploi sur le marché du travail, tel qu'il est prévu par règlement;  
 d) moins de quatre cent quatre-vingt-dix de l'une ou l'autre de ces heures.

[...]

Inadmissibilité aux prestations  
 Disponibilité, maladie, blessure, etc.

**18.** Le prestataire n'est pas admissible au bénéfice des prestations pour tout jour ouvrable d'une période de prestations pour lequel il ne peut prouver qu'il était, ce jour-là :  
 a) soit capable de travailler et disponible à cette fin et incapable d'obtenir un emploi convenable;  
 b) soit incapable de travailler par suite d'une maladie, d'une blessure ou d'une mise en quarantaine prévue par règlement et aurait été sans cela disponible pour travailler;  
 c) soit en train d'exercer les fonctions de juré.

Remboursement de prestations par le prestataire

**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,

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.

#### Return of benefits by employer or other person

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

#### Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages

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.

#### Remboursement de prestations par l'employeur ou une autre personne

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

#### Remboursement de prestations par l'employeur

(2) Lorsque le prestataire a reçu des prestations au titre d'une période et que, soit en application d'une sentence

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.

#### Debts to Crown

**47.** (1) All amounts payable under section 38, 39, 43, 45, 46 or 46.1 are debts due to Her Majesty and are recoverable in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.

#### Recovery

(2) If benefits become payable to a claimant, the amount of the indebtedness may be deducted and retained out of the benefits.

#### Limitation

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

#### Appeals

(4) A limitation period established by subsection (3) does not run when there is pending an appeal or other review of a decision establishing the liability.

#### Reconsideration of claim

**52.** (1) Notwithstanding section 120, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

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.

#### Créances de la Couronne

**47.** (1) Les sommes payables au titre des articles 38, 39, 43, 45, 46 ou 46.1 constituent des créances de Sa Majesté, dont le recouvrement peut être poursuivi à ce titre soit devant la Cour fédérale ou tout autre tribunal compétent, soit selon toute autre modalité prévue par la présente loi.

#### Recouvrement par déduction

(2) Les sommes dues par un prestataire peuvent être déduites des prestations qui lui sont éventuellement dues.

#### Prescription

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

#### Interruption de la prescription

(4) Tout appel ou autre voie de recours formé contre la décision qui est à l'origine de la créance à recouvrer interrompt la prescription visée au paragraphe (3).

#### Nouvel examen de la demande

**52.** (1) Malgré l'article 120 mais sous

#### Decision

(2) If the Commission decides that a person  
(a) has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or  
(b) has not received money for which the person was qualified and to which the person was entitled,  
the Commission shall calculate the amount of the money and notify the claimant of its decision and the decision is subject to appeal under section 114.

#### Amount repayable

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,  
(a) the amount calculated is repayable under section 43; and  
(b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

#### Amount payable

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

#### Extended time to reconsider claim

(5) If, in the opinion of the Commission, a false or misleading statement or

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

#### Décision

(2) Si elle décide qu'une personne a reçu une somme au titre de prestations pour lesquelles elle ne remplissait pas les conditions requises ou au bénéfice desquelles elle n'était pas admissible, ou n'a pas reçu la somme pour laquelle elle remplissait les conditions requises et au bénéfice de laquelle elle était admissible, la Commission calcule la somme payée ou payable, selon le cas, et notifie sa décision au prestataire. Cette décision peut être portée en appel en application de l'article 114.

#### Somme remboursable

(3) Si la Commission décide qu'une personne a reçu une somme au titre de prestations auxquelles elle n'avait pas droit ou au bénéfice desquelles elle n'était pas admissible :  
a) la somme calculée au titre du paragraphe (2) est celle qui est remboursable conformément à l'article 43;  
b) la date à laquelle la Commission notifie la personne de la somme en cause est, pour l'application du paragraphe 47(3), la date où la créance a pris naissance.

#### Somme payable

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

Prolongation du délai de réexamen de la



representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.

demande

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

[5] As can be seen, section 52 stipulates that the Commission may not reconsider a claim for paid or payable benefits if more than 36 months have passed since those benefits were paid or became payable.

[6] Section 46, which is more specific and is different in content, creates an obligation, on the part of an employer or any other person, such as a trustee in bankruptcy, who is liable to pay earnings, to deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits. Section 45, which goes hand in hand with section 46, creates the obligation on the part of the claimant to repay overpayments.

[7] Section 47 provides for the mechanism for recovering the amount of the indebtedness under section 46 as well as a 72-month limitation period to do so, failing which the recovery is time-barred.

**Facts and proceedings**

[8] The applicants were employed by the company. There was a shortage of work in 2001. Mr. Chartier, along with other employees, lost his employment on December 7, 2001, and made an initial claim for benefits. A benefit period was established beginning on December 9, 2001.

[9] In October 2002, the company encountered significant financial difficulties. A court order was made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. 36 (CCAA).

[10] The order authorized the company to file a plan of arrangement with creditors. A monitor was appointed and given specific powers, including that of suspending employees' benefit payments, among which were benefits related to drug, dental, life and disability insurance, subject to the submission of proofs of claim. The order was renewed on November 29, 2002, and amended on December 2, 2002.

[11] However, on taking up his duties, the monitor was confronted with difficulties caused by the collective agreements, in particular as regards liabilities relating to vacation leave accumulated prior to October 7, 2002, which was payable on January 1, 2003, under those agreements. The company's outstanding liabilities as of October 7, 2002, therefore became claims against the company that would later be disposed of in the plan of arrangement with creditors.

[12] This plan of arrangement under the CCAA was proposed to the creditors on October 29, 2004. It is not necessary to go into the details, except to say for the purposes of this proceeding that this plan set out the terms and conditions for payment of certain claims, including for earnings. Section 1(ee) of the plan defined earnings as relating to unpaid wages and vacation pay as of October 7, 2002, while excluding claims for termination of employment.

[13] The plan of arrangement provided for the creation of a fund, from which claims for earnings would be paid in full. The monitor was responsible for producing, on behalf of the creditor employees of such a claim, proof of the claim.

[14] The October 29 plan of arrangement was approved by the creditors on November 26, 2004. It was to be sanctioned by the Superior Court nearly one month later, on December 20, 2004.

[15] The Commission was told by a representative of the monitor that, under the plan of arrangement, the applicant was about to be paid a dividend of \$1,399.40, representing 20 per cent of the applicant's total claim for vacation pay owing as of October 7, 2002. This information was sent to the Commission on March 31, 2008.

[16] Having received this information, the Commission in turn notified the applicant on June 7, 2008, that the amount that the monitor was about to pay him constituted earnings within the meaning of the Act. In accordance with the Act, these earnings had to be deducted from the benefits that he had been paid. The Commission applied the earnings to the period between

October 20, 2002, and November 2, 2002. It informed the respondent that the amount to be paid by the monitor would be applied towards repayment of the overpayments of benefits that he had received.

[17] The applicant exercised his right to appeal to the Board of Referees, where his case came to represent former colleagues in the same situation.

[18] On July 4, 2008, the Commission reminded the monitor that, under subsection 46(1) of the Act, it had to deduct the \$118,076 that it was about to pay as claims for earnings and remit it to the Receiver General of Canada, since this amount was to serve as repayment of overpayments of benefits.

[19] Relying on section 46 of the Act, the Board of Referees dismissed the applicant's appeal in docket A-353-09. It determined that the Commission could allocate the \$1,399.40 paid by the monitor, despite the fact that more than 36 months had passed. It also found that the allocation of the amount had to be made from the date of the termination of employment, October 7, 2002.

[20] The applicant and those he represented then appealed to Umpire Hurtubise on the basis of two grounds. The Board of Referee's interpretation of section 46 in relation to section 52 was inconsistent with recent case law. Secondly, the allocation date chosen by the Board of Referees was contrary to the Act and should have been the date on which the plan of arrangement had been sanctioned, December 20, 2004.

[21] In docket A-354-09, the Board of Referees determined that the \$1,000 was paid to the applicants for medical expenses incurred, not services rendered. Consequently, it did not constitute earnings. The Commission's appeal was also heard by Umpire Hurtubise.

[22] Lastly, docket A-355-09 completes the range of varying opinions. The Board of Referees was of the view that the section 52 limitation period applied to section 46 and that the allocation of amounts could be made only as of the date on which the plan of arrangement with creditors had been sanctioned. The Commission's subsequent appeal was also heard by Umpire Hurtubise.

[23] The appeals before the Umpire met with limited success. The Umpire accepted the applicant's argument regarding the allocation period, that is, that it had to begin on December 20, 2004. However, as regards the section 52 limitation period, he decided that it does not apply to the recovery of debts in section 46 of the Act. He also allowed the Commission's appeal regarding the \$1,000. He held that it constituted earnings within the meaning of the Regulations.

[24] This now leads me, following that long but necessary account of the facts, to the analysis of the Umpire's decision and the parties' submissions.

#### **Analysis of the Umpire's decision and parties' submissions**

[25] The issue of the allocation period of earnings should be disposed of so as to avoid any ambiguity from the outset. The applicant successfully argued that the period had to correspond to the date on which the plan of arrangement was sanctioned. He can therefore not appeal that

favourable conclusion that he sought and obtained. The respondent chose not to challenge it, so the decision on the issue is *res judicata*.

[26] Nonetheless, I understand that the applicant is not attacking that conclusion but, rather, the validity of the notice that he was given by the Commission under section 46 of the Act, which, as mentioned above, is allegedly invalid because it was initially issued for an allocation period different from the one subsequently determined by the Umpire.

[27] However, to better understand my conclusion on this point, it is best to defer the analysis until after that of the relationship between section 46 and section 52.

**Does the section 52 limitation period apply to section 46?**

[28] The answer to the question above is simple and unequivocal: no, because Parliament, which is never supposed to speak in vain, expressly set out in section 47 of the Act a specific limitation period for the amounts payable under section 46. Section 47 includes section 46, but not section 52, in its list, whereas section 52 makes no reference to section 46. However, an explanation of the fundamental distinction between the two sections should shed some light on the scope and subsequent application of each section.

[29] Section 46 involves a situation that is quite different from that of section 52. It allows the Commission to meet the immediate needs of claimants who have lost their employment because of their company's precarious financial situation, among other reasons, even if it knows that, in

the bankruptcy or the arrangement proposal with creditors, the claimants will eventually be paid the amounts owing to them. It is well known that bankruptcy proceedings or the drafting of a proposal may take a long time and that claimants have a pressing need to support their family or themselves.

[30] That is why section 46 states that, so long as the claimant qualifies for benefits (see for example section 7 of the Act) and is not disentitled to be paid benefits (see for example section 18 of the Act), which was true in the applicants' case, the Commission will pay benefits, knowing that it will be able to recover the overpayments when the earnings that were payable, but deferred, will be paid.

[31] Sections 45, 46 and 47 respect the goal and objectives of the Act: to offer material support to those affected by the loss of their employment. The Act provides for a contributory insurance plan. It does not seek to, allow, or encourage the receiving or withholding of overpayments of benefits. It must be kept in mind that workers and employers bear the cost of the employment insurance system. The program is neither intended to nor administered in such a manner as to enrich certain claimants to the detriment of other claimants and the workers and employers financing it. It is appropriate to quote from this Court's decision in *Attorney General of Canada v. Walford*, A-263-78, December 5, 1978. At page 4 of the reasons, Justice Pratte writes the following:

The *Unemployment Insurance Act, 1971* sets up an insurance scheme under which the beneficiaries are protected against the loss of income resulting from unemployment. The purpose of the scheme is obviously to compensate unemployed persons for a loss; it is not to pay benefits to those who have not suffered any loss. Now, in my view, the unemployed person who has been

compensated by his former employer for the loss of his wages cannot be said to suffer any loss. A loss which has been compensated no longer exists. The Act and Regulations must, therefore, in so far as possible, be interpreted so as to prevent those who have not suffered any loss of income from claiming benefits under the Act.

[32] If, to achieve the objectives of the Act, the Commission should be authorized to pay benefits to claimants in need, knowing that the claimants will be paid earnings later and that an allocation would then be made for the purposes of the Act, these claimants should also repay any overpayments that they may have received. That was Parliament's goal in enacting section 46 and its reason for stipulating a 72-month limitation period for the recovery of debts, knowing that there are often long delays in court proceedings, negotiations of agreements in court or out of court, and bankruptcy compromises and proposals.

[33] However, section 52 of the Act adopts a whole other premise, perspective and purpose altogether. As was already mentioned, it authorizes the Commission to reconsider a claim for benefits, whereas sections 45 and 46 involve only the recovery of overpayments.

[34] In support of their submission that the limitation period for recovering overpayments is that of section 52, the applicants rely on, among other things, the recent judgment of this Court in *Braga v. Canada (Attorney General)*, 2009 FCA 167.

[35] In that case, Justice Ryer, at paragraph 40 of his reasons, states that the ability of the Commission to reconsider its decisions to grant benefits is somewhat analogous to provisions in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). Of particular relevance, in his opinion—and I



agree—are subsections 52(2) and (3) of the Act. I reproduce them again, underlining the noteworthy passages:

## Decision

**52.** (2) If the Commission decides that a person  
 (a) has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or  
 (b) has not received money for which the person was qualified and to which the person was entitled,  
 the Commission shall calculate the amount of the money and notify the claimant of its decision and the decision is subject to appeal under section 114.

## Amount repayable

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,  
 (a) the amount calculated is repayable under section 43; and  
 (b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

## Décision

**52.** (2) Si elle décide qu'une personne a reçu une somme au titre de prestations pour lesquelles elle ne remplissait pas les conditions requises ou au bénéfice desquelles elle n'était pas admissible, ou n'a pas reçu la somme pour laquelle elle remplissait les conditions requises et au bénéfice de laquelle elle était admissible, la Commission calcule la somme payée ou payable, selon le cas, et notifie sa décision au prestataire. Cette décision peut être portée en appel en application de l'article 114.

## Somme remboursable

(3) Si la Commission décide qu'une personne a reçu une somme au titre de prestations auxquelles elle n'avait pas droit ou au bénéfice desquelles elle n'était pas admissible :

a) la somme calculée au titre du paragraphe (2) est celle qui est remboursable conformément à l'article 43;

b) la date à laquelle la Commission notifie la personne de la somme en cause est, pour l'application du paragraphe 47(3), la date où la créance a pris naissance.

[Emphasis added]

[36] If a parallel can be drawn between the power of the Commission under section 52 and that of the Minister of National Revenue (Minister) to issue a re-assessment, it is important not to

overlook the criteria for the Commission's exercise of that power under section 52, just as one would take into account the conditions governing the Minister in the exercise of his power to re-assess a taxpayer.

[37] An analysis of the criteria at section 52 reveals its true purpose and distinguishes its scope from that of section 46. Section 52 involves a situation of fact and law unlike that of section 46. It is useful to recall that the obligation at section 46, imposed on an employer or any other person, arises whenever a duly qualified claimant is paid benefits that later turn out to be over and above those to which the claimant was unequivocally entitled.

[38] However, the section 52 power to reconsider is exercised whenever the claimant did not qualify or was not entitled to receive benefits. Recovering benefits paid to a claimant who was disentitled to them differs legally and factually from recovering overpayments of benefits made to a claimant who was entitled to them. The first case refers not to overpayments of due and payable benefits but, rather, to undue appropriations, made in good or bad faith, depending on the circumstances.

[39] Again in the first case, the Commission is unaware that the benefits were not owed, otherwise it would not have paid them. In the second case, that of section 46, the Commission is acting in anticipation or knows that it is paying more than what is owed, but it does so in order to help the claimant, knowing that the employer must eventually remit to the Receiver General the earnings owed to the claimant, so that an allocation of the amounts may then be made according to the Act.

[40] In one case involving the application of section 52, a claimant may have acted and received benefits in good faith, but it is later determined that he or she did not qualify under the Act or was disentitled to receive those benefits. In the public interest, Parliament has provided for the reconsideration of benefit claims. However, in the interest of making fair and final decisions, it required that the reconsideration occur within 36 months of the time the benefits were paid or became payable. Nevertheless, in cases of bad faith manifested by false or misleading statements, Parliament extended the period to 72 months.

[41] There is no mention of good or bad faith in section 46, which must be read together with section 45, which refers to a claimant's obligation to repay overpayments of benefits upon receiving deferred earnings.

[42] Lastly, unlike section 52, section 46 does not provide for the reconsideration of initial claims for benefits. Initial claims remain as they were made by the claimant, and received and accepted by the Commission. The application of sections 45 and 46 merely gives rise to the allocation of amounts paid, and payments to the claimant or recovery of overpayments, as the case may be. To quote Umpire Cullen in CUB 37418, Pogue, June 3, 1996, and replacing the section numbers, section 45 "is not addressed to the claimant who is disentitled or disqualified from receiving benefits". It "speaks to the claimant who is in good standing with the Commission, but simply has received too many benefits". Section 45 "serves no adjudicative function comparable" to section 52. "To the contrary, it is more of an administrative provision,

that allows for corrections in calculations of benefits to be made. For this reason, [subsection 52(1) is not] necessary to invoke section [45]”. This is also the case for section 46.

**Prior case law**

[43] The parties referred the Court to earlier decisions in support of their respective submissions.

[44] The respondent relies on *Wheaton v. Canada Employment and Immigration Commission*, A-1780-83, May 23, 1984 (FCA), and *Brulotte v. Attorney General of Canada*, 2009 FCA 149. Although the second decision involves the allocation, under section 36 of the Regulations, of earnings later paid by a trustee in bankruptcy, *Wheaton*, despite its succinctness, deals specifically with the issue before this Court. In no uncertain terms, this Court unanimously held that the limitation period at section 52 (section 57 at the time) does not apply to a matter within section 46 (section 52 at the time).

[45] The applicants rely on *Landry*, CUB 63468, upheld by this Court; *Canada (Attorney General) v. Landry*, 2006 FCA 184; *Braga v. Canada (Attorney General)*, 2009 FCA 167; and, by analogy, *Simard v. Canada (Attorney General)*, 2001 FCA 270.

[46] These decisions can, for a number of reasons, be distinguished from *Wheaton* and *Brulotte*. I will refer to only one that, in my opinion, is dispositive. None of these decisions involve the interpretation and application of sections 45 and 46. It is true that, in *Braga*, above,

this Court found that the ability of the Commission to reconsider its decisions is found in section 52 of the Act: see paragraph 40 of the reasons for decision.

[47] However, as mentioned above, there are conditions for the exercise of this ability, and section 52 involves the reconsideration of initial claims for benefits, and not simply the allocation of newly received sums, as is the case in sections 45 and 46.

[48] Moreover, no mention was made of this Court's earlier decisions, either *Wheaton* or *Brulotte*, or Umpire Cullen's decision in *Pogue*. There is no doubt in my mind that, had these decisions been brought to the panel members' attention, a different legal approach would have been adopted in the statement at paragraph 40 of *Braga*.

[49] I agree with Umpire Cullen in *Pogue*, above, that the section 45 and 46 calculations can be made at any time when justified by one of the reasons listed in those sections: see page 3 of the reasons for decision. "Calculations" must also be taken to mean the allocation on which they are based.

[50] Overall, the Umpire did not err in concluding that the section 52 limitation period does not apply to the recovery of debts under section 46.

**Did the Umpire err in law in not rescinding the notice issued under section 46 of the Act for an allocation of earnings beginning on October 7, 2002, even though he determined that the allocation had to be made in the week of December 20, 2004?**

[51] The applicants submit that, in light of his conclusion on the allocation period for the sums received, the Umpire should have rescinded the Commission's notice stipulating a different period.

[52] No application for review was made of the Umpire's decision on this issue, and the Commission intends to abide by it and make a reallocation.

[53] The nullity of the notice is not a ground of appeal that was raised before the Board of Referees or the Umpire: see for example in docket A-355-09, Respondent's Record, at pages 93 to 95 and 142 to 146, the notices of appeal. However, the applicants state that it is a logical outcome of the Umpire's decision amending the date of the allocation period.

[54] With respect, I do not think that the validity of the notice issued under section 46 is dependent on the correctness of the allocation period stated therein. The purpose of the notice is to inform claimants that earnings owed to them by their employer will be deducted from the benefits that they have received and to indicate the allocation period for these earnings. Recipients are asked to contact the Commission to make changes or request further information. Lastly, they are told that they may appeal that decision of the Commission within 30 days of receiving the notice: see for example in docket A-354-09, Respondent's Record, Volume 1, at page 92, the notice that Mr. Chartier received.

[55] The notice is procedural and achieves its purpose once it has been issued and delivered to the recipient. It is the Commission's decision that forms the subject matter and substance of the appeal. Contrary to what was stated in the notice, the applicants demanded that the allocation be made as of the date of the sanctioning of the plan of arrangement with creditors, and they were successful. Clearly, the notice to the applicants effectively served its purpose of imparting information. Now that they have what they wanted, the applicants are in no position to seek nullity.

[56] In conclusion, I see no merit in this ground of attack.

**Did the Umpire err in intervening to restore the Commission's decision that the \$1,000 constituted earnings within the meaning of subsection 35(2) of the Regulations?**

[57] Whether the \$1,000 received constitutes earnings within the meaning of the Regulations is a question of mixed fact and law. It involves determining for what purpose the amount was paid and applying the definition of "earnings" to those facts. The standard of reasonableness applies to the Board of Referees' decision: see *Budhai v. Canada (Attorney General)*, 2002 FCA 298, at paragraph 22.

[58] The Umpire was right to intervene and reverse this aspect of the Board of Referees' decision. As the Umpire properly noted, it appears at section 1(ff) of the modified plan of arrangement that the \$1,000 was paid as severance pay, as compensation in lieu of notice, or for the loss or reduction of benefits. There is no doubt that the applicants were paid this amount

because they [TRANSLATION] “worked or had worked” for the company, as the Umpire stated. It constitutes earnings within the meaning of the Regulations.

**Conclusion**

[59] For these reasons, I would dismiss the applications for judicial review in each case with costs, limited to one set of costs for the hearing, given that all three cases were heard jointly.

“Gilles Létourneau”

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J.A.

“I agree.  
M. Nadon J.A.”

“I agree.  
J.D. Denis Pelletier J.A.”

Certified true translation  
Tu-Quynh Trinh



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKETS:** A-353-09, A-354-09 and A-355-09

**STYLE OF CAUSE:** RODRIGUE CHARTIER ET AL. v.  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** May 19, 2010

**REASONS FOR JUDGMENT BY:** LÉTOURNEAU J.A.

**CONCURRED IN BY:** NADON J.A.  
PELLETIER J.A.

**DATED:** June 10, 2010

**APPEARANCES:**

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