

[TRANSLATION]

Citation: *M. R. v. Canada Employment Insurance Commission*, 2013 SSTGDEI 4

Consolidated appeals Nos.: GE-13-412  
GE-13-413  
GE-13-414  
GE-13-415  
GE-13-417  
GE-13-418  
GE-13-419

BETWEEN:

**M. R.**

Appellant  
Claimant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance**

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SOCIAL SECURITY TRIBUNAL MEMBER: Jean-Philippe Payment

HEARING DATE: October 16, 2013

TYPE OF HEARING: In Person

DECISION: Appeal allowed in part

## **PERSONS IN ATTENDANCE**

[1] The claimant was present at the hearing in person at the Service Canada Centre in downtown Montreal.

## **DECISION**

[2] The Tribunal allows in part the claimant's appeal regarding the reconsideration of the claim for benefits and finds that the Commission used its discretion judiciously in that file.

[3] The Tribunal allows in part the claimant's appeal concerning the allocation of earnings and finds that, even though the farm's revenues did not seem to be paid to him, they constitute earnings within the meaning of the Act and the case law.

[4] The Tribunal allows the claimant's appeal concerning disentitlement for operating a business and finds that the Commission did not submit any evidence that shows that the claimant operates a farming business within the meaning of section 30 of the *Employment Insurance Regulations* (the Regulations).

## **INTRODUCTION**

### *Methodology*

[5] The Tribunal would like to explain the methodology used in drafting the decision to make it easier to read. For this appeal consolidated by the Tribunal, each part of this decision, namely, review of the facts, review of the evidence, review of the arguments and analysis, will first be discussed in general terms to group together the common elements of each file under the heading "common elements". Second, each of the above-listed parts of this decision will contain distinctive elements of each benefit period in chronological order under the headings "First benefit period – 2006-2007", "Second benefit period – 2007-2008", etc.

*First benefit period – 2006-2007 (GE-13-418)*

[6] The claimant filed an initial claim for Employment Insurance benefits on November 1, 2006 (Exhibit GD3-11). The Canada Employment Insurance Commission (the Commission), granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-13 to 48) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the benefit periods covering 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013. That decision of the Commission dated April 19, 2013 (Exhibits GD3-47 and 48) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibits GD3-57 and 58). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Second benefit period – 2007-2008 (GE-13-417)*

[7] The claimant filed an initial claim for Employment Insurance benefits on November 11, 2007 (Exhibit GD3-11). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-23 to 46) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-68) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibits GD3-80 and 81). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Third benefit period – 2008-2009 (GE-13-419)*

[8] The claimant filed an initial claim for Employment Insurance benefits on November 11, 2008 (Exhibit GD3-12). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-20 to 68) found the claimant to not be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-69) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibit GD3-69 and 70). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Fourth benefit period – 2009-2010 (GE-13-415)*

[9] The claimant filed an initial claim for Employment Insurance benefits on November 20, 2009 (Exhibit GD3-12). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-20 to 69) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-60) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibit GD3-63 and 64). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Fifth benefit period – 2010-2011 (GE-13-414)*

[10] The claimant filed an initial claim for Employment Insurance benefits on November 15, 2010 (Exhibit GD3-12). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-15 to 47) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-48) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibit GD3-61 and 62). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Sixth benefit period – 2011-2012 (GE-13-413)*

[11] The claimant filed an initial claim for Employment Insurance benefits on November 10, 2011 (Exhibit GD3-13). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-16 to 49) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-50) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibit GD3-63 and 64). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

*Seventh benefit period – 2012-2013 (GE-13-412)*

[12] The claimant filed an initial claim for Employment Insurance benefits on November 14, 2012 (Exhibit GD3-13). The Commission granted him Employment Insurance benefits, but after a subsequent investigation by the Commission's Integrity Services (Exhibits GD3-15 to 50) found the claimant not to be entitled to Employment Insurance benefits because the claimant had not reported his business earnings during the 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 and 2012-2013 benefit periods. That decision of the Commission dated April 19, 2013 (Exhibit GD3-53) resulted in an overpayment. In its revised decision dated June 19, 2013, the Commission confirmed its decision in its entirety (Exhibit GD3-51 and 52). The claimant is appealing to the Tribunal from the Commission's revised decision dated June 19, 2013 (Exhibits GD2-2 to 4), confirming the original decision to disentitle him, to allocate his business's earnings and to extend the investigation to seventy-two months before the benefits were paid or became payable.

#### **TYPE OF HEARING**

[13] The hearing was held in person for the reasons stated in the notice of hearing dated September 26, 2013.

#### **ISSUES**

[14] The Tribunal must determine whether the Commission was justified under section 52 of the *Employment Insurance Act* (the Act) in reconsidering the claimant's claim within thirty-six months after the benefits had been paid or had become payable (subsection 52(1) of the Act), in deciding that the claimant did not meet the conditions required to receive benefits and in notifying him of it (subsection 52(2) of the Act), in calculating the amount repayable by the claimant and notifying him of it (subsection 52(3) of the Act), and in having seventy-two months in which to reconsider the claim if, in its opinion, the statement in support of the claim is false or misleading (subsection 53(5) of the Act).

[15] The Tribunal must determine whether the Commission was justified in imposing disentitlement on the claimant under sections 9 and 11 of the Act and section 30 of the Regulations.

[16] The Tribunal must determine whether the Commission was justified in allocating the earnings from the claimant's business under sections 35 and 36 of the Regulations.

## **APPLICABLE LAW**

### *Reconsideration of the claim for benefits*

[17] Subsection 52(1) of the Act sets out that, despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within thirty-six months after the benefits have been paid or have become payable.

[18] Subsection 52(2) of the Act sets out that 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, or has not received money for which the person was qualified and to which the person was entitled, the Commission calculates the amount paid or to pay, depending on the case, and notifies the claimant of its decision.

[19] Subsection 52(3) of the Act sets out that, 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 in regard to subsection (2) is the one 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.

[20] Subsection 52(5) sets out that, if, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has seventy-two months within which to reconsider the claim.

[21] *Canada (Attorney General) v. Laforest* (A-607-87) explains that the Commission has the authority to reconsider a claim, to consider that the benefits were paid incorrectly and to request a repayment, if applicable.



[22] *Arsenault et al. v. Canada (Attorney General)* (2006 FCA 12) explains that the Commission has the power to reconsider a claim after thirty-six months if it believes that false or misleading statements have been made.

[23] *Canada (Attorney General) v. Falardeau* (A-396-85) states that the onus is on the claimant has to prove his or her benefit entitlement in all cases.

[24] *Canada (Attorney General) v. Chinook* (A-117-97) explains that a claimant has the duty to prove that he or she meets the requirements for receiving benefits throughout the entire period that he or she is receiving them.

[25] *Brière v. Canada (Employment and Immigration Commission of Canada and Attorney General (mis-en-cause))* (A-637-86) explains that the onus of proof is on the Commission to explain why it is reconsidering and extending its application of the reconsideration provisions and sets up the four obligations that the Commission must fulfill for the reconsideration of a claim within the time limit prescribed by the Act to be valid:

1. to decide whether or not to exercise its discretion to reconsider;
2. to make the decision;
3. to calculate the amount to be paid or to be recovered;
4. to notify the claimant of the decision.

#### *Disentitlement for operating a business*

[26] Section 9 of the Act sets out that, when an insured person meets the prescribed requirements, benefits are payable to the person for each week of unemployment that falls in the benefit period.

[27] Section 11 of the Act sets out that a week of unemployment for a claimant is a week in which the claimant does not work a full working week.

[28] Section 30(1) of the Regulations sets out that, where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

[29] Section 30(2) of the Regulations indicates that where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded to have worked a full working week.

[30] *Canada (Attorney General) v. Jouan* (A-366-94) but, more recently, *Martens v. Canada (Attorney General)* (2008 FCA 240), and section 30(3) of the Regulations indicate the circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2):

- (a) the time spent;
- (b) the nature and amount of the capital and resources invested;
- (c) the financial success or failure of the employment or business;
- (d) the continuity of the employment or business;
- (e) the nature of the employment or business; and
- (f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[31] However, the most important factor to consider is the time spent on the business: *Fatt v. Canada (Attorney General)* (A-406-94).

[32] *Lemay v. Canada (Attorney General)* (A-662-97) explains that it is for the claimant who operates a business to rebut the presumption that he works a full working week.

[33] *Canada (Attorney General) v. D'Astoli* (A-999-96) explains that a claimant can hold insurable employment while holding shares in a business.

#### *Allocation of earnings*

[34] Subsection 35(1) of the Regulations defines “income” as any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.

[35] Subsection 35(1) of the Regulations defines “self-employed person” as having the same meaning as in paragraph 30(5)(a) of the Regulations, which defines it as an individual who is or was engaged in a business.

[36] Paragraph 35(10)(b) of the Regulations indicates that, in the case of a claimant who is self-employed in farming, the gross income from that self-employment, including any farming subsidies the claimant receives under any federal or provincial program, remaining after deducting the operating expenses, other than capital expenditures, incurred in that self-employment.

[37] Subsection 36(6) of the Regulations sets out that, the earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions shall be allocated to the weeks in which those services are performed.

[38] *Canada (Attorney General) v. Vernon* (A-597-94) explains that, as a term, “income” is not defined in the Act. However, earning in the broad sense means everything that a worker earns as a pecuniary profit from his or her current or past work.

[39] *Viel v. Canada (Attorney General)* (2001 FCA 9) explains that, during unemployment, actually receiving income from the operation or business is unnecessary, as the mere right to receive such income is sufficient.

[40] *Canada (Attorney General) v. Oram* (A-676-93) states that deferred amounts of money, that is, amounts that were earned but not paid at the time they were earned, are earnings.

[41] *Lanuzo v. Canada (Attorney General)* (2005 FCA 324) explains that an error in the amounts paid as benefits by the Commission does not exempt a claimant from repaying an overpayment.

[42] *Canada (Attorney General) v. Mosher* (2002 FCA 355) confirms that neither the Board of Referees nor the Umpire has jurisdiction or discretion to compel the Commission to write off an overpayment.

## **EVIDENCE**

[43] The evidence on the record is as follows:

### *Common elements*

- (a) Registration of a business with the Registraire des entreprises du Québec, on which the claimant is the second shareholder and Vice-President (Exhibit GD3-15 to 18);
- (b) The claimant holds 20% of the shares in the business (Exhibit GD3-23);
- (c) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibits GD3);
- (d) A letter from the Commission dated June 19, 2013, indicating that the original decision has been confirmed (Exhibits GD3);

### *First benefit period – 2006-2007 (GE-13-418)*

- (e) A claim for benefits filed on November 1, 2006 (Exhibit GD3-11);

(f) Financial statements for the business for the fiscal year ending on November 30, 2007 (Exhibit GD3-27 to 46);

*Second benefits period – 2007-2008 (GE-13-417)*

(g) A claim for benefits filed on November 11, 2007 (Exhibit GD3-11);

(h) Financial statements for the business for the fiscal year ending on November 30, 2007 (Exhibit GD3-27 to 46);

(i) Financial statements for the business for the fiscal year ending on November 30, 2008 (Exhibit GD3-47 to 67);

(j) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-68);

(k) A letter from the Commission dated April 19, 2013, indicating that the Commission does not consider the claimant to have been unemployed for that period at issue (Exhibit GD3-70);

*Third benefit period – 2008-2009 (GE-13-419)*

(l) A claim for benefits filed on November 14, 2008 (Exhibit GD3-12);

(m) Financial statements for the business for the fiscal year ending on November 30, 2008 (Exhibit GD3-28 to 48);

(n) Financial statements for the business for the fiscal year ending on November 30, 2009 (Exhibit GD3-49 to 68);

(o) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-69);

(p) A letter from the Commission dated April 19, 2013, indicating that the Commission does not consider the claimant to have been unemployed for that period at issue (Exhibit GD3-72);

*Fourth benefit period – 2009-2010 (GE-13-415)*

- (q) A claim for benefits filed on November 20, 2009 (Exhibit GD3-12);
- (r) Financial statements for the business for the fiscal year ending on November 30, 2009 (Exhibits GD3-28 to 47);
- (s) Financial statements for the business for the fiscal year ending on November 30, 2010 (Exhibits GD3-48 to 59);
- (t) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-60);
- (u) A letter from the Commission dated April 19, 2013, indicating that the Commission does not consider the claimant to have been unemployed for that period at issue (Exhibit GD3-63);

*Fifth benefit period – 2010-2011 (GE-13-414)*

- (v) A claim for benefits filed on November 15, 2010 (Exhibit GD3-12);
- (x) Financial statements for the business for the fiscal year ending on November 30, 2010 (Exhibit GD3-28 to 48);
- (y) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-48);
- (z) A letter from the Commission dated April 19, 2013, indicating that the Commission does not consider the claimant to have been unemployed for that period at issue (Exhibit GD3-51);

*Sixth benefit period – 2011-2012 (GE-13-413)*

- (aa) A claim for benefits filed on November 10, 2011 (Exhibit GD3-13);
- (ab) Financial statements for the business for the fiscal year ending on November 30, 2011 (Exhibit GD3-29 to 36);
- (ac) Income statement for the business between December 1, 2011 and November 30, 2012 (Exhibit GD3-37 to 49);

(ad) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-50);

(ae) A letter from the Commission dated April 19, 2013, indicating that the Commission does not consider the claimant to have been unemployed for that period at issue (Exhibit GD3-53);

*Seventh benefit period – 2012-2013 (GE-13-412)*

(af) A claim for benefits filed on November 14, 2012 (Exhibit GD3-13);

(ag) Financial statements for the business for the fiscal year ending on November 30, 2011 (Exhibit GD3-30 to 37);

(ah) Income statement for the business between December 1, 2011 and November 30, 2012 (Exhibit GD3-38 to 50);

(ai) A letter from the Commission dated April 19, 2013, indicating that income was adjusted for the benefit period at issue (Exhibit GD3-51);

(aj) A letter from the Commission dated April 19, 2013, indicating that the Commission considers the claimant to have been a self-employed farmer during the farming season (Exhibit GD3-53);

[44] The evidence collected at the hearing is as follows:

(a) The claimant brought no new evidence to the hearing.

**SUBMISSIONS BY THE PARTIES**

[45] The claimant submitted the following:

*Common elements*

(a) He was not disputing the Commission's data (hearing);

- (a) He considers that he does not have to repay the overpayment because the government should have told him that he had to report his business earnings (hearing);
- c) He will work wherever work is needed (the Commission's interview with the claimant on December 17, 2012);
- (d) The entire harvest is sold immediately and there are no revenues during the off-season (the Commission's interview with the claimant on December 17, 2012);
- (e) He is paid for hours worked (the Commission's interview with the claimant on December 17, 2012);
- (f) He works in snow removal in the off-season (the Commission's interview with the claimant on December 17, 2012);
- (g) They have grown field soybean for the last two (2) years and they sell some outside of the high season (the Commission's interview with the claimant and his mother on January 30, 2013);
- (h) They do not grow Christmas trees, but only sell them (the Commission's interview with the claimant and his mother on January 30, 2013);
- (i) He disagrees with the Commission's method and was never informed that he had to have reported his business income since 2007 (the Commission's interview with the claimant on February 7, 2013);
- (j) He had never received a letter advising him to report his business income (the Commission's interview with the claimant on February 7, 2013).

[46] The respondent submits the following:

*Common elements on the allocation of earnings*

- (a) Section 35 of the Regulations defines "income" as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any



other person, including a trustee in bankruptcy”. It also specifies the type of income that is considered earnings (Exhibits GD4).

(b) Section 36 of the Regulations states how those earnings are to be allocated, that is, to the week during which these earnings are considered to have been earned by the claimant (Exhibits GD4).

(c) Once it is established that the claimant is a self-employed worker, any income he earns from his self-employment is earnings. There is no provision that makes it possible to establish that part of the self-employment income is from the investment that the claimant made in the business regardless of whether the claimant is self-employed and operates his own business as a sole proprietor, a partner or within a corporation (Exhibits GD4).

(d) In this case, the claimant received money as net profits from the Ferme Clément Roy Inc (Exhibits GD4).

(e) That money constitutes earnings under paragraph 35(10)(c) of the Regulations and must be allocated under subsection 36(6) of the Regulations (Exhibits GD4).

(f) The Commission made the following calculations to determine the amount to be allocated for snow removal and sale of Christmas trees (Exhibits GD4-4):

$$\text{Net profit} / \text{Products total} = X\%$$

Then

(total revenue from off-season activity \* X%) \* claimant's share = revenue attributable to the claimant

As such, for the

first benefit period – 2006-2007 (GE-13-418): \$3,326.30 (Exhibit GD4-5);

second benefit period – 2007-2008 (GE-13-417): \$3,326.30, \$176.50, \$3,836.20 and \$187.36 (Exhibit GD4-6);

third benefit period – 2008-2009 (GE-13-419): \$3,836.20, \$176.50, \$227.74, \$5,724.93 (Exhibit GD4-6);

fourth benefit period – 2009-2010 (GE-13-415); \$5,724.93, \$227.74, \$75.59 and \$1,546.28 (Exhibit GD4-6);

fifth benefit period – 2010-2011 (GE-13-414): \$1,546.28, \$98.47, \$2,427.94 and \$75.59 (Exhibit GD4-6);

sixth benefit period 2011-2012 (GE-13-413): \$2,427.94 and \$98.47 (Exhibit GD4-5);

seventh benefit period – 2012-2013 (GE-13-412): \$2,427.94 and \$98.47 (Exhibit GD4-5).

(g) In this case and with the facts on the record, it has no other choice but to apply the net profits to the weeks relating to the snow removal contract, that is, from November 1 to March 31 of each year. In addition, the net profits from the sale of Christmas trees must be applied to the period in which services were rendered, namely, the last week of November and first two (2) weeks of December of each year (Exhibits GD4-7).

*Common elements for reconsidering the claim for benefits*

(h) Reconsideration is the means specified in the *Employment Insurance Act* to recognize the fact that it may be necessary to retroactively modify or to correct a decision concerning a benefit claim in order to ensure that claimants receive only the benefits they are legally entitled to (Exhibits GD4 except in GE-13-412).

(i) When a claimant has not received the benefits to which he is entitled or has received benefits to which he was not entitled, section 52 of the Act stipulates that in the 36 months after the benefits have been paid or would have been payable, the Commission can reconsider any claim regarding these benefits (Exhibits GD4-4).

(j) Since it found that the claimant made a false or misleading statement, knowingly or unknowingly, the period for reconsidering the claim is extended to 72 months after the benefits have been paid or would have been payable (Exhibits GD4-4).

(k) Based on the case law, it does not need to prove that the claimant knowingly made a false or misleading representation or statement with intent to defraud (Exhibits GD4-4).

(l) In this case, when the claimant filed his claim for benefits, he never mentioned that he was the owner of or a partner in a business (Exhibits GD4-4).

(m) He also indicated that he was not reporting his farming income in his tax returns (Exhibit GD4-4).

(n) It considers that, because of the false or inaccurate statements, it may retroactively correct the statements (Exhibits GD4-4).

(o) It reconsidered the claim on April 19, 2013. The Commission was therefore within the time limit of 36 months (at all times) or of 72 months (when it believed there were false statements) prescribed by the Act for doing so (Exhibits GD4-5).

*Common elements for disentitlement for operation of a business (except for the 2006-2007 period - GE-13-418)*

(p) A person who operates a farm is presumed to work a full working week unless he can show that he is engaged in his farming activities to such a minor extent that a person would not normally rely on them as his primary means of livelihood (Exhibit GD4-6).

(q) To determine whether the claimant's farming business is operated to such a minor extent, the Commission must apply the objective test under subsection 30(2) of the Regulations to the six (6) factors in subsection 30(3) of the Regulations, within the context of the claimant's farming activities during the benefit period. The time spent and the claimant's willingness to seek and immediately accept alternate employment are the two most important factors (Exhibit GD4-6).

(r) The Commission considers that it has no information in support of the six (6) factors that can show that the claimant operates a business full time. (Exhibit GD4-6).

(s) The Commission recommends to the Tribunal to rescind the disentitlement imposed for the period when the business was operated (Exhibit GD4-6).

(t) If the recommendation is accepted by the Tribunal, the overpayment will be adjusted when the appeal is returned (Exhibit GD4-6).

*Elements specific to the sixth and seventh benefit periods – 2011-2012 (GE-13-413 – Allocation of earnings*

(u) The amount owing was determined for allocation based on the financial statements ending on November 30, 2011 (Exhibit GD3-30 to GD3-37 for the two periods).

(v) For the fiscal year ending on November 30, 2012, the financial statements were not produced because, at the time of the investigation, they were not available (Exhibits GD4-4 for the two periods).

(w) It could not use the income statement from December 1, 2011 to November 30, 2012 as it did not contain all of the information needed (Exhibits GD4-4 for the two periods).

(x) The Commission could not obtain the details of income and expenses starting from December 1, 2012; it therefore used financial statements ending on November 30, 2011, for the allocation of earnings (Exhibits GD4-4 and 5 for the two periods).

(y) An error was made in determining the overpayment for the period during which the claimant performed snow removal and sold Christmas trees (Exhibit GD4-5 for the two periods).

(z) If the amendment is accepted by the Tribunal, the overpayment will be adjusted when the appeal is returned (Exhibits GD4-5 for the two periods).

**ANALYSIS**

*Reconsideration of the claim for benefits*

[47] Subsection 52(1) of the Act provides that the Commission may reconsider a claim for benefits within thirty-six months after the benefits have been paid. In addition, the Commission must, under subsection 52(2) of the Act, calculate the amount of the money to which the claimant was not entitled after reconsidering the claim or claims and notify the claimant. Subsection 52(3) of the Act sets out that the amounts calculated under subsection 52(2) of the Act are repayable by the claimant at the time when the claimant is notified of it. Subsection 52(5) of the Act enables the Commission to reconsider a claim within seventy-two months if it believes that a false or misleading statement has been made. *Laforest* (A-607-87) explains that the Commission is authorized to reconsider a claim, to consider that benefits have been paid incorrectly and to request a repayment if needed, in accordance with *Arsenault et al* (2006 FCA 12), even after thirty-six months if it believes that a false or misleading statement has been made.

[48] *Brière* (A-637-86) explains that the onus is on the Commission to explain why it is reconsidering and extending its application of the reconsideration provisions. That decision sets up the four obligations the Commission must fulfill in order for the reconsideration of a claim within the time limit prescribed by the Act to be valid:

1. to decide whether or not to exercise its discretion to reconsider;
2. to make the decision
3. to calculate the amount to be paid or to be recovered;
4. to notify the claimant of the decision and of the amount to be paid or recovered.

[49] In its submissions, which are similar on almost all points among the files, the Commission is of the opinion that the claimant has made a false or misleading statement or representation (Exhibits GD4-4) because, in this case, when he filed his claim for benefits, the claimant never mentioned that he was the owner of or a partner in a business (Exhibits GD4-4). The Commission even added that the claimant had not reported his farming income on his tax return (Exhibits GD4-4). For his part, the claimant considers that he does not have to pay the amounts claimed because the government should have told him that he had to report his business earnings (hearing).

He also disagrees with the Commission's methods, that he was never informed that he had to have reported his business income since 2007 and that he never received a letter advising him to report his business earnings (the Commission's interview with the claimant on February 7, 2013).

[50] The Commission considered the claimant's claim on April 19, 2013, and, with the facts provided and undisputed by the claimant that he is a 20% owner of the business, undertook a revision of the benefit periods within the 72 months preceding the claim. That revision was supposed to include only the benefit claims between April 20, 2007, and April 19, 2013. The Act and case law tell us that the Commission may reconsider only the claims that were made within the 72 months preceding April 19, 2013. The period within which the Commission may reconsider a claim must be between April 20, 2007, and April 19, 2013, not between November 6, 2006, and April 19, 2013. The fundamental principle of the Act is based on the fact that, during the benefit period, the claimant must make a claim for each new period and prove that he is willing and able to work every day by searching for work as the Act prescribes in order to eventually find suitable employment. By making a mandatory report, as required by the Act, a claimant makes an Employment Insurance claim within a benefit period. The Commission erred in law in extending its claim to November 6, 2006. It is indeed a benefit period, but not a benefit claim covered by the seventy-two months for which the Commission is entitled to claim amounts paid incorrectly or correctly to the claimant. To this end, the Tribunal relies on *Brière* (A-637-86) and maintains that the Commission has only seventy-two months in order for the reconsideration of the claim within the time limit prescribed by the Act to be valid.

[51] Thus, since April 20, 2007, did the claimant make false or misleading statements, making it possible for the Commission to reconsider these claims for benefits made within the seventy-two-months period? It has been established that the claimant holds 20% of the shares in the business. The claimant stated to the Tribunal at the hearing and previously to the Commission that he does not receive net profits from the business. For the Tribunal, it does not matter whether the claimant receives profits from the business. The claimant's shares in the business entitle him to 20% of the business's net profits, which constitute earnings within the meaning of section 35 of the Act. The fact that the

business's affairs are managed in such a way that the claimant cannot benefit from its profits or that he may have thought that he could not receive them is an aspect of the claimant's personal business on which the Tribunal cannot comment. The Tribunal relies on *Viel* (2001 FCA 9), which states that, during an unemployment period, actually receiving income from the operation or business is unnecessary, as the mere right to receive such income is sufficient.

[52] Therefore, it appears that, in terms of the Act, the claimant has made false statements, knowingly or unknowingly, which means that the Commission had the power to reconsider these earlier claims, which were within the seventy-two-month period. This time limit starts on April 19, 2013, when the Commission finally met the criteria in *Brière* (A-637-86) by notifying the claimant of its decision. The time limit can be no more than seventy-two months and can go back no further than April 20, 2007. The Tribunal therefore notes that the Commission did not entirely exercise its discretion in a judicial manner towards the claimant as it is explained in *Brière* (A-637-86). All amounts calculated as "to be recovered" by the Commission prior to April 20, 2007, may not be recovered by the Commission.

[53] As such, the Commission will have to recalculate the amounts owing starting from April 20, 2007, only because it had decided that it was going to exercise its discretion to reconsider on April 19, 2013. The Commission then made the decision in its letter dated April 19, 2013 (Exhibit GD4) for all of the files, calculated the amount to recover (Exhibit GD3) for all of the files and informed the claimant of its decision in a letter dated April 19, 2013, for all of the files (Exhibit GD4). The claimant's appeal is allowed in part.

*Disentitlement for operation of a business (except for the 2006-2007 period – GE-13-418)*

[54] Subsection 30(1) of the Regulations sets out that, where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week. Subsection 30(1) is the general rule, that is, that self-employed workers

like the claimant are normally subject to it. However, given the claimant's low participation in the management of the business, subsection 30(2) of the Act provides an exception, which the claimant may be subject to. Subsection 30(3) sets out six (6) criteria which can be used to determine whether the claimant's employment or engagement in the operation of a business is described in subsection 30(2).

[55] Subsection 30(2) of the Regulations sets out that, where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[56] Subsection 30(3) of the Regulations and *Jouan* (A-366-94) specify that the circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is to the minor extent described in subsection (2) are

- (a) the time spent;
- (b) the nature and amount of the capital and resources invested;
- (c) the financial success or failure of the employment or business;
- (d) the continuity of the employment or business;
- (e) the nature of the employment or business; and
- (f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[57] However, in *Fatt* (A-406-94), the Court indicated that the most important factor to consider is the time spent on the business.

[58] *D'Astoli* (A999-96) explains that a claimant may hold insurable employment while holding shares in a business. A claimant has the duty to prove that he meets the requirements for receiving benefits throughout the entire period during which he receives



them (*Chinook* (A-117-97)), but a claimant who operates a business also has the onus of rebutting the presumption that he works a full week *Lemay* (A-662-97).

[59] Section 11 defines a week of unemployment as a week in which the claimant does not work a full working week. Section 9 of the Act sets out that, when an insured person meets the requirements prescribed, benefits are payable to the person for each week of unemployment that falls in the benefit period.

[60] With the exception of the file covering 2006 and 2007 (Tribunal Record GE-13-418) in which the issue is not raised by the Commission, the Commission notes that it cannot argue the exercise prescribed by subsection 30(3) of the Act and/or *Jouan* (A-366-94), and asks the Tribunal to allow the claimant's appeal on that point. The Commission does not raise other considerations to this effect.

[61] The claimant stated in an interview with the Commission on December 17, 2012, that he is paid for the hours worked and would work where work is needed. At the hearing, the claimant told the Tribunal that the administration of the business is done jointly by his father and mother and, that, despite his position as vice-president of the business, he controls very little.

[62] If the Tribunal examines the six (6) conditions in subsection 30(3) of the Act, and/or *Jouan* (A-336-94), the Tribunal would find that the claimant operates a business to a minor extent.

#### 30(3)(a) The time spent

[63] The claimant certainly spends time on the business since he works there as an employee. But, within the meaning of this paragraph, he does not spend the kind of time that a businessman might invest in it in order to build his business. It is not very clear whether the claimant has real influence on the direction of the business in which he nonetheless holds 20% of the shares. Therefore, according to the Tribunal, this aspect is inconclusive.

#### 30(3)(b) The nature and amount of the capital and resources invested

[64] The claimant described at the hearing the method used by his father to take advantage of a grant, which resulted in the claimant's entering the company as a shareholder at 20%. However, these amounts are not covered by the benefit periods at issue, but constitute a capital amount belonging to the claimant dating from well before the benefit periods at issue. In light of the various discussions between the Commission and the claimant and his parents, it seems unclear whether the claimant could have invested additional resources in the business, especially since the Tribunal did not have access to the shareholder agreement to verify this. Therefore, this aspect is inconclusive in the Tribunal's opinion.

30(3)(c) the financial success or failure of the employment or business;

[65] The claimant stated that he receives a salary for the hours he works in the business. The claimant stated that he has not received benefits from the net revenue of the business, that he has very little influence on the direction of the business, despite his official position as vice-president. The claimant also stated that he receives no benefits to which he should reasonably be entitled; it seems that the claimant is not entirely connected to the success or failure of the business. Therefore, this aspect is inconclusive in the Tribunal's opinion.

30(3)(d) The continuity of the employment or business

[66] The Tribunal believes that the claimant is dependent on the work provided by the business season after season. The claimant is perhaps privileged in the job since he is a co-shareholder in the business or even the son of the company's owner. However, there are no facts enabling the Tribunal to believe that the claimant has a fairly determinative influence in the business that could have influence over his employment or the business in general. Therefore, this aspect is inconclusive in the Tribunal's opinion.

30(3)(e) The nature of the employment or business;

[67] The claimant stated that he works where the work is needed. Certainly, the claimant may have privileges that other employees do not, but it must be admitted that the claimant seems not to have control over the business's direction. He stated at the

hearing that the business's decisions are made around the tractor and that he does not have the last word on these issues. The admittedly low value of his real weight in the administration of the business leads me to believe that the claimant has no control over the nature of his employment. Therefore, this aspect is inconclusive in the Tribunal's opinion.

30(3)(f) The claimant's intention and willingness to seek and immediately accept alternate employment

[68] The claimant stated that he does some searching for work in the winter. He sells fir trees during the holiday season and removes snows for the farm during snowfalls. However, the Tribunal would be astonished if the claimant could really look for work in the circumstances. Since the Commission conceded this point to the claimant, the Commission did not feel it needed to explain the reasons why it assessed this criterion in the first place. Although the Tribunal doubts the claimant's intention and willingness to seek and immediately accept alternate employment because of the shares the claimant has in the company, nothing in the evidence can rebut the fact that the claimant is, first and foremost, an employee of his own business, without control over its administration and that he has duties to the Employment Insurance program when he files a claim for benefits. Since the Commission is not seeking a further investigation on this point and the claimant states that he seeks employment during the winter, the Tribunal must find that this aspect is inconclusive.

In summary

[69] In summary, the claimant does not satisfy the presumption that he is considered to have worked a full working week. This presumption may be reversed only through an analysis of criteria related to subsections 30(2) and 30(3), which the Commission did not delve into. In its analysis, the Tribunal did not recognize him as a self-employed worker. In the absence of evidence filed by the Commission, the Tribunal maintains that the claimant does not work a full week as provided in section 11 of the Act, and that he meets the requirements under section 9 of the Act. The claimant's appeal regarding disentitlement for operating a business is allowed.

*Allocation of earnings*

[70] Subsection 35(1) of the Regulations defines “income” as any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. However, subsection 35(1) of the Regulations defines “self-employed person” as having the same meaning as in paragraph 30(5)(a) of the Regulations, namely, an individual who is or was engaged in a business. With respect to farming specifically, paragraph 35(10)(b) of the Regulations sets out that, in the case of a claimant who is self-employed in farming, the gross income from that self-employment remaining after some prescribed additions and deductions is considered as earnings. Subsection 36(6) of the Regulations sets out that the earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

[71] As very aptly noted in *Vernon* (A-597-94), the word “income” is not defined in the Act. However, earnings in the broad sense means everything a worker receives as a pecuniary benefit from current or past employment. *Mosher* (2002 FCA 355) confirms that neither the Board of Referees nor the Umpire has jurisdiction or discretion to compel the Commission to write off an overpayment. *Lanuzo* (2005 FCA 324) adds that an error by the Commission does not exempt a claimant from repaying an over-payment.

[72] More specifically relevant to this case, *Oram* (A-676-93) indicates that the amounts of money deferred, that is, amounts earned but unpaid at the time they were earned, are earnings. Finally, *Viel* (2001 FCA 9) explains that, during unemployment, actually receiving income from the operation or business is unnecessary, as the mere right to receive such income is sufficient.

[73] In its submissions, the Commission stated that, once it is determined that the claimant is a self-employed worker, all income that he makes from his self-employment is earnings. It also stated that there is no provision that makes it possible to establish that part of the income from self-employment comes from the investment that the claimant made into the business, regardless of whether the claimant is self-employed

and operates his business as a sole proprietor, partner or as part of a corporation (Exhibit GD4). The Commission went as far as saying that, in this case, the claimant received money as net profits from the Ferme Clément Roy Inc (Exhibits GD4). More specifically, in each benefit period, the Commission calculated, erroneously according to its own words, the net profits within the weeks related to the snow removal contract and Christmas-tree sales (Exhibit GD4-7). The claimant stated that he does not dispute the Commission's data (hearing).

[74] At an interview with the Commission dated December 17, 2012, the claimant stated that the entire harvest is sold immediately and that there are no revenues during the off-season, but that he works in snow removal during the off-season. In another interview with the Commission on January 30, 2013, the claimant stated that they have grown field soybeans for two years and that they sell some outside of the high season and that they do not grow Christmas trees but only sell them.

[75] *Mosher* (2001 FCA 355) clearly indicates that the Tribunal can never reduce an overpayment. Deciding differently would go against the law. Although the claimant raises the fact that the error came from the government and that he was never informed that he had to report his business income, *Lanuzo* (2005 FCA 324) states that an error by the Commission does not exempt a claimant from repaying an overpayment. *Oram* (A-676-93) and *Viel* (2001 FCA 9) state that even the amounts of money earned by the claimant that were not paid to him are considered earnings. And although it is not necessary to receive this income for it to be considered earnings, the mere right to receive such income is sufficient for it to be considered as earnings.

[76] The Commission, in its submissions for all of the files, states that it made an error in calculating the overpayments, recommends that the Tribunal allow the claimant's appeal and that, when the appeal is returned, the files will be revised. The Tribunal consents that the Commission thoroughly review its calculations, as it mentioned in all of the files, for all of the benefit periods at issue to ensure that subsection 36(6) of the Act is complied with integrally. That is to say that the Commission must fairly and diligently apply

subsection 36(6) of the Act in order for the claimant to know the amounts owed to the Commission as soon as possible.

[77] Since the claimant does not dispute the Commission's numbers, the claimant's statements, mentioned by the Commission, are to the effect that the data in the financial statements are correct and the shares held by the claimant in his business are real, the Tribunal is of the opinion that the claimant's appeal should be allowed in part.

### **Conclusion**

The appeal regarding the reconsideration of claims for benefits is allowed in part.

The appeal regarding the allocation of earnings is allowed in part.

The appeal regarding the disentitlement for operating a business is allowed.

Jean-Philippe Payment  
Member, General Division

DATE OF REASONS: November 26, 2013