[TRANSLATION]

Citation: *G. D.et al. v. Canada Employment Insurance Commission,* 2014 SSTGDEI 45

Appeal No: GE-13-656

BETWEEN:

G. D. et al.

Appellants

and

Canada Employment Insurance Commission

Respondent

and

Les Fruits de Mer de l'Est du Québec Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Me Dominique M. Bellemare, Vice-chairperson (Employment Insurance)
HEARING DATE:	April 1 and 2, 2014
TYPE OF HEARING:	In person
DECISION:	Appeal allowed

PERSONS IN ATTENDANCE

[1] Jean Mailloux, counsel, and Cassandra Riendeau, intern, and Laroche Martin, legal department of the Confédération des syndicats nationaux [confederation of national unions] (CSN) representing the Appellants who are members of the Fruits de Mer de l'Est du Québec (FMEQ) plant employee union affiliated with the CSN; and also representing the three non-unionized supervisors, J. B., S. B. and C. F.;

[2] Renée Baillargeon, counsel for the Fédération des travailleurs du Québec [federation of Quebec workers] (FTQ), representing the Appellants who are members of the FMEQ plant employee union affiliated with local union 503 of the United Food and Commercial Workers Union (UFCW), accompanied by Alain Langlois, UFCW secretary-treasurer;

[3] The following witnesses attended the hearing: C. O., Richard Labrie, André Cloutier, G. D., J. H., M. T. and J. B. Ms. C. M. also attended the hearing.

INTRODUCTION

[4] The Appellants appealed to the Canada Employment Insurance Commission (the Commission) regarding the issuance of notices concerning the imposition of disentitlements for certain periods during 2010, 2011 and 2012, as well as the issuance of overpayment notices as a result of those decisions. According to the files, the overpayment amounts range from $281 to $11,725.

[5] The Commission issued review letters between June 27 and August 21, 2013, regarding the Appellants who are part of this group appeal and upholding the disentitlements imposed. The list of other Appellants who are part of this group appeal can be found in Appendix 1 of this document. Between July 30 and November 7, 2013, the Appellants filed their appeals before the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the Tribunal).

[6] The Tribunal rendered a number of interlocutory decisions before this hearing. The Tribunal initially decided to join the appeals using its authority under section 13(1) of the *Social Security Tribunal Regulations* (Tribunal Regulations) and to create a group appeal, thereby making it possible to hold one hearing, gather the evidence and render a single decision that applies to all the files. The Tribunal made a second interlocutory decision to add the employer, FMEQ, as a party to this group appeal using its authority under subsection 10(1) of the Tribunal Regulations. Lastly, the Tribunal made a third decision to dismiss the Commission's request to participate in the hearing by teleconference. Initially, the Commission was expected to participate in person at the hearing for four days.

[7] Following the Tribunal's decision to refuse to allow the Commission to participate by teleconference, the Respondent decided not to attend the hearing. The added party (FMEQ) did not attend the hearing either, even though it was held in the municipality where the FMEQ plant is located. The Tribunal has no authority to compel a party or witness to appear before it. Consequently, the Tribunal was unable to question the absent parties or ask them for any further information at the hearing. As a result and under the authority granted to it under subsection 12(1) of the Tribunal Regulations, the Tribunal proceeded with the hearing in the absence of the Respondent and the added party.

[8] At the hearing, counsel Mailloux requested that the file of G. D. (GE-13-656) be designated as the model file for the hearing and that the evidence presented for this file also apply as evidence for all the files under appeal. The Tribunal allowed this request.

DECISION

[9] The Tribunal allows the appeal for the reasons below. The Tribunal finds that the employees were unemployed during the periods that were the subject of the Commission's decisions because of the lack of evidence on file. The Tribunal also finds that, under current legislation, it does not have the jurisdiction to review a write-off request.

TYPE OF HEARING

[10] The in-person hearing was held in Matane, Quebec, for the reasons set out in the notice of hearing dated March 5, 2014.

ISSUES

[11] Were the Appellants unemployed within the meaning of section 9, and subsections 11(1) and 11(4) of the *Employment Insurance Act* (the Act) and section 31 of the *Employment Insurance Regulations* (the Regulations)?

[12] Does the Tribunal have the authority to render a decision on the Commission's authority to write off an amount under section 56 of the Regulations?

[13] Did the Commission exercise its discretion for writing off amounts in a judicial manner under section 56 of the Regulations?

APPLICABLE LAW

[14] Section 9 of the Act sets out that when an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

[15] Under subsection 11(1) of the Act, a week of unemployment for a claimant is a week in which the claimant does not work a full working week.

[16] Subsection 11(4) of the Act sets out that an insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment; and the person is

entitled to the period of leave under an employment agreement to compensate for the extra time worked.

[17] Subsection 47(1) of the Act sets out that 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.

[18] 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 36 months after the benefits have been paid or would have been payable.

[19] Section 31 of the Regulations sets out that:

> 31. (1) A full working week of a claimant, other than a claimant referred to in section 29 or 30, is the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.
>
> (2) When the number of hours, days or shifts referred to in subsection (1) is the number that is normally worked by persons in part-time employment and is less than the number of hours, days or shifts normally worked in a calendar week by persons employed in fulltime employment in the employment that is closest in nature to the claimant's employment, the claimant is considered to have worked a full working week when the claimant has worked the number of hours, days or shifts that are normally worked by a person in full-time employment.
>
> (3) The full working week of a claimant, other than a claimant referred to in section 29 or 30, who is remunerated on a piece, mileage or other unit rate is the number of days normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

[20] Subsection 56(1) of the Regulations sets out that:

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

(*a*) the total of the penalties and amounts, including the interest accrued on those penalties and amounts, owing by the debtor to Her Majesty under any program administered by the Department of Employment and Social Development does not exceed $100, a benefit period is not currently running in respect of the debtor and the debtor is not currently making regular payments on a repayment plan;

(*b*) the debtor is deceased;

(*c*) the debtor is a discharged bankrupt;

(*d*) the debtor is an undischarged bankrupt in respect of whom the final dividend has been paid and the trustee has been discharged;

(*e*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not, but arises from

(i) a retrospective decision or ruling made under Part IV of the Act, or

(ii) a retrospective decision made under Part I or IV of the Act in relation to benefits paid under section 25 of the Act; or

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

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

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

(iii) the administrative costs of collecting the penalty or amount, or the interest accrued on it, would likely equal or exceed the penalty, amount or interest to be collected.

[21] Subsection 56(2) of the Regulations sets out that:

> (2) The portion of an amount owing under section 47 or 65 of the Act in respect of benefits received more than 12 months before the Commission notifies the debtor of the overpayment, including the interest accrued on it, may be written off by the Commission if
>
> > (*a*) the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration or representation made by the debtor, whether the debtor knew it to be false or misleading or not; and
> >
> > (*b*) the overpayment arises as a result of
> >
> > > (i) a delay or error made by the Commission in processing a claim for benefits,
> > >
> > > (ii) retrospective control procedures or a retrospective review initiated by the Commission,
> > >
> > > (iii) an error made on the record of employment by the employer,
> > >
> > > (iv) an incorrect calculation by the employer of the debtor's insurable earnings or hours of insurable employment, or
> > >
> > > (v) an error in insuring the employment or other activity of the debtor.

[22] Section 3 of the Tribunal Regulations sets out that:

> 3. (1) The Tribunal
>
> > (*a*) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; and
> >
> > (*b*) may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.
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> (2) If a question of procedure that is not dealt with by these Regulations arises in a proceeding, the Tribunal must proceed by way of analogy to these Regulations.

[23] Subsection 24(1) of the Tribunal Regulations reads as follows:

> 24. (1) An appeal must be in the form set out by the Tribunal on its website and contain
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> (*a*) a copy of the decision that was made under subsection 81(2) or (3) of the *Canada Pension Plan*, subsection 27.1(2) of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;
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> (*b*) the date the decision was communicated to the appellant;
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> (*c*) if a person is authorized to represent the appellant, the person's name, address, telephone number and, if any, facsimile number and email address;
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> (*d*) the grounds for the appeal;
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> (*e*) any documents or submissions that the appellant relies on in their appeal;
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> (*f*) an identifying number of the type specified by the Tribunal on its website for the purpose of the appeal;
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> (*g*) the appellant's full name, address, telephone number and, if any, facsimile number and email address; and
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> (*h*) a declaration that the information provided is true to the best of the appellant's knowledge.

EVIDENCE

Documentary evidence

[24] With regard to the evidence contained in file GE-13-656:

a) Pages GD3-13 and GD3-14 of file GE-13-656 contain the Appellant's Records of Employment (ROEs) for the years in question.

b) Pages GD3-15 to GD3-21 contain excerpts from the Industry Canada and Registre des entreprises du Québec websites regarding the added party, FMEQ.

c) Page GD3-22 contains an investigation report signed by Martial Lévesque, Commission investigator, regarding conversations that he allegedly had with Colette Inglis, an employee in the pay department of Les crevettiers Marinard (Marinard), on November 15, 2012 and May 24, 2013. The conversations were to the effect that the employee schedules were five work days, followed by two days off, that is, 40 to 45 hours per week for employees in the processing plant, and 55 hours per week for workers in the unloading area.

d) Pages GD3-23 to GD3-30 contain a statutory declaration by F. B. dated November 22, 2012, made to investigator Martial Lévesque and another investigator whose name is not legible. This declaration is a summary of questions asked by the investigator to which the witness responded. The witness stated that she is FMEQ's director of human resources; that the company specializes in processing seafood; that they have approximately 140 employees working in various areas; that the company's operations are mainly seasonal, from April to October every year; that production was continuous in 2011 and 2012; that the collective agreements contain specific work schedules for employees affiliated with both unions, the CSN and the UFCW, that is, work schedules from Sunday to Saturday, with one day shift and one night shift that alternate weeks; that the employees could have worked full-time from April to mid-September, that is, 5 days a week most of the time, like at Marinard; that the employees did not want to concede on the work schedules and that, when they were called back, they did not want to do only one day because it would reduce their unemployment; that, in 2008, J. C., the president, tried to change the work schedules, but was not successful because, money-wise, it was more beneficial for the employees; that the company did not suggest any schedule changes because it would be fighting a losing battle, but it reduced the wages of employees who were called back from time and a half to straight time; that unworked days are actually days off and that they are an integral part of the work schedule; that the employees can volunteer to work by placing themselves on a callback list, and that they

are called back based on their seniority; that the employees normally work 60 hours per week, but sometimes up to 75 hours per week; that the supervisors work 7/7 or 14/7 schedules; that the company never informed the employees that they were not entitled to Employment Insurance benefits; and that the contract ends at the end of the production season.

e) Page GD3-31 contains an investigation report from investigator Martial Lévesque that summarizes a meeting with J. C. on November 22, 2012. He is the president of FMEQ; in 2008, they allegedly tried to change the work schedules, to no avail; they allegedly suggested 5/2 schedules in 2008 because, without this, they could not have stable work schedules; however, this was not successful because the employees preferred to receive more unemployment; that C. O. was not on the negotiating team in 2008, even though she had sat on the executive committees since 1979; that the 7/7 schedules had existed for a long time, namely, 25 to 30 years, with a view to having the greatest possible number of people working; that the 7 days off were taken as unemployment, even though the employer had work to give them; that the 7/7 schedules were set out in the collective agreement; and that the employees could volunteer to work during their week off.

f) Pages GD3-32 to GD3-35 contain a statutory declaration by C. O. dated November 23, 2012, made to Martial Lévesque and another investigator. She explained that the 7/7 schedules were established in 1996 at the employer's request; that call-backs are done first based on seniority in the department and then by seniority in general; that the work schedules are 7 days followed by 7 days off, but that the employees are available to work during the 7 days off; that, at the start of the season, the employees choose their work team, which is based on seniority; that, in 2009, during the negotiation of the collective agreement, the employer offered a 4/3 work schedule, but that no one was against a 5/2 work schedule; that the 7/7 schedule was maintained that year; that the 7/7 schedules began in 1996 in order to keep the greatest number of people possible and that this skilled labour was necessary; that, physically, it was difficult to work 7 consecutive days; that, when the mechanization started, the employer was able to

ensure that it had skilled labour; and that the employees are always available to work otherwise, even if their name is not on the call-back list, and the employer will call them if necessary and they are required to come to work.

g) Pages GD3-133 to 165 of file GE-13-1184 contain the text of the UFCW collective agreement for 2011 to 2014. The work schedules for 2011 and 2012 can be found on pages GD3-150 to 152 and read as follows:

[Translation]

ARTICLE X – WORKFORCE AND WORK SCHEDULE PLANNING

10.1 Workforce planning

i. The work schedule is established by the Employer in accordance with operational needs.

ii. The daily work schedule must include consecutive hours at all times with the exception of meal periods. This provision does not apply to the weighing section.

iii. The work schedules are established taking into account the following without this being a guarantee in terms of number of work hours per day, work days per week or working weeks per year.

iv. The employees will have one (1) defined week of work according to the following work teams, which are assigned for a period of two (2) weeks.

The working week is made up of calendar weeks that continue to run throughout the year for the 7/7 schedule.

Team A: From five-forty-five (5:45) a.m. to four-fifteen (4:15) p.m. from Sunday to Saturday inclusively for the first (1st) week.

Team B: From three-forty-five (3:45) p.m. to one-thirty (1:30) a.m. from Sunday to Saturday inclusively for the first (1st) week.

Team C: From five-forty-five (5:45) a.m. to four-fifteen (4:15) p.m. from Sunday to Saturday inclusively for the second (2nd) week.

Team D: From three-forty-five (3:45) p.m. to one-thirty (1:30) a.m. from Sunday to Saturday inclusively for the second (2nd) week.

a) The parties may agree on a different schedule at any time, but if no agreement is possible, the above-mentioned schedule remains in effect. The employees must choose their shift according to seniority, with the more senior employees being given priority. These choices must be made according to seniority at the start of each year or when there is a decrease in teams or shifts. Absent employees must still make their choice of team known.

b) When the teams are formed, if the Employer finds that a team is lacking experienced staff members, the Employer may temporarily assign one or more persons of its choosing to the team, regardless of the seniority provisions, so long as the affected employees are in agreement. Afterwards, if the number is still insufficient, the Employer will assign the employees with the least amount of seniority.

c) The Employer cannot make employees finish their work shifts more than fifteen (15) minutes after the shift ends, as set out in 10.01 d), unless the employees consent to this.

d) Starting in the week of August 1, every Thursday before noon, employees who wish to work the following week shall contact the director of quality control and commit to being available for the entire week. This employee will take the place of the employee with the least amount of seniority in his or her classification. The employee is paid at the single rate for all regular hours worked during that week.

10.2 Posting of the work schedule

a) The work schedule for all employees for the following week is posted every Thursday. Any corrections are posted subsequently.

b) A legible carbon copy of the original is given to the union representative at the time of the posting.

c) Each employee is responsible for ensuring accurate entries on their attendance card. Under no circumstances are employees permitted to punch another employee's card.

10.3 Compensation hours following leave

Employees who request and obtain leave during their working week cannot compensate for their lost hours by taking hours from another employee whose hours have already been assigned.

10.4 Shift exchange

Two (2) employees on the same week but working on two (2) different teams may, after coming to an agreement with the Employer, exchange one or more shifts for the week. To do so, the employees must use the designated form and the Employer will indicate the shift exchanges on the work schedule. This provision may not result in overtime.

h) The CSN union's work schedules for 2011 and 2012 are on pages GD3-160 to GD3-163 and read as follows:
[Translation]

Article 7 WORK HOURS

7.1 Despite article 7, the parties may, by agreement, establish different work schedules so long as they maintain or allow for optimal performance in terms of quantity and quality.

7.2 Employees whose duties are related to ongoing (weekly) production needs in departments that have undergone or that will undergo technological changes (having accepted that the "shrimp" and "repacking" departments have undergone such changes) will have a defined working week based on the following work teams, which are assigned for a period of 2 weeks.

The working week is made up of calendar weeks that continue to run throughout the year for the 7/7 schedule.

Team A: From 7:00 a.m. to 4:00 p.m. from Sunday to Saturday inclusively for the first week;

Team B: From 4:00 p.m. to 1:00 a.m. from Sunday to Saturday inclusively for the first week;

Team C: From 7:00 a.m.to 4:00 p.m. from Sunday to Saturday inclusively for the second week;

Team D: From 4:00 p.m. to 1 a.m. from Sunday to Saturday inclusively for the second week;

For the other departments, the 7-day schedule applies, but its rotation is established for each department in accordance with the option chosen by the department's employees, provided that an employee is not assigned to work more than 3 consecutive periods. However, as of August 1, an employee may work more than three (3) consecutive periods.

The parties may agree on 7-day work schedules that function on a rotation that differs from that listed above in this section.

The employees must choose their work schedule according to seniority, with the employees with the most seniority having priority. These choices must be made at the start of every year or when there is a decrease in teams or shifts.

When the teams are formed, if the employer finds that a team is lacking experienced members, the employer may temporarily assign one or more persons of its choosing, regardless of the seniority provisions, so long as the affected employee(s) agree(s) to this. Afterward, if the number is still insufficient, the employer will

assign the employees with the least amount of seniority. In all cases, the employer cannot require more than 20% of experienced staff when forming a team for a duration not exceeding 10 working days.

b) The employer may decide to proceed with the processing of raw materials by modifying the existing weekly schedule for 2 days of 12 hours of work and 2 days of 8 hours of work in the event of a force majeure (e.g., a mechanical malfunction lasting more than four hours, a power failure, a blizzard).

Employees are given notice before the end of their shift on the day preceding the schedule change. The new schedule is mandatory for the employees. It is understood that overtime applies in accordance with the collective agreement and a fifteen- (15)-minute break (on a rotating basis) is provided at the end of the regular work shift. In addition, it is understood that, when the schedule is applied, the supervisors may replace employees in the pickling area and at the inspection table during the 30-minute meal break.

7.3 It is agreed that the seventh day of this schedule is a period of rest that the employees agree to work.

7.4 The seniority of employees assigned to the second week of this schedule (teams C and D) will be deemed to have begun accumulating at the same time that the employees called to work the first week (teams A and B) begin their work on this schedule.

7.5 It will be possible, notwithstanding the provisions set out above, to make the employees assigned to cleaning and the sanitation team begin as soon as the day production team has finished that day's work, and these employees' regular hours will be advanced accordingly. The same is true for employees at the start and end of each shift. This work must be considered included in the work schedule. Given that, in certain departments, employees currently perform work for which they are not paid after the work ends for other employees, it is agreed that a special schedule will be assigned to these employees to make up for this situation. If this is not possible, the employer agrees to pay the time worked in excess of the work schedule.

7.6 Employees in the unloading and reception departments will be asked to work according to deliveries of raw materials.

7.7 Each employee must personally punch their attendance card. Under no circumstances are employees permitted to punch another employee's card.

7.8 Employees who request and obtain leave during their working week cannot compensate for their lost hours by taking hours from another employee whose hours have already been assigned.

i) A questionnaire was sent to the employees. It can be found on pages GD3-164 to GD3-169.

j) Page GD3-170 contains an interview report dated February 14, 2013, in which the employee states that she was available for work even though her name was not on an availability list.

k) The Commission's initial decision can be found on pages GD3-171 and GD3-172.

l) The review letter can be found on pages GD3-180 and GD3-181.

m) The write-off request for the employees who are members of the CSN can be found on pages GD3-178 and GD3-179.

n) The write-off request for the employees who are members of UFCW can be found in document GD25, which was filed at the hearing.

o) The write-off request for the three non-unionized supervisors can be found in document GD29, which was filed after the hearing.

[25] The documentary evidence submitted at the hearing consists of the following exhibits:

a) GD5: Documents dated 1995, namely, a request from the Commission's Matane office and a response from the Commission's regional office in Montreal regarding FMEQ's work schedules.

b) GD6: Email exchanges between Michel Harrisson of the Commission and F. B. of FMEQ dated June 2011.

c) GD7: FMEQ-CSN collective agreement covering 1989 to 1992.

d) GD8: FMEQ-CSN collective agreement covering 1992 to 1995.

e) GD9: FMEQ-CSN collective agreement covering 1995 to 1998.

f) GD10: FMEQ-CSN collective agreement covering 1998 to 2003.

g) GD11: FMEQ-CSN collective agreement covering 2003 to 2006.

h) GD12: FMEQ-CSN collective agreement covering 2006 to 2008.

i) GD13: FMEQ-CSN collective agreement covering 2008 to 2011.

j) GD14: FMEQ-CSN collective agreement covering 2011 to 2014.

k) GD15: FMEQ-CSN agreement letter amending the collective agreement covering 2011 to 2014.

l) GD16: Board of Referees' decision dated September 23, 2013, in file 1300816116 regarding C. O.

m) GD17: Board of Referees' decision dated September 23, 2013, in file 1300815607 regarding C. O.

n) GD18: Employer demands during the FMEQ-CSN negotiation of the collective agreement covering 2011 to 2014.

o) GD19: 14/7 work schedule proposed by FMEQ to the CSN in 2013.

p) GD20: CSN's notice to appear for July 4, 2013.

q) GD21: FMEQ-UFCW collective agreement covering 1999 to 2001.

r) GD22: FMEQ-UFCW collective agreement covering 2002 to 2005.

s) GD 23: FMEQ-UFCW collective agreement covering 2005 to 2008.

t) GD24: Agreement letter dated June 3, 2013, amending the collective agreement with regard to work schedules.

u) GD25: Write-off request sent to the Commission by counsel Renée Baillargeon, UFCW legal advisor, dated October 23, 2013.

v) GD26: Summary of various files of employees affiliated with the CSN regarding the status of their requests for administrative review, as prepared by their representatives.

w) GD27: Summary of various files of employees affiliated with the UFCW regarding the status of their requests for administrative review, as prepared by their representatives.

x) GD29: Write-off request for the non-unionized supervisors, submitted after the hearing.

y) GD31: Book of authorities submitted by the Appellants' representatives.

Testimonial evidence

Testimony of C. O.

[26] Before the testimony of C. O., witnesses Richard Labrie and André Cloutier were excused from the room at the request of the Appellants' legal advisor, counsel Jean Mailloux.

[27] She has been an employee of FMEQ since 1977. She was a groundfish slicer when she began working at the plant. Following a decline in fishing and in groundfish catches, the plant specialized in processing large northern shrimp (*Pandalus borealis*). She is presently a shrimp grader.

[28] She is currently the president of the local union affiliated with the CSN. She took up duties in 1981, the year when the union was formed. Before this date, the employees were

non-unionized. From 1981 to 1992, she worked as the union's secretary. Then, in 1992, she became the president. She held this position on a number of occasions from 1992 to 2005. From 2005 to 2009, she did not hold any position on the union's executive committee. Then, in 2009, she returned as the president, a position that she has held to date. The president's mandate is a two-year term and is renewable.

[29] In 1995, she was on the negotiating team for the renewal of the collective agreement. She was also the president in 1992, during the negotiation of the previous collective agreement. She participated to varying degrees in the negotiation of all the collective agreements from 1988 to 2013, sometimes signing them as president, with the exception of the collective agreement covering 2006 to 2008 (GD12) in which she did not participate in any way, as well as the collective agreement covering 2008 to 2011 (GD13) in which she participated in part only.

[30] At the hearing, she filed the collective agreements that have been in effect since 1988, as well as the amendment agreement for the collective agreement covering 2011 to 2014 (GD15), signed on April 23, 2013, which was an amendment to the work hours.

[31] In the collective agreement covering 1989 to 1992, the official work schedule is 42.5 hours per week, but, in reality, the employees often worked 70 to 80 hours per week. The first hour of overtime was paid at double time, while the other hours were paid at time and a half. The work is seasonal, from April to October, sometimes going as late as November.

[32] In 1996, at the request of the company, the schedules changed. At the start of negotiations in 1995, the company announced that it would proceed with major changes involving the mechanization of operations, which would significantly reduce the number of employees. Wanting to keep this specialized labour, the company called for a 7/7 schedule, that is, the employees would have to work seven consecutive days from Monday to Sunday, and then were without work for the seven days that followed. These provisions can be found in section 7 of GD9. During these negotiations, the employer representative was J. O.

[33] Ms. C. O. did not like this type of schedule at all because her work days over two weeks were reduced to 7 while, prior to this, she had had 10. Her earnings also decreased. She no longer received overtime, whereas she used to get it before. The employer, through its director general at the time, J. Y. O., and its production manager, A. O., insisted that the employees agree to this schedule, telling them that they had consulted the Commission and that during the weeks without work, the employees would be eligible for Employment Insurance benefits. They maintained that this approach was legal. In the end, Ms. C. O. and the most senior employees earned less but more people could work with this schedule.

[34] Not believing their employer's statements, the collective agreement negotiating committee referred to the union support committee, made up of Gaétan Paradis, union advisor on mobilization for the Conseil central du Bas-Saint-Laurent [Lower St. Lawrence central council] and André St-Pierre, local union officer. These individuals spoke with Mr. Paradis from the Respondent's local office, who discussed the matter with Shirley Nesrallah from the Respondent's Montreal office. The employees wanted to know if they were allowed to proceed in this manner. The response was clear: yes, you are entitled to Employment Insurance benefits for the week that you are without work, but on the condition that you remain available for work. Once this response was received, the employees were reassured, and they proceeded with the negotiation process and signed collective agreement GD-9. According to Ms.C, O., the employer had conducted its own verifications and the onus was on it to take these steps with the Commission because it had initiated this approach. The union merely verified the information.

[35] Once this system came into effect in April 1996, because the employees were still in the same period of unemployment that began in November 1995, they continued to receive their reports and state that they were not working one out of every two weeks and, as a result, they received their benefits without being asked any questions by an unemployment officer. The employees were frequently called back to work during their [translation] "off" week, particularly during the high season. When this occurred, they did not receive benefits if they worked a certain number of hours or days, based on the year. The call-backs were done according to the seniority lists. The employees were not receiving new ROEs for every off week,

but rather, once a year at the end of the season. At no time, between 1996 and 2013, were the employees denied their bi-weekly benefits based on the [translation] “alternative” schedule implemented at the employer’s request.

[36] Then, on two occasions, because the union was receiving questions from its members, who were hearing rumours, and because it was being asked to check, the executive committee asked the employer to hold joint meetings at the plant with someone from Employment Insurance to verify whether the 7/7 schedule implemented by the employer complied with the Act. She personally contacted the Commission through the local office in Matane. Joint meetings were held at that time between the Commission, the union and the employer in the FMEQ’s conference room. The Commission sent one of its officers from the Matane office to these meetings, which were held proactively, given that the Commission had not raised any issues. The union wanted written confirmation from the Commission, but the oral response from the Commission’s office in Matane was that [translation] “at FMEQ, you are on a 7/7 schedule. We are aware of this.” The same was true when FMEQ employees showed up to claim their benefits and dealt with other local Commission officers.

[37] The first meeting was held in 1999. Richard Labrie, a Commission representative and A. O., the employer’s production manager, were present, as were union representatives G.U. D., M. D. and C. O. The meeting lasted approximately one hour. Following this meeting, the union called the employees to a general meeting to give them the information, and the employees were reassured by this clarification. The issue was discussed for approximately 15 minutes, and the meeting lasted two hours. Approximately 60 to 70 out of the 90 members of the union attended this meeting, representing a large percentage, as the meeting was held at the same time as a shift when a number of employees were working.

[38] The second meeting was held in 2001, once again at the initiative of the union, in the FMEQ conference room. M. D., G. U. D. and C. O. attended this meeting on behalf of the union, A. O. attended for the employer, and Maurice Bellavance attended for the Commission. At the meeting, the participants asked questions that were similar to those asked in 1999. Mr. Bellavance’s response was again that if the employees were available for and ready to work,

their 7/7 schedule was acceptable. Once more, a report of this meeting was discussed at a general meeting of union members. Again, over 50 out of 90 members attended the meeting, taking into account that one of the shifts was working at that time.

[39] As a result, the collective agreements followed one another, namely, those labelled GD11, GD12 and GD13. During the negotiation of GD13, the collective agreement covering 2008 to 2011, an availability list was introduced to call back members during off weeks if the workload increased or to replace employees who were ill. The employees had to sign up every week. However, although this system existed in an official sense, the employees who were not on the company's availability list were still called in to work regardless. In response to a question from the Tribunal regarding whether, to her knowledge, there were employees who refused to report for work after a callback or whether any grievances had been filed or disciplinary measures imposed in this regard, Ms. C. O. responded no, to her knowledge there had not been any grievances filed or disciplinary measures taken against employees. On occasion, certain employees were difficult to contact. At that time, M. P. managed human resources, then, in 2010, it was F. B. Moreover, members were reminded at each general or special union meeting, that is, once or twice a year, that they had to be available for work during their off weeks.

[40] Starting in early 2000, Employment Insurance changed its system, moving from weeks worked to hours worked to determine qualification thresholds. For employees like those working at FMEQ, the incentive offered by the availability or call-back list to work the greatest number of hours possible was important because it made it easier for them to qualify.

[41] In 2008, J. C., FMEQ's director general at the time, allegedly asked the union to amend the work schedule. He wanted a 4/7 schedule, and then a 14/7 schedule of 14 consecutive days of work followed by one week off, but without benefits. The union did not agree to this because, in the end, the employees would earn less money. This allegation can be found in pages GD3-31 and GD-3-32 of file GE-13-656. Ms. C. O. did not remember that the employer had wanted to change the 7/7 schedule at this time. With regard to Mr. J. C.'s allegation that the union refused a 5/2 schedule, that is, a conventional working week, Ms. C. O. is adamant:

the employer never offered or called for this schedule. During the negotiations that led to the signing of the collective agreement in 2009, there was no such demand. If a 5/2 schedule had been offered, Ms. C. O., as president of the union, would have recommended to the members that they accept it because it is not true that the 7/7 schedule resulted in a better Employment Insurance benefit rate. Consequently, the employees would have accepted it. The allegation that the work schedules were created by the unions is false. The employer always created the work schedules. J. C. allegedly told the investigators (page GD3-31) that the union demanded such a work schedule in 1979. The witness stated that it is false to claim that the union demanded this in 1979 because the union was not created until 1981. When the 7/7 system was introduced in April 1996, Mr. J. C. did not work for FMEQ. He arrived in 1998 as counsel for the fishers with Clearwater. He never received a demand from the union to establish the 7/7 schedule. It was during the negotiations for the GD9 collective agreement that the schedule appeared in response to the employer's demand in 1995 that resulted from mechanization.

[42] It was following the amendment of the collective agreement covering 2011 to 2014 (Exhibit GD14) on April 23, 2013, by document GD-15, that the 7/7 schedule was terminated. Ms. C. O. repeated that, before this amendment, the employer had not made any demands relating to the work schedules. The number of employees decreased from 118 to 64, that is, a difference of 54 employees. The new schedule was 7 consecutive days with the possibility of requesting vacation days one week in advance. The company initially requested a 14/7 schedule. This suggestion was rejected at the general meeting by approximately 98.6% of members. This system is relatively difficult to manage because all the employees want to have the weekends off. Sometimes the employees work 15 consecutive days. The days off are initially taken as vacation, then without pay. However, with the new system, the remaining employees make more money.

[43] As president of the union, Ms. C. O. sits on the labour relations committee, which is a joint labour-management committee. Committee meetings are held every month or two, sometimes bi-weekly, and sometimes also during the off-season. It was at this committee that amendment GD15 to collective agreement GD14 was discussed. During the negotiation of the

collective agreement covering 2011 to 2014 (GD14), Ms. C. O. was part of the negotiating committee with G. U. D. and M. D., as well as with Jonathan Racine, union advisor. During the negotiations that led to the amendment (GD15) to collective agreement GD14, the negotiating committee included G. U. D., S. J. and herself, as well as André Cloutier from the CSN.

[44] Because of the investigation initiated by the Commission in fall 2012, the employees were asked to fill out a questionnaire. In January 2013, Ms. C. O. received a call from Martial Lévesque, Commission investigator, informing her that the use of the 7/7 schedule by FMEQ employees in conjunction with their benefit claims was prohibited and that the employer had been informed. Then, the Commission rendered its decisions and the overpayment notices were sent to the employees.

[45] After the overpayment notices were sent to the employees, three general meetings were held. The first was held after the notices were received in late November 2012. The second meeting was held in winter/spring 2013, after the Commission sent the questionnaires. The third meeting was held in late March 2013 and focused on the action to be taken. Over 100 out of the 130 employees attended these meetings as they were held during the off-season. The meetings were fueled by anger, and the members stressed their inability to pay, the resulting depression and the feeling of not being responsible for this situation because the employees had always been told by the Commission and their employer that everything was in order.

[46] The overpayments were significant. In her case, the amount was from $10,000 to $12,000. In some cases, the amounts were a lot smaller. Among the employees, there were at least three couples who worked at the FMEQ plant, which could mean over $25,000 for each couple. Had they not received assistance from the CSN, it would have been very difficult to pay for counsel.

[47] The witness was shown by her counsel Exhibits GD16 and GD17, the decisions of the Board of Referees, which heard, in September 2009, another group of FMEQ employees. She then confirmed that the facts described in the decisions were similar.

[48] In response to a question from the Tribunal regarding the Commission's allegations in its arguments (GD4) to the effect that the Commission's investigation was conducted following a [translation] "complaint" from the employer, the witness responded that the request of F. B., FMEQ's director of human resources at the time, produced under Exhibit GD6, referred to herself. It was not until these hearings before the Board of Referees in September 2009 that she was aware of the existence of this document.

[49] The witness stated that her meeting with Martial Lévesque, Commission investigator, was held on November 23, 2012. The Tribunal then asked the witness whether, after the overpayment notices were sent, the employer modified the ROEs. The answer was no. The Tribunal also asked the witness whether, as union president, she had been aware that the employer had allegedly completed certain ROEs with the comment [translation] "refusal to work". The answer was no.

[50] In response to a question from the Tribunal, Ms. C. O. stated that, because the new schedule was more physically demanding, there was an increase in work accidents. The Tribunal also wanted to know why certain employees were being asked to repay overpayments sometimes for 2010, sometimes for 2011 and sometimes for 2012. The witness responded that, in certain cases, overpayments were claimed for one year, sometimes two years or sometimes three years, but that she did not know why.

Testimony of Richard Labrie

[51] The witness is now retired. From 1971 to 2004, he worked for the Commission. He held various positions during his career. From 1988 to1989, he worked in Matane as a benefits advisor, as a liaison officer with the public (a public relations position) and as a records clerk. When he was a liaison officer, he sometimes went to visit businesses to speak with the employers, the employees, or their union, as required. He held this position in 1995.

[52] In 1995, he received a request from the FMEQ employee union to meet with them to determine whether the 7/7 schedule that the employer was suggesting was acceptable. They wanted to validate this information. He met the union and the employer during a visit to FMEQ. At this meeting, C. O. was present, in addition to one or two other individuals for the union, and one or two individuals for the employer. He responded that, so long as the requirements of the Act were met, namely, that the employees were available and unemployed, the work schedule in place was acceptable. However, he made sure to state that [translation] "they did not manage the collective agreement". If an employee refused to work, the employee would be considered not available. They had this validated by the regional office in Montreal. Shirley Nesrallah was in charge of the file.

[53] In response to a question from the Tribunal as to whether such an arrangement was a case of work-sharing, the answer was no, that that was not the case at all. In response to a question from the Appellants' counsel as to whether this approach was legal, the witness responded yes, so long as the employees were unemployed and available. The witness was then shown Exhibit GD5, namely, the correspondence from 1995 between André Bellavance from the Commission office in Matane and the Commission office in Montreal, and he responded that he was aware of this correspondence and that he had discussed it with Mr. Bellavance. Ms. Ricci's response to Mr. Bellavance's request was that, under paragraph 14(*a*) of the Act (now paragraph 18(1)(*a*)), the work schedule at FMEQ complied with the spirit of the Act so long as the employees were available for work and unemployed. The issue was based on availability and not on a week of unemployment.

[54] The witness stated that, yes, the Commission office in Matane was aware that FMEQ had a 7/7 schedule. The office in Matane was open in 1995 and Mr. Labrie worked there until 1998, when he was transferred to Rimouski. In 1995 he was an inspector and investigator. The witness also explained that the exchange of correspondence produced in Exhibit GD5 did indeed involve FMEQ. For him, the issue was settled. It was not necessary to revisit the issue. He set the FMEQ file aside at this point.

Testimony of André Cloutier

[55] The witness is a union advisor in negotiations for CSN. He started with the CSN in 1992 and has held various positions. He was appointed to the FMEQ union in 2004. He negotiated the 2006 collective agreement for the FMEQ employee union. He prepared negotiations for the 2008 collective agreement before being assigned to another job in Montreal, and then returning. He was the negotiator of record when the amendment agreement was signed for the collective agreement covering 2011 to 2014 (document GD15) in 2013.

[56] During the 1996 negotiations, the 7/7 schedules were included at the employer's request. Therefore, in 2006, they already existed and the employer asked to amend these schedules. Discussions were held, but the status quo remained. That year, FMEQ asked the employees to change the work schedule for a 4/3 schedule with three shifts. With regard to the 2008 collective agreement, according to his knowledge of the file, there were no discussions as to the work hours, but he did not act as a negotiator at that time.

[57] However, during the negotiations, the 7/7 schedule was retained because, otherwise, the employees risked losing too much money. The two main issues that the union had to ensure during negotiations were: 1. that the employees had enough income to live on when they were working and, 2. that the employees were able to accumulate enough work hours to qualify for Employment Insurance at the end of the season.

[58] In 1992, he negotiated the collective agreement for Marinard in Rivière-aux-Renards. At the time, this company had a different schedule, a 4/3 schedule of 4 days of work performed by a day shift and an evening shift, followed by three days off by a third back-up shift. However, at the time, the owner of Marinard owned a number of other businesses in the region and could therefore permit his employees to complete the number of missing weeks, enabling them to qualify for Employment Insurance. This allowed him to keep his specialized workforce and avoid losing their expertise. According to the witness, there are two other shrimp processing plants in the region, one in Sainte-Anne-des-Monts and the other in Chloridorme.

[59] He heard word that it was the same situation that Marinard currently has, but aside from the 1992 negotiation and a short period in 2004 when he worked on this company's file but did not negotiate the collective agreement, he did not have direct knowledge of the situation at Marinard. According to him, the two companies' situations are not comparable. Even if the processes are similar, the context and the equipment are different. Marinard's supply rate is more stable than that of FMEQ.

[60] In 2012, he returned to the FMEQ file 10 days after collective agreement GD14 was signed. Exhibit GD18 was produced and indicates management's position when negotiations began for this agreement. He drew the Tribunal's attention to the work schedule note on page 8. The company's demand was to maintain the status quo with regard to the 7/7 schedule and they did not come back with a demand for a 4/3 schedule or for any other type of work schedule. He stated that the 2011-2014 collective agreement (GD14) was signed in 2012.

[61] After the end of the production season in 2012, the employees received a call from Mr. Lévesque, who allegedly stated that the 7/7 schedule did not comply with the Act. In 2013, the Commission issued the overpayment notices. He then told Mr. Lévesque that [translation] "there had not been any concealment and that the 120 employees had filled out their reports this way for 17 years." In its overpayment notices, the Commission went back two years, sometimes three. He did not know why they went back two years in some cases and three years in other cases. Mr.Cloutier then contacted inspector Lévesque in January or February 2013 to find out who they should be speaking with to obtain the correct perspective on the situation and give them the right information, and to stop the process initiated by the Commission.

[62] In 2013, following the Commission's decisions, the employer was asked to amend the 7/7 program. Negotiations were held on amending the work schedules. The union suggested a 5/2 schedule, namely, 5 work days for two shifts and 2 days off. A third shift would ensure operations over the first shifts' two days off. The employer refused. The employer wanted to avoid returning to the pre-1995 situation with regard to having to pay overtime, motivated by the reduction in operating costs. The company wanted a 14/7 schedule, or even a 21/7

schedule, but this was not possible for the employees. Consequently, the new schedule was 7 consecutive days and the employees asked for days off, starting with paid leave, followed by leave without pay, in accordance with employee requests and their seniority. The proposed 14/7 schedule was rejected by more than 90% of employees. With the new schedule, approximately 75% of the employees kept their employment.

[63] The witness read the investigation report on file of the interview with Mr. J. C. of FMEQ. He disagreed with the statement that the 7/7 schedule was an employee demand. If these schedules existed, it was at the employer's request. Now that the employees have their new schedule, they work 7 days out of 7 for approximately 6 to 7 production weeks. The rest of the time, the employees now work from 4 to 5 and a half days per week. There is a great deal of pressure on the employees. The average working week is over 70 hours. Since the introduction of the new system, work accidents have increased and the productivity rate has decreased. However, the abolition of the 7/7 program has improved the financial situations of those individuals who retained their jobs. The plant's production capacity increased from 30,000 pounds/day in 2004 to 90,000 pounds/day today.

[64] Mr. Cloutier attended the general employee meetings after the Commission sent the overpayment notices. There was a feeling of major generalized insecurity in the air. He stated that these notices would cause the employees significant hardship, that is, close to 50% of their wages in certain cases. Neither the union nor the employees would have ever accepted a 7/7 schedule in 1995 if it had not been [translation] "legal" and that is why the information was validated with a Commission employee. According to the notes that he saw in the file, in 1995, the union advisors on file were Claude Beaupré (now deceased) and Gaétan Paradis.

Testimony of J. B.

[65] The witness is a supervisor who works in [translation] "sanitation" at FMEQ. He has been working in this position since 2011. He was hired at FMEQ in 2008 after spending 20 years in the Canadian Armed Forces. When he started this unionized job in 2008, it was his first civilian job. The work schedule was 7/7. Being unfamiliar with the civilian work

environment, he went to his local Service Canada office in the days following his hiring to ensure that the work schedule complied with the Act. He was welcomed by a clerk and was told [translation] “yes, at FMEQ, you have a 7/7 schedule. We are aware of this and it is okay.”

[66] The amount stated in the notice of overpayment that he received is $10,998. Because his earnings are $35,000, having to repay this amount would cause him hardship. Because he is not in the same department, his work season is slightly longer than that of the regular employees. He starts approximately two weeks before the production season and ends approximately two weeks after the production season.

Testimony of M. T.

[67] The witness is the [translation] “slush” supervisor at FMEQ, and she has held this position since 2011. Before this, she held various positions at FMEQ, where she has been working since 2007. She had a 7/7 schedule at FMEQ on the condition that she was available during the 7 days off, as was explained to her by M. P. of FMEQ. During the weeks when she was not working or during the 7 days off, she often worked after receiving call-backs and she always agreed to report for work.

[68] She attended the hearing before the Board of Referees in September 2009 for one of her files. She received a notice of overpayment in the amount of $4,200 for the year 2012 only. She did not work very much in 2010 and 2011 because of maternity leave. She earns approximately $28,000 to $30,000 per year. Paying $4,200 would be difficult, particularly with young children. She did not receive a penalty.

Testimony of G. D.

[69] The witness has worked at FMEQ since 1975 and has been a grader since 2010. She has never been a part of the union’s executive committee. In 1996, the work schedules were amended and a 7/7 schedule was introduced. She was made aware of this new schedule at a

union meeting held in 1995. The union's executive committee never stated that this new schedule was part of the union demands made during the negotiation of the collective agreements. Rather, it was a management demand.

[70] On occasion, she visited the Commission office in Matane to file her Employment Insurance benefit claims. During these visits, the Commission employees were aware of the 7/7 schedule at FMEQ.

[71] Following the end of the production season in 2012, she received a questionnaire from the Commission and then, in 2013, she received a notice of overpayment for $10,495. Her annual earnings are $26,103 with the new schedule. She believes that she does not have to repay this amount, which she is unable to pay. Before 2013, with the 7/7 schedules, her employment earnings were approximately $14,100. As a result, the 7/7 schedules did not benefit her.

Testimony of J. H.

[72] The witness has worked at FMEQ since1990, and has always held the position of quality controller. She is unionized with the UFCW and, since 2002, has been the union representative for the UFCW local union. There are 8 FMEQ employees who are members of this union. Because of the small number of members, they do not have a union executive committee. The work schedules are based on the 7/7 system, except for those employees assigned to unloading, who have a 5/2 schedule. The 7/7 schedule started for them in 2005 following a request by the employer. She also filed Exhibits GD21 (1999 to 2001 collective agreement); GD22 (2002 to 2005 collective agreement); GD23 (2005 to 2008 collective agreement); and GD24 (agreement letter amending the collective agreement). A complete copy of the 2011 to 2014 collective agreement is already on file.

[73] The witness also filed document GD25, which represents the official write-off request to the Commission dated October 23, 2013. No response has been received to date. None of the files of the employees affiliated with the UFCW from September 2009 have been heard by the Board of Referees.

[74] During negotiations, the employees were offered 14/7 schedules and even 21/7 schedules. Sometimes, there are 6/2 schedules, but they are difficult to manage. When the 7/7 schedules started in 2005, the weeks were often between 70 and 80 work hours, but sometimes it was as [translation] "few" as 50 hours per week. The employees were often called back to work on off days. They were always available to work. The employer told them on a number of occasions that, with the 7/7 schedules, they were entitled to Employment Insurance for the weeks they did not work. In 2005, M. P. was the director of human resources. Then it was F. B., and now it is M. P. again. Currently, as a result of agreement GD25, the working week is based on a 14/7 schedule, and it is [translation] "hell", because they are losing one week of earnings out of three, even if they are sometimes called back on the days off. The company continues to require that they be available on their days off because they are often short-staffed. This type of employment is very dependent on deliveries.

[75] Following the end of the production season in 2012, she received a questionnaire from the Commission. In 2013, she received a notice of overpayment in the amount of approximately $12,000. Currently, she earns approximately $25,000. The amount of the overpayment is enormous and she does not have the means to repay it. The employees questioned the Commission and the response had always been [translation] "yes, you at the FMEQ, you are on a 7/7 schedule." The UFCW employees were in contact with CSN employees on a daily basis. They were aware of the negotiations conducted by these individuals with the employer, and they were told that the 7/7 schedule was legal. She personally discussed this with A. S., an employee and CSN union officer, in 1996.

SUBMISSIONS OF THE PARTIES

[76] The Appellants pointed out that:

a) On the issue of unemployment and section 11 of the Act, the Respondent's evidence is weak, poorly documented and incomplete. The best evidence rule must apply in this case. The documents submitted by the Commission are contradicted by the evidence presented by the Appellants.

b) The issue of the 7/7 work schedule exists because of an employer demand in 1995, and this schedule was included in the 1995 collective agreement (GD9) and subsequent agreements only after steps were taken with the Respondent to validate this particular work schedule. These steps took place in 1995, 1999, 2001 and 2008. The employees did not like the 7/7 schedule, which replaced a 5/2 schedule in 1995, because they lost money when the change was made and their total earnings decreased.

c) Richard Labrie, a former employee of the Respondent, testified that this validation was communicated to the employees and to the employer in 1995. Consequently, the Respondent agreed to this 7/7 schedule because, during his visit in 1995, witness Cloutier indicated that the 7/7 schedule was acceptable so long as the employees were unemployed and available. Mr.Bellavance's letter (GD5) and Ms. Ricci's response (GD5-8) constitute acquiescence.

d) With the exception of witnesses Labrie and Cloutier, all the witnesses heard were affected by the decisions being appealed to the Tribunal, or appealed in September 2013 at hearings before the Board of Referees. In every case, they found the amounts unreasonable and the Appellants were experiencing significant economic hardship because their earnings were modest. Consequently, the repayment of these amounts would cause them serious hardship.

e) During the 2011 to 2014 negotiations, which were held in 2012, although it had received information from the Respondent in June 2006 that the 7/7 schedules did not comply with the Act, not only did the employer not ask to amend the work schedules (GD18), it also signed the 2011 to 2014 collective agreement (GD14) as written on this issue in 2012. In 2008, the issue of the work schedule was raised and witness Cloutier came to confirm two important questions: 1) Can the employees make enough money to live with this work schedule? 2) Are they able to qualify for Employment Insurance once the production season is over? Because the analysis was negative in both cases, the work schedule was not amended in 2008. Were it not for the validation and the approval of the schedule by the Commission, none of the employees would have accepted it.

f) In its arguments, the Respondent noted that the employees were not available. This is false because there is no credible evidence on file to this effect. The only evidence that exists is hearsay. None of the parties submitted a callback list. Neither the employer nor the Respondent attended the hearings, and the evidence filed by the Appellants in this regard was not contradicted.

g) The statement by Ms. F. B. (GD3-23 to GD3-30) and the interview report written by Mr. J. C. (GD3-31), both employer representatives, should be rejected. In Mr. J. C.'s case, it is solely an interview report. The facts stated therein are either wrong (such as start dates for the union and the 7/7 schedule) or deceptive, and employees are painted as fraudsters who are seeking to exploit the system at all costs. The facts misled the Commission. It is stated that the employees refused the amendments to the work schedules in 2008, but there is no evidence of this.

h) The Respondent's arguments (GD4) contain a series of factual elements that cannot be found anywhere in the evidence. The Tribunal must therefore be discerning. The Respondent knew the situation when it was questioned by the employer in 2011, but did nothing until late 2012 and did not inform the employees until 2013. However, the arguments do not state anything in this regard. The investigation began after the Respondent became aware of the situation, 18 months later, and, apart from the questionnaire sent to the employees in fall 2012, it was not until January 9, 2013, that witness C. O. was informed by telephone of the [translation] "illegality" of the 7/7 schedule. The meter was left running for no reason. After agreeing to the 7/7 schedule in 1995, the Respondent let the situation continue openly and publicly for 17 years. Various witnesses reported that the Respondent's local office was reassuring the employees that the 7/7 schedule was legal.

i) The Appellants asked the Tribunal to allow a write-off under section 56 of the Regulations, particularly, subparagraph 56(1)(*f*)(ii), where undue hardship to the debtor is discussed, because both the Commission and the employer were aware of the illegality of the situation and because the employees were kept in the dark.

j) The legal basis granting the Tribunal this authority can be found in the comments of Justice Stratus in *Steel v. Canada (Attorney General)*, 2011 FCA 153. The Commission dismissed the write-off request from the representatives of the employees who are members of the union affiliated with the CSN. The Commission has yet to respond to the write-off request from the representatives of the employees who are members of the union affiliated with the UFWC, which was sent in October. The request for the non-unionized employees was filed after the hearing for this matter, and also remains to be decided.

k) In paragraphs 74 to 78 of *Steel*, *supra*, Justice Stratas is of the opinion that, when the Act was amended in 1996, this authority was conferred to the Board of Referees and, by extension, to the Tribunal. In *Zora Gill*, 2010 FCA 112, the Court decided that interpretations that give rise to unexpectedly harsh or inequitable consequences should be avoided unless clearly required by the wording, structure and purposes of the Act. In this case, because of the undue hardship that has been established and that is part of the criteria of section 56 of the Regulations, the Commission should write off the debts. In administrative law, when discretion is exercised, the verb [translation] "can" becomes "must" if the criteria for its exercise have otherwise been met. In *Campbell*, 2002 FCT 811, the Federal Court determined that a Board of Referees (and by extension, the Tribunal) is in a better position than the Commission to make findings of fact in terms of the Respondent's exercising its discretion.

l) Further legal basis for the Tribunal's write-off authority can be found in the Supreme Court of Canada decision *Abrahams v. Attorney General of Canada*, [1983] 1 SCR 2, in which Justice Wilson states that, since the overall purpose of the Act is to make benefits available to the unemployed, there must be a liberal interpretation in favour of the employees when the text is ambiguous.

m) There is also legal basis for the Tribunal's authority in section 3 of the Tribunal Regulations and, more specifically, in the wording of paragraph 3(1)(*a*), which grants the Tribunal the authority to conduct proceedings as quickly as the circumstances permit. This means that the claimant could appeal to the Tribunal to request a review of

a write-off request in order to avoid the claimant's having to appear before the Federal Court of Appeal, which is a longer and more costly process. Section 3 of the Tribunal Regulations confirms Parliament's intention as to the Tribunal's jurisdiction on write-off authority and reflects the findings in the *Steel* decision.

n) In light of the facts, the evidence before the Tribunal, the applicable rules of law and their jurisprudential interpretation, the Appellants are asking the Tribunal to allow the appeal. It was as a result of an error of law by the Commission that the overpayment amounts were established. The Commission cannot establish these overpayments retroactively, but only for future cases.

[77] The Commission-Respondent stated that:

a) The Appellants were not unemployed during the periods noted in each of the files that make up this group appeal because they worked more hours than a full-time employee in a period of 7 days under the terms of their employment contract.

b) For this reason, the Commission imposed a disentitlement under section 9 and subsection 11(4) of the Act.

c) The Appellants' representative made allegations [translation] "without including any facts."

d) The Commission exercised its discretion in a judicial manner when it decided not to write off the overpayment.

e) The decision not to write off the overpayment cannot be appealed before the Tribunal because the Tribunal does not have the authority to make a determination on this issue. The Federal Court of Appeal alone possesses this authority according to subsection 47(1) of the Act. The Tribunal must limit itself to dealing with the issue of the week of unemployment and must not make a decision on the write-off request.

f) Under subsection 52(1) of the Act, the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid. The Commission complied with this time frame.

g) It was not until fall 2012, when contacted by the employer, that the Commission was made aware that the collective agreement included a 7/7 work schedule.

h) The Commission could not, cannot and can never authorize the payment of benefits in contravention of the Act. After verifying its archives, the Commission stated that there was no agreement or evidence in this regard. According to the case law, if a Commission officer misinforms one of the parties, this misinformation does not allow a claimant to bypass the Act.

i) Under section 43 of the Act, a claimant is liable to repay benefits to which he or she is not entitled.

j) With regard to subsection 31(1) of the Regulations, the Commission established that a full working week for a person working a normal full-time week in a shrimp processing plant is 42.5 hours based on Pêcheries Marinard, which is located a few kilometres away from FMEQ (GD4-10).

k) There are two questions that must be asked to determine whether a claimant with a 7/7 schedule at FMEQ is considered unemployed:

   i) Does the claimant normally work more hours over a week than persons employed full-time in a normal work week?

   ii) Does the employment contract set out that the claimant must follow a work schedule that entitles him or her to time off after the period of work?

l) In response to the first question, the Tribunal must answer [translation] “yes,” because, according to the evidence on file, a normal working week is 42.5 hours per week. The

employees of Pêcheries Marinard, located a few kilometres away from FMEQ, who also work in shrimp processing, have a regular working week of 42.5 hours. Therefore, under subsection 31(1) of the Regulations, the Commission established that a full working week for a shrimp processing plant is 42.5 hours per week. FMEQ employees work an average of 60 to 75 hours, which represents a working week that is greater than that of Marinard, which is 42.5 hours per week.

m) In response to the second question, the answer is also yes. The 2008 to 2011 and 2011 to 2014 collective agreements indicate the work schedule for FMEQ employees and set out a work period of 7 days followed by a period of 7 days off. This is corroborated by the president of FMEQ, the director of human resources and the president of the union. In addition, at FMEQ, the employees earn more than employees at Marinard over a 14-day period.

n) The Federal Court of Appeal upheld the principle that claimants who have a schedule that contains periods of work and time off are deemed to be employed during the periods of time off that are included in this recognized schedule.

o) FMEQ employees must not be considered laid-off or unemployed when the processing season is in full swing.

ANALYSIS

[78] The issues are clear, but the facts are less so. It is important to point out that, in the absence of certain parties, the Tribunal can rely only on the documentary evidence produced in the files by these parties with regard to their claims. The Tribunal will also review the probative value of this documentary evidence.

[79] There are two important components to examine in this case. The first is the legal basis for the Commission's decision regarding the Appellants' unemployment in accordance with the legislative provisions mentioned above. If the Tribunal finds that the Appellants were employed

during the respective periods in question, there would be reason for the Tribunal to deal with the second component, that is, whether the Tribunal has the authority to render a decision on a write-off and, if so, whether it must write off the Appellants' overpayments.

Witness credibility

[80] Before examining the issues under appeal, it is important to note that the Tribunal heard a number of witnesses. The Tribunal finds all the witnesses who were employees to be credible. They were calm and composed, and responded without trying to bypass the questions asked by their counsel or the Tribunal. There were no hesitations or contradictions, despite the pre-testimony exclusion that was requested. Some witnesses gave shorter testimony. Witness C. O.'s testimony was particularly long in light of the fact that, as union president for numerous years, she had to present the background of the events. In addition, she attended the meetings with the Respondent's representatives, participated in and signed a number of collective agreements, and had discussions with the Respondent's investigators. Without diminishing the credibility of the other witnesses, the Tribunal wants to emphasize the sincerity, accuracy and precision of her testimony. With regard to witness Cloutier, as a union representative for his central labour body (CSN), he was more detached from the events, mainly because he was absent from the file for a number of years. However, yet again, his responses were clear and direct. As for witness Labrie, the Tribunal notes a contradiction when comparing his testimony to that of witness C. O. with regard to the individual from the union or FMEQ who spoke to the Respondent. Nearly 17 years later, witness C. O. may have made a mistake. Regardless, this matter is of little importance. Steps were taken and the Respondent sent a representative to provide an answer to the Appellants and their employer.

Week of unemployment

[81] The Appellants chose to present only a few arguments on this issue, preferring to focus on the second component, that is, having the benefit overpayments written off and the Tribunal's authority in this regard. Their only argument regarding the week of unemployment was that the Commission's evidence supporting its claims is weak and insufficient.

[82] The Commission argued that everything is based on the comparison made between the two companies examined, FMEQ and Pêcheries Marinard, as well as on all their documentary evidence.

[83] However, the Tribunal has the authority to bring *proprio motu* its own arguments to support its own findings.

[84] Section 9 of the Act states that benefits are payable for insured persons who qualify for each week of unemployment that falls in the benefit period.

[85] Subsection 11(1) of the Act states that a week of unemployment is a week in which the claimant does not work a full working week.

[86] Subsection 31(1) of the Regulations sets out that a full working week (with the exception of sections 29 and 30 of the Act) is the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

[87] Subsection 11(4) of the Act sets out that an insured person is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave if the insured person works a greater number of hours, days or shifts than are normally worked by persons and the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

Application of subsection 11(4) of the Act

[88] In order for the insured person to benefit from the presumption of having worked a full working week under subsection 11(4) of the Act, two conditions must be met. First, the insured person must have worked a greater number of hours, days or shifts than are normally worked by persons employed in full-time employment. Second, the person must be entitled to

the period of leave under an employment agreement as compensation. In order for subsection 11(4) of the Act to apply, these two conditions must be met.

[89] There is very little case law on subsection 11(4) of the Act, which represents the cornerstone of the case at hand. The Tribunal cited only a few decisions: *Canada (Attorney General) v. Merrigan*, 2004 FCA 253; *Attorney General of Canada v. Duguay*, A-75-95; and *Kieley v. CAIC*, A-708-92, cited by the Commission, as well as *Canada (Attorney General) v. Buchanan*, 2003 FCA 51.

[90] In *Merrigan*, *supra*, it was not the work schedule that was established for a bar employee that was the subject of the appeal, but rather, its interpretation. Regardless, the Federal Court of Appeal stated that, in cases where a decision-maker must rule on the applicability of the provisions of subsection 11(4) if the Act, it is important to examine each situation as a case in point. Justice Desjardins stated that:

> In order to make a determination under subsection 11(4) of the Act, there must be evidence to show that the claimant worked more than the usual number of hours that are normally worked in a week by persons employed in full time employment. This question is essentially one of fact [our emphasis] and the Umpire should not intervene unless the Board made a reviewable error, namely that it "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (paragraph 115(2)(*c*) of the Act).

[91] In *Buchanan*, *supra*, which pre-dates *Merrigan*, *supra*, the Court refused to overturn the decision of the Umpire, who refused to apply subsection 11(4) of the Act because of a lack of evidence by the Commission as to what constituted a normal work schedule. The work schedule was not disputed, but the comparison factor was not demonstrated, although it was alleged. It was a processing company in the agri-food field, similar to FMEQ. The case involved benefit claims following a production stoppage, but the point to bear in mind is not the nature or even the industry in question, but rather, the fact that, without stating it explicitly, the Court seemed to indicate that the Commission-Respondent had the burden of proving what constituted a normal work schedule. According to Justice Sharlow:

> [10] Subsection 11(4) applies only if the respondents regularly work a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment.
>
> [11] The Board of Referees accepted the submission of counsel for the respondents that in the Province of Prince Edward Island, the standard work week is 48 hours, pursuant to subsection 15(1) of the *Employment Standards Act*, R.S. P.E.I. 1988, Cap. E-6.2. Although the Crown had asserted before the Board of Referees that a normal work week consists of 40 hours, no evidence was presented to support that assertion. The Board found that the respondents did not regularly work more than the normal number of hours, days or shifts in the week, and concluded that subsection 11(4) could not be applied. [Our emphasis]
>
> [12] The Umpire held that there was strong and cogent evidence before the Board to support their factual conclusion as to the number of hours in a normal work week. For that reason, he could not conclude that the Board had erred in law when they found subsection 11(4) to be inapplicable.
>
> [13] We agree with the Umpire. We note also that the Board could not have concluded that the respondents worked more hours in each week than persons employed in full-time employment because there was no evidence that the normal number of hours worked by a person in full-time employment is 40 hours. [Our emphasis]

[92] With regard to the first question under subsection 11(4) of the Act and the number of hours that are normally worked in a week by persons employed in full-time employment, the Respondent's statements in support of its claims are quite problematic.

[93] The Commission [translation] "stated" that a normal working week for a company similar to FMEQ is 42.5 hours. It came to this conclusion by comparing FMEQ with Marinard, which is located only a few kilometres away from FMEQ (our emphasis) or based on the fact that, more than 25 years before the periods in question, FMEQ had a schedule of 42.5 hours per week. The Respondent's arguments were unclear in this regard, but, with full knowledge of the facts, it decided not to attend the hearing where it could have provided further

clarification. It is a matter of judicial notice that Marinard, based in Rivière-aux-Renards, is located over 250 kilometres away from FMEQ, which is in Matane. In addition, the evidence gathered at Marinard does not indicate that the work performed at this plant is similar. The only evidence on file is that the two companies process shrimp. Colette Inglis, whose name appears on the above-mentioned investigation report, is an [translation] "employee in the pay department". However, neither her duties nor her rank are specified. In addition, witness Cloutier, a union representative who works in the region in the field of seafood product processing, stated to the Tribunal that there were at least two other shrimp processing plants: one in Ste-Anne-des-Monts, located approximately 85 kilometres from FMEQ, and a second in Chloridorme, located approximately 220 kilometres from FMEQ. Why didn't the Commission draw comparisons with these plants? The Tribunal was unable to obtain an answer to this question. The Respondent's evidence in this regard consists solely of an investigation report (page GD3-22) and does not include any signed declarations. Although there is more flexibility in terms of evidence presented before an administrative tribunal, the Tribunal can give little probative value to this proof, which, moreover, contains very little evidence.

[94] With regard to 2010, there is no evidence on file with the exception of certain work schedules and the collective agreements. The only evidence on file regarding the three years in question, which is slightly more concrete, can be found in F. B.'s statutory declarations. However, she only provides information regarding 2011 and 2012. It is only through assimilations to presumably similar facts and analogies that this interpretation is extended to 2010.

[95] Although they are signed and sworn, F. B.'s declarations are also unreliable with regard to the work schedule at Marinard because she does not work there. In addition, Ms. F. B., like Mr. J. C. and the other FMEQ executives, did not attend the hearing and because neither the Tribunal nor the claimants can issue a subpoena, they cannot compel any individual to testify. According to the rules of natural justice, it is important to have the ability to hear witnesses, but also to cross-examine them. In this case, neither the Appellants' representatives nor the Tribunal were able to do so.

[96] With regard to the rest of the Respondent's evidence, the Tribunal must assess this evidence on its face, without the ability to cross-examine the individuals who signed declarations or who spoke with the Respondent's investigators. In Mr. J. C.'s case, what seems to be his words contradict certain obvious points, such as the start of the collective agreements, the party who asked that these 7/7 schedules be introduced, the union's grounds for keeping them, and the reasons why these schedules were maintained from 1996 to 2013. The same is true in Ms. F. B.'s case, even though she signed her declaration and affirmed that it was true. It is thus impossible, under these circumstances, for the Tribunal to consider their declarations determinative, and it must rely more heavily on the documentary evidence on file. Contrary to the Respondent's statements in its arguments, the elements on file from Mr. J. C. and Ms. F. B. do not [translation] "corroborate" the Respondent's claims regarding the Appellants' lack of unemployment. With respect to the elements on file relating to witness C. O. when she responded strictly to specific questions selected by the Respondent's investigators, this witness qualified her words at the hearing, as described below.

[97] The rules of evidence must be the same for each party. Under the rules of natural justice, the Tribunal must apply the same constraints and obligations to all the parties. In addition, the Tribunal's practice is to swear in each witness heard before it. Consequently, if documents and declarations presented by the Respondent do not include such a declaration, and the Respondent deliberately chooses, with full knowledge of the facts, not to appear before the Tribunal, the Tribunal must then give the evidence before it relative probative value in accordance with these principles. comments made by the Federal Court of Appeal in *Buchanan, supra*. However, giving the same probative value granted to testimony given under oath to the Tribunal with the ability to cross-examine available to all the parties, to evidence consisting of, for example, mere investigators' reports not signed by the witnesses, is problematic in the eyes of the Tribunal. It is also important to point out that, if, in some cases, the Respondent makes certain witnesses sign and affirm certain pieces of evidence to be true and not others, it is clear that the Respondent itself gives different probative value to the evidence that it presents.

[98] The first question that the Tribunal must answer is: have the employees worked a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment? For the above-mentioned reasons, the Tribunal disagrees with the Respondent's argument that the answer is [translation] "yes." The Tribunal is of the opinion that the answer is [translation] "no". The Tribunal notes that, according to its analysis of *Buchanan*, *supra*, there seems to be a reversal of the burden of proof with regard to the issue of determining what constitutes a normal working week. Consequently, the Respondent did not succeed in demonstrating, based on the principle of the preponderance of the evidence, according to its arguments, that the normal work schedule of a full-time employee is 42.5 hours per week and that the FMEQ work schedule contravenes subsection 11(4) of the Act. Although it is true that, in *Buchanan*, the Board of Referees determined what constituted a normal working week, in this case, the facts presented by all the parties do not allow the Tribunal to do so and the onus is not on the Tribunal to research this evidence and, even less so, to play the role of investigator.

[99] Now, let us examine the second question in subsection 11(4) of the Act: Are the employees entitled under an employment agreement to the period of leave as compensation? Because, according to the criteria established above, it is necessary to answer [translation] "yes" to the two questions that make up the test in subsection 11(4) of the Act and the Tribunal answered "no" to the first question, it is not necessary to make a decision on the second question.

[100] However, in order for subsection 11(4) of the Act to apply, the two conditions set out in the text must be met. Because the answer is [translation] "no" to the first criterion, subsection 11(4) of the Act does not apply in this situation.

Application of subsection 31(1) of the Regulations

[101] Once the issue of subsection 11(4) of the Act is settled, subsection 11(1) of the Act and 31(1) of the Regulations, as raised by the Respondent, must be reviewed.

[102] Subsection 11(1) of the Act sets out that a week of unemployment is a week in which the claimant does not work a full working week. Under subsection 31(1) of the Regulations:

> A full working week of a claimant, other than a claimant referred to in section 29 or 30, is the number of hours, days or shifts normally worked in a calendar week by persons in the claimant's grade, class or shift at the factory, workshop or other premises at which the claimant is or was employed.

[103] However, in this case, the Respondent did not bring any evidence regarding the other employees working at the same company. Consequently, subsection 31(1) of the Regulations does not apply in this case in light of the facts entered as evidence. The collective agreements indicate that the employees work approximately 70 hours per week and that, the following week, they have 0 hours. As a result, they have not worked a full working week.

Findings on the week of unemployment

[104] Consequently, the Tribunal finds that the Appellants were unemployed because the Respondent failed to show that subsection 11(4) of the Act applies or that the Appellants worked a full working week under subsections 11(1) of the Act and 31(1) of the Regulations.

The write-off

[105] Because the Tribunal determined that the employees were unemployed for the periods indicated in the various files for which the Respondent proceeded with a review, it should not be necessary to deal with the write-off issue. However, the Appellants and, in particular, their counsel, spent a lot of energy presenting their position and the Respondent made note of this in its arguments. Finally, the question is a relatively hot issue in light of certain jurisprudential positions that are developing on the write-off issue, pushing the Tribunal to give its opinion, even though it is limited to the status of *obiter dictum* in this decision.

[106] The Appellants are requesting that the Tribunal allow their two grounds of appeal with respect to the write-off issue. The first is that the Tribunal finds that it has the jurisdiction and the authority to review a Commission decision with regard to a write-off. The second follows the first, to the effect that once the Tribunal finds that it has the authority to review a Commission decision with regard to a write-off, it reviews this decision and proceeds with the write-off.

[107] The Tribunal is asked to appropriate this jurisdiction, and once it has this jurisdiction, to make a decision on the write-off issue and find that the Commission did not exercise its discretion in a judicial manner, and, consequently, order the overpayment to be written off.

[108] The Appellants' argument as to the scope of section 3 of the Tribunal Regulations is based on a misunderstanding of this section. When it is stated that proceedings must be conducted "informally and quickly" this in no way refers to taking procedural shortcuts with a view to eliminating certain levels of appeal, but rather to ensuring that the proceedings will be conducted efficiently and rapidly, processing the files as quickly as possible. This section does not include any provision that would grant such authority to the Tribunal.

[109] The Appellants base the thrust of their arguments in this regard on the concurrent position of Justice Stratas in *Steel*, *supra*. Justice Stratas deals with the issue as follows:

> **E. The merits of the jurisdictional issue**
>
> [74] In my view, Parliament's decision to add the words "other person" to subsection 114(1) and section 115 of the current Act was intended to allow persons, such as Mr. Steel, to appeal rulings on write-off requests to the Board of Referees and the Umpire, and then to proceed to this Court. Were it not so, it would be very difficult to see what Parliament had in mind when it added those words.
>
> [75] In my view, this interpretation should be tested by examining Parliament's overall purpose behind this administrative scheme, as shown by the specific statutory provisions it adopted: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2

S.C.R. 559; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394. This administrative scheme is aimed at diverting issues relating to employment insurance from the court system into the more informal, specialized, efficient adjudicative mechanisms set up by Parliament. My interpretation of "other person" is consistent with, and furthers that aim.

[76] A contrary interpretation would mean that the writing-off of liabilities to repay the overpayment of benefits, a matter related to the entitlement to employment insurance benefits, would be diverted from this informal, specialized, efficient regime into the slower, more formal, more resource-intensive court system. That interpretation makes no sense. Only the clearest of statutory wording, not present here, could drive us to such a result.

[77] The statements in *Buffone, Mosher* and *Villeneuve* that suggest a different answer to the jurisdictional question in this case are best regarded as not being the considered opinion of the panels that decided them. Further, to the extent that *Cornish-Hardy* and *Filiatrault* bar persons like Mr. Steel from appealing to the Board of Referees and the Umpire under subsection 114(1) and 115 of the Act, they should no longer be followed. Those cases were decided under the former Act which, unlike the current Act, did not allow "other persons" to appeal.

[78] Therefore, in my view, Mr. Steel was an "other person" under subsection 114(1) and section 115 and could appeal to the Board of Referees and the Umpire and, under subsection 118, could apply for judicial review in this Court. Therefore, this Court has jurisdiction.

[110] Moreover, the Appellants gave additional arguments on jurisdiction, and also presented arguments with a view to explaining why the Tribunal, once it allows the jurisdictional request, should decide to allow the write-off under section 56 of the Regulations.

[111] On the issue of jurisdiction, the Respondent based its arguments on subsection 47(1) of the Act, as well as on the case law.

[112] The Tribunal agrees with Justice Stratas's position in *Steel, supra,* that it would be desirable for a [translation] "competent and specialized" Tribunal to deal with this issue, just as it has the authority to uphold, cancel or modify a penalty imposed by the Respondent. Moreover, the wording of subsection 47(1) of the Act does not apply to this situation because the text refers to the recovery of a debt and to competent jurisdiction. This provision does not deal with the write-off issue in any way.

[113] A federal administrative tribunal is not a court of common law. The authorities and competency that it exercises are either granted by legislation created by the Parliament of Canada, or in accordance with a competency that a superior court has recognized or assigned to it. With regard to write-offs, the provision has existed for some time (1996) and, with the exception of *Steel, supra,* and, to a certain degree, *Bernatchez v. Canada (Attorney General),* 2013 FC 111, the case law is consistent in this regard. Justice Stratas's position, as interesting as it is, does not constitute the *ratio decidendi* of *Steel,* but rather, a position that is proper and specific to its concurrent decision that is not shared by his colleagues in that judgment.

[114] In *Berntachez, supra,* Justice de Montigny effectively summarizes the situation:

> [23] Before examining the merits of the applicant's application for judicial review, consideration must be given to the appropriate forum for hearing this dispute. At the hearing, I raised this issue on my own initiative, and I invited the parties to make representations on this point in light of the concurring reasons of Justice Stratas of the Federal Court of Appeal in *Steel v Canada (Attorney General)*, 2011 FCA 153, 418 NR 327. In that case, Justice Stratas was of the view that since the *Employment Insurance Act* came into force, SC 1996, c 23 [EIA], "a claimant or other person" and not simply a "claimant", as was the case previously, may appeal a decision of the Commission to the Board of Referees then to the Umpire (see subsection 114(1) and section 115 of the EIA). It follows that, even in write-off cases, a decision by the Commission may be appealed to the Board of Referees, the Umpire and then the Federal Court of Appeal, in accordance with section 118 of the EIA.
>
> [24] The applicant made no further representations on this point. On the other hand, the Attorney General submitted that the Federal Court is always the appropriate forum to hear an

application for judicial review regarding a write-off decision by the Commission, insofar as Justice Stratas' reasons did not bind this Court.

[25] It is true that Justice Stratas' reasons are *obiter dictum*, which the majority did not agree with. It is also accurate to maintain that a write-off is not part of the Board of Referees' expertise because a person makes such a request as a debtor not as a claimant. That being said, Justice Stratas' reasoning appears unassailable to me. The previous jurisprudence was based on the fact that section 79 of the *Unemployment Insurance Act*, RSC 1985, c U-1, conferred a right of appeal on a claimant only, which excluded a person who was asking for debt forgiveness because that person was not acting as a claimant but a debtor. Parliament amended that provision in 1996 by introducing subsection 114(1) of the EIA, which provides that "a claimant or other person who is the subject of a decision of the Commission" may appeal that decision to the Board of Referees and the Umpire. I would accordingly be inclined to agree with this argument and to dismiss the applicant's application for judicial review on this ground alone. However, two reasons lead me to examine his application on the merits.

[26] First, the respondent correctly submits that Justice Stratas' comments in *Steel* do not formally bind this Court until such time as the Court of Appeal adopts Justice Stratas' opinion and explicitly disregards the numerous decisions it has issued (before and after the statutory amendment enacted in 1996) to the effect that a decision by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees [Our emphasis]: see, *inter alia*, *Cornish-Hardy v Canada (Board of Referees)* (1979), [1979] 2 FC 437 (available on QL) (CA), aff'd by [1980] 1 SCR 1218; *Canada (Attorney General) v Idemudia*, 236 NR 359 at para 1, 86 ACWS (3d) 253; *Buffone v Canada (Minister of Human Resources Development)*, [2001] FCJ No. 38 at para 3 (QL); *Canada (Attorney General) v Mosher*, 2002 FCA 355 at para 2, 117 ACWS (3d) 650; *Canada (Attorney General) v Villeneuve*, 2005 FCA 440 at para 16, 352 NR 60.

[115] Justice de Montigny, like the Tribunal, is of the opinion that it would be desirable for a decision dismissing a write-off request to be heard and decided by the Tribunal, but until this authority is clearly granted to the Tribunal by the Federal Court of Appeal or the Parliament of Canada, the Tribunal does not have this authority.

[116] Consequently, the Tribunal is of the opinion that, until this authority is granted to it by the Parliament of Canada or by a superior court, it does not have the jurisdiction to review a Commission decision with regard to a write-off. In addition, even if the Tribunal had the authority to review Commission decisions, the Tribunal would have to be presented with write-off decisions to review. Write-off requests were presented, but not write-off decisions by the Commission. For the employees who are members of the CSN union, both the claimants and the Respondent alluded to the Respondent's negative decision in this regard. However, for the employees who are members of the UFCW union, as well as for the non-unionized supervisors, the Tribunal has no decisions before it. Since the Tribunal finds that it does not have the authority to decide on this issue, this point is largely academic, which is why it is making a recommendation in this regard.

Write-off recommendation

[117] The Tribunal recommends that a write-off be allowed and in order to do so, it must analyze the issue under section 56 of the Regulations, which it does as follows.

[118] The wording of section 56 of the Regulations is very explicit and detailed. According to subparagraph 56(1)(*f*)(ii) of the Regulations, an amount may be written off if, having regard to all the circumstances, "the repayment of the . . . amount . . . would result in undue hardship to the debtor," and in addition, according to subsection 56(2) of the Regulations, if the overpayment does not arise from an error made by the debtor or as a result of a false or misleading declaration, and arises as a result of an error made by the Commission.

[119] All the employees who testified stated that the repayment of such an amount would result in hardship. Without performing advanced calculations, it is clear that repaying an amount of approximately $10,000 for an individual with annual earnings of $25,000 to $30,000 constitutes undue hardship. Although some claimants owe smaller amounts—in one case, the amount is only $281—these cases are the exceptions. In the vast majority of cases, the amount is significant.

[120] In this case, the Respondent did not acknowledge its error at all. On the contrary, it stated that there was nothing in its archives to this effect. The Tribunal had previously brought up the fact that this was false, as is demonstrated in Exhibit GD5, which speaks for itself. There is a great deal of testimony, which is not contradicted, including testimony from one of the Respondent's retired employees. This is not one error by a single employee, but rather, a series of errors by a number of employees. In other words, the Respondent gave its consent.

Other comments

[121] Before finishing, the Tribunal wants to address the final points raised by the parties, namely, the issue of the disentitlement, the amended notices of review, the concept of error by the Commission employees and the Commission's prior knowledge of the employees' particular situation, and the Commission's attitude in this file.

[122] First, the Respondent stated that the Appellants did not all report that they were available on the employer's callback lists, and that this is another element that weighs in favour of the disentitlement imposed on the Appellants. The Tribunal does not agree with the Respondent's statement. Nowhere in the evidence for all the files were these [translation] "availability lists" produced. Furthermore, according to witness C. O., there were no cases involving disciplinary measures for employees who allegedly refused to be available on these lists. The issue of availability, which falls under section 18, is not before the Tribunal.

[123] Second, with regard to the files currently under review, the Commission, in certain cases, issued amended notices of review in which it stated that it was reducing the number of days and amounts resulting in overpayment notices, but it did not change the overpayment amounts in the review letters. However, if the Tribunal had dismissed the Appellants' arguments regarding unemployment and write-offs, the subsidiary decision should have focused on the overpayment amounts, but in the absence of information in this regard, the Tribunal was unable to do this.

[124] Third, the Respondent argued that, in situations where one of its employees commits an error, the case law states that they are not able to change the Act. The Respondent does not cite any case law, but the Tribunal consulted *Granger v. CEIC* (A-684-85). The Tribunal agrees that the situation could apply here but once again because of the Respondent's failure with regard to the issue of unemployment, the issue is insignificant. In any case, in *Granger, supra*, the Respondent acknowledged its error and its decision was to change its interpretation solely with regard to future benefits. The Respondent did not retroactively apply the change in its interpretation.

[125] Finally, the Respondent stated in its arguments that it was not until September 2012 that it was made aware of the 7/7 schedule situation at FMEQ. This claim was contradicted and it is clear that the Respondent had been aware of the situation at FMEQ for a long time. Witness Labrie, one of the Respondent's former employees, confirmed that, in 1995, he met with the union and the company to validate the work schedule. Pages 6 to 8 of documentary evidence GD5 proves that André Bellavance sent a specific request to the Respondent's office in Montreal. Even if Ms. Ricci sent a response that was neither here nor there, the questions that she had been asked were clear and support the fact that the Respondent was aware at that time. According to witness C. O., this same evidence was submitted before the Board of Referees, which heard the appeals of the other FMEQ employees. According to witnesses C. O. and G. D., the employees conducted the same verifications in 1999 and 2001. Witness J. B. confirmed that he personally took steps in 2008. In addition, document GD6, filed by the Appellants at the hearing, shows that it was not in 2012, but rather, in 2011, that the FMEQ reminded the Respondent of the existence of the FMEQ employees' 7/7 schedule. On June 21, 2011, Michel Harrisson, a Service Canada employee, replied to the request sent on June 14, 2011, by F. B. of FMEQ to the Respondent. This issue is of little importance in itself, but serves to show the Respondent's attitude in this file.

[126] The Respondent's attitude in this file is very problematic. It was shown that the employees never wanted this work schedule, that it was imposed by the employer and that, if, in 1995, the Respondent stated that it did not want to interfere in the collective agreements between employees, unions and employers, it seems to have changed its mind in 2011 when

the employer wanted to change a collective agreement that no longer suited it and used the Respondent to indirectly accomplish what it seemed to have difficulty accomplishing directly. In addition, in certain cases, and even if this matter was before the Tribunal, the Respondent knowingly refused to decide on certain write-off requests, such as that sent by UFCW in October 2013, which remains undecided at the time of the writing of this decision, that is, nearly eight months later.

[127] Because of its attitude, its lack of promptness and rectitude, and its major errors over all these years and the fact that it continued to confirm, on a number of occasions, to employees and to the employer, that the 7/7 schedule complied with the Act when it should have simply informed the employees in 2011 or 2012 that FMEQ's particular situation no longer corresponded to its interpretation of the Act, and proceeded with changes to be applied henceforth, as it did in *Granger*, *supra*, it is now its duty to write off the amounts claimed from each and every Appellant.

CONCLUSION

[128] The appeal is therefore allowed for the above-mentioned reasons, the disentitlement notices issued by the Respondent are cancelled and, as a result, the Appellants are not required to repay the overpayments.

Me Dominique M Bellemare
Vice-chairperson,
Employment Insurance section,
General Division

DATE OF REASONS: May 30, 2014

APPENDIX 1 OF THE DECISION

SOCIAL SECURITY TRIBUNAL (SST)

EMPLOYMENT INSURANCE SECTION

GROUP APPEAL – JOINT PARTIES

FRUITS DE MER DE L'EST DU QUÉBEC

APPELLANT NAME	FILE NUMBER(S)	APPELLANT NAME	FILE NUMBER(S)	APPELLANT NAME	FILE NUMBER(S)	APPELLANT NAME	FILE NUMBER(S)
N. B.	**GE-13-756 GE-13-757**	N. D.	**GE-13-662 GD-13-665**	D. A. L.	**GE-13-635 GE-13-755 GE-13-754**	D. P.	**GE-13-693 GE-13-685**
A. B.	**GE-13-640 GE-13-717 GE-13-761**	G. D.	**GE-13-658 GE-13-656**	C. M. R.	**GE-13-639**	A. R.	**GE-13-684**
G. B.	**GE-13-759 GE-13-760 GE-13-758**	O. D.	**GE-13-691 GE-13- 696**	S. M.	**GE-13-682 GE-13-679**	D. S.	**GE-13-690 GE-13-687**
J. A. B.	**GE-13-697 GE-13-694**	S. D.	**GE-13-670 GE-13-666**	C. M.	**GE-13-702 GE-13-695**	S. S.	**GE-13-677 GE-13-683**
H. B.	**GE-13-664 GE-13-660**	S. F.	**GE-13-657**	F. M.	**GE-13-709 GE-13-713 GE-13-705**	D. I. S.	**GE-13-688 GE-13-686**
T. C.	**GE-13-655 GE-13-681**	E. F.	**GE-13-698 GE-13-703**	P. M.	**GE-13-673 GE-13-661**	G. T.	**GE-13-678 GE-13-671 GE-13-680**
S. C.	**GE-13-762 GE-13-676 GE-13-674**	M. G.	**GE-13-675 GE-13-672**	M. O.	**GE-13-708 GE-13-699 GE-13-704**	J. T.	**GE-13-659 GE-13-663**
R. T.	**GE-13-692 GE-13-689**	H. L.	**GE-13-1174 GE-13-1176 GE-13-1178**				
M. V.	**GE-13-637**	D. L.	**GE-13-1172 GE-13-1171**				
A. N. B.	**GE-13-1168 GE-13-1167**	C. L.	**GE-13-1181 GE-13-1179**				
M. C.	**GE-13-1164 GE-13-1165 GE-13-1166**	S. B.	**GE-13-1223 GE-13-1224**				
M. D. A.	**GE-13-1173**	J. B.	**GE-13-897 GE-13-899**				
J. D.	**GE-13-1169 GE-13-1170**	C. F.	**GE-13-455 GE-13-593**				
J. H.	**GE-13-1183 GE-13-1184**						