

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. C. L.*, 2014 SSTAD 130

Appeal No: 2012-1998

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**C. L.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Appeal decision**

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SOCIAL SECURITY TRIBUNAL MEMBER: Pierre LAFONTAINE

DATE OF DECISION June 2, 2014

TYPE AND DATE OF HEARING: In-person hearing held in Sainte-Thérèse on May 20, 2014, at 10:00 a.m. (Eastern Time)

## **DECISION**

[1] The appeal is allowed, the Board of Referees' decision dated November 28, 2012, is set aside, and the Respondent's appeal to the Board of Referees is dismissed for lack of jurisdiction.

## **INTRODUCTION**

[2] On November 28, 2012, a Board of Referees determined that:

- The Respondent was entitled to a write-off under section 43 of the *Employment Insurance Act* (the Act) and subsection 56(2) of the *Employment Insurance Regulations* (the Regulations).

[3] The Appellant filed an appeal from the Board of Referees' decision to the Umpire on December 12, 2012.

## **TYPE OF HEARING**

[4] The Tribunal held an in-person hearing for the reasons set out in the notice of hearing dated March 18, 2014. The Appellant was represented by counsel Joshua Wilner. The Respondent attended the hearing and was represented by counsel Jean-Guy Ouellet.

## **THE LAW**

[5] The Appeal Division of the Social Security Tribunal (the Tribunal) hears appeals that were filed with the Office of the Umpire and not heard before April 1, 2013, in compliance with sections 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act* of 2012. On April 1, 2013, the Umpire had not yet heard or rendered a decision on the Appellant's appeal. The appeal was transferred from the Office of the Umpire to the Tribunal's Appeal Division. Leave to appeal from the decision is considered to have been granted by the Tribunal on April 1, 2013, in compliance with section 268 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[6] To ensure fairness, this appeal will be reviewed on the basis of the legitimate expectations of the Appellant at the time of filing its appeal to the Umpire. For this reason, the present appeal will be decided in accordance with the applicable provisions of the Act in effect immediately before April 1, 2013.

[7] In compliance with subsection 115(2) of the Act, in effect at the time of the appeal, the only grounds of appeal are the following:

- (a) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) the board of referees 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.

## **ISSUE**

[8] Did the Board of Referees have the requisite jurisdiction to determine the issue of the overpayment write-off?

[9] If so, is the Board of Referees' decision concerning the Appellant's exercise of its discretionary power reasonable?

## **SUBMISSIONS**

[10] The Appellant submitted the following reasons in support of its appeal:

- The Board of Referees exceeded its jurisdiction by allowing the Respondent's appeal on the issue of the overpayment write-off;

- Under subsection 114(1) of the Act at the time of the decision, the Board of Referees did not have the jurisdiction to determine the issue of the overpayment write-off;
- Under the *Federal Courts Act*, this jurisdiction falls solely to the Federal Court, which has exclusive authority over judicial reviews made in respect of any board, commission or tribunal, including the Appellant and the CRA;
- The Appellant submitted that the CRA's decision dated July 21, 2011 (Exhibit 7-4) constitutes a refusal to write off the overpayment;
- The Respondent's position is essentially based on the concurring reasons of Justice Stratas in *Steel v. Canada (AG)*, 2011, FCA 153;
- The reasons of Justice Stratas are not binding on the Tribunal, as a majority of the Court held that the issue of whether the Board of Referees and the Umpire have the jurisdiction to hear appeals of write-off decisions did not arise and was therefore not justiciable in the absence of the Commission's decision on this issue;
- In *Bernatchez v. Canada (AG)*, 2013 FC 111, the Federal Court held that it was not bound by Justice Stratas' comments, as the Federal Court of Appeal had not adopted Justice Stratas' opinion or explicitly disregarded the numerous decisions it had issued to the effect that a decision by the Commission refusing to write off an overpayment cannot be appealed to the Board of Referees;
- The Board of Referees could not decide whether the Appellant had exercised its discretionary power judicially by refusing to write off the overpayment in the absence of evidence from the Appellant in support of its decision;
- The Board of Referees acknowledged in its decision (page 12 of the decision) that it could not render an informed decision on the Appellant's exercise of its discretionary power;

- If the Tribunal determines that the Board of Referees had the jurisdiction, the Appellant submits that the matter should be returned to the General Division to enable it to provide evidence in support of its decision to refuse the write-off.

[11] The Respondent submitted the following reasons against the Appellant's appeal:

- The wording of the provision providing jurisdiction was discussed in detail in a recent decision, *Steel v. Canada (AG)*, 2011 FCA 153;
- It is clear from Justice Stratas' reasons that the wording of the sections of the Act that define appeal procedures has since been amended by Parliament, given that decisions have been rendered on wording that differs from the wording in earlier sections and that these constitute the key decisions supporting the lack of jurisdiction of the Board of Referees;
- The objection raised in earlier decisions based on the use of the term "debtor" in section 56 of the Regulations and the term "claimant" in the sections enabling the filing of an appeal no longer applies;
- The amendments now use the terms "other person" and "other persons," to which we must give a broader scope and which, for all the reasons to be submitted with respect to the other criteria, should be interpreted as including the situation of the "debtor";
- The purpose of the Act is to pay benefits to persons who are unemployed. The courts have repeatedly held that the Act should be interpreted liberally and that, when in doubt with respect to the scope of a text, the text should be interpreted in favour of the scheme's recipients;
- Over the past several years, the courts have rejected interpretations that limit the Tribunal's jurisdiction;
- The Board of Referees has developed expertise in reviewing the discretion assigned to the Appellant, whether it pertains to the refusal to extend a delayed

appeal, the evaluation of the number of weeks of disqualification or a penalty amount;

- The Board of Referees' decision that it has jurisdiction over write-offs is a reasonable finding in the circumstances;
- An error on the part of the Appellant or the retroactive reconsideration of a case following an error has been recognized as grounds for writing off an overpayment;
- The Board of Referees found that the ground cited by the CRA in its decision to refuse to write off the overpayment, namely, the ability to reimburse the claim, could not be maintained, as the evidence in the Respondent's file clearly showed that the Respondent was in a precarious financial situation at the time of the events leading up to the claim, as well as at the time of the claim. These are relevant facts that both the case law and the Commission's directives have highlighted;
- The Board of Referees noted the factors identified by the Umpires as relevant to analyzing the possibility of writing off an overpayment: Commission error, financial situation, undue hardship, employment insecurity or uncertainty, health, age, and delay in proceeding with the reconsideration. The Board supported its conclusions in this regard with factual elements;
- The Board of Referees' reference to the case law having the identified factors relevant to the exercise of the power to write off an overpayment is entirely reasonable and appropriate, particularly in the absence of a policy by the Appellant in this regard;
- The reasonableness standard must apply, and the Appellant cannot demonstrate that the decision does not meet the standard in this matter.

## **STANDARDS OF REVIEW**

[12] The parties submitted that the standard of review applicable to a question of error of jurisdiction is correctness – *Canada (AG) v. Hallée*, 2008 FCA 159, and *Dunsmuir v. Nouveau-Brunswick*, 2008 SCC 9. The Appellant’s decisions concerning overpayment write-offs are subject to the reasonableness standard – *Wegener v. Canada (AG)*, 2011 FC 137.

[13] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on a question of law, including jurisdiction, is correctness – *Canada (AG) v. Hallée*, 2008 FCA 159, and *Martens v. Canada (AG)*, 2008 FCA 240. The Appellant’s decisions concerning overpayment write-offs are subject to the reasonableness standard – *Wegener v. Canada (AG)*, 2011 FC 137, and *Claveau v. Canada (AG)*, 2008 FC 672.

## **ANALYSIS**

### The facts

[14] The facts on file are not disputed.

[15] Following a claim for regular benefits made on November 12, 2009, and effective October 25, 2009, (Exhibit 2), the Appellant failed to consider that the Respondent was not unemployed and without earnings for at least seven consecutive days, as required by section 7 of the Act and section 14 of the Regulations, and paid the Respondent benefits until July 31, 2010.

[16] On November 13, 2009, the Respondent immediately notified the Appellant [translation] “that she had not had an interruption of earnings of seven consecutive days for a year” (Exhibit 9-15).

[17] On August 25, 2010, considering that the claimant had not had an interruption of earnings, the Appellant reconsidered the file in accordance with section 52 of the Act (Exhibit 3), which resulted in a \$7,037 overpayment (Exhibit 4).

[18] On September 23, 2010, the Respondent appealed that decision to a Board of Referees.

[19] The Board of Referees dismissed the Respondent's appeal on the issue of a lack of an interruption of earnings, strongly recommending that the Appellant write off the entire overpayment (Exhibit 5-5).

[20] The Appellant submitted the Board of Referees' recommendation to write off the overpayment to CRA Non-Tax Collections which, at the time, was the appropriate authority to decide requests for write-off based on paragraph 56(1)(f) of the Regulations because the repayment would result in undue hardship to the debtor.

[21] On January 12, 2011, the CRA refused to write off the overpayment and notified the Respondent of its decision on July 21, 2011, concluding that [translation] "Following a review of your situation and based on the documentation provided, CRA will continue to collect the outstanding debt, as the evidence shows that you are or may be able to repay your outstanding balance" (Exhibits 6 and 7-4).

[22] On November 28, 2012, the Board of Referees allowed the Respondent's appeal on the issue of the overpayment write-off (Exhibits 25-1 to 25-11), hence this appeal by the Appellant;

[23] After expressing various ambiguous positions on the issue (Exhibits 8-1, 8-2, 17-1 and 17-2), the Appellant finally acknowledged that the CRA decision constituted a refusal to write off the overpayment (Appellant's submissions on appeal, p.4).

#### Board of Referees' decision on the jurisdictional issue

[24] When it allowed the Respondent's appeal, the Board of Referees stated the following with respect to its jurisdiction over debt write-off:



[Translation]

The evidence on which the Board of Referees is relying to determine that it has jurisdiction over debt write-off is as follows:

- Amendments to the legislation in 1996 (subsection 114(1) of the Act, which provides that “A claimant or other person who is the subject of a decision of the Commission” may appeal to the board of referees);
- The fact that the Commission never gave the claimant any explanation as to the reason why it had rejected her request for a write-off (see Memorandum BE 2012-01, Exhibit 22);
- The Commission’s refusal to answer the Board of Referees’ repeated requests that it provide the evidence taken into consideration and that not taken into consideration, and to provide the Canada Revenue Agency policy on debt write-off;
- The Federal Court of Appeal decision (A-53-10) in respect of Zack Steel in which Justice Stratas states that an “other person” can appeal to the Board of Referees (para. 57).

In addition, an increasing body of case law holds that the Board of Referees be given greater jurisdiction over, for example, notices of violation, penalties, etc.

[25] Did the Board of Referees have the requisite jurisdiction to decide the issue of the overpayment write-off?

[26] The parties agree that the correctness standard applies on the strict issue of whether the Board of Referees had jurisdiction over the write-off – *Hallée v. Canada (AG)*, 2008, FCA 159.

[27] Counsel for the Appellant submitted that the Board of Referees exceeded its jurisdiction by allowing the Respondent’s appeal on the issue of the overpayment write-off. He stated that this jurisdiction falls solely to the Federal Court, which has exclusive authority over judicial reviews made in respect of any “board, commission or tribunal.” He added that the Tribunal was not bound by Justice Stratas’ comments in *Steel v. Canada (AG)*, 2011 FCA 153, as a majority of the Federal Court of Appeal did not make a determination on the jurisdictional issue.

[28] Before the Tribunal and in his written submissions dated March 8, 2013, counsel for the Respondent essentially pleaded the concurring reasons of Justice Stratas in *Steel* in support of his position that the Board of Referees correctly exercised its jurisdiction in this case. He stated that, in this case, contrary to the situation in *Steel*, the Appellant finally acknowledged that the CRA decision dated July 21, 2011, constituted a refusal of the Respondent's request for a write-off (Exhibit 7-4).

[29] In *Steel*, the claimant was liable to pay back an overpayment of benefits and said that he had requested the Commission to write off that liability under subsection 56(1) of the Regulations because of "undue hardship." The majority of the Federal Court of Appeal, without effectively deciding the jurisdictional issue, found that:

In the absence of a decision there is no basis upon which the Board or the Umpire could decide the issues Mr. Steel wishes to raise concerning a write-off of his indebtedness. He is not a "person who is the subject of a decision of the Commission" who may appeal from the decision to the Board.

Nor is there a decision that could be judicially reviewed in the Federal Court. The question Mr. Steel wishes to raise simply does not arise on this record. There is no justiciable issue.

[30] Despite the majority position, Justice Stratas was of the opinion that the jurisdictional question could not be avoided and that the Court had the duty to first determine the issue. He stated the following:

[54] In this case, Mr. Steel became liable to pay back an overpayment of benefits. He says that he requested the Commission to write off that liability under subsection 56(1) of the *Employment Insurance Regulations*, SOR/96-332 because of "undue hardship". Mr. Steel contends that the Commission decided against his request for a write-off.

[55] Accordingly, Mr. Steel has pursued appeals to the Board of Referees and the Umpire under subsection 114(1) and section 115 of the *Employment Insurance Act*, S.C. 1996, c. 23. These provisions, set out in the schedule to my colleague's reasons, allow a "claimant" or an "other person" to appeal to the Board of Referees and the Umpire. From there, a judicial review may be brought to this Court under section 118 [...] of the Act.

[56] On the existing authorities of this Court, Mr. Steel is not a "claimant": *Cornish-Hardy v. Board of Referees (Unemployment Insurance Act, 1971)*, [1979] 2 F.C. 437 (C.A.), aff'd [1980] 1 S.C.R. 1218 and *Canada (Attorney General) v. Filiatrault* (1998), 235 N.R. 274 (F.C.A.).

[57] Therefore, the jurisdictional issue boils down to whether Mr. Steel is an “other person” under subsection 114(1) and section 115 of the Act. If Mr. Steel is an “other person”, then he can appeal to the Board of Referees and the Umpire and, from there, can apply to this Court for judicial review under section 118 of the Act. If Mr. Steel is not an “other person”, then his only recourse is by way of judicial review from the Commission’s refusal to the Federal Court under sections 18 [...] and 18.1 [...] of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[58] For some time now, this Court has held that persons aggrieved by write-off decisions made by the Commission have to proceed by way of application for judicial review to the Federal Court: *Cornish-Hardy* and *Filiatrault*, both above. The appeal and review route involving the Board of Referees, the Umpire and this Court is not available.

[59] However, *Cornish-Hardy* and *Filiatrault* arose under different statutory provisions: just before a statutory reform in 1996, these provisions were subsection 79(1) and section 80 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1. These provisions were more limited than subsection 114(1) and section 115 of the current Act. Subsection 79(1) only allowed a “claimant” or “an employer of the claimant” to appeal from a decision of the Commission to the Board of Referees. Section 80 allowed “the Commission, a claimant, an employer or an association of which the claimant or employer is a member” to appeal from a decision of the Board of Referees to the Umpire. Neither provision allowed an “other person” to appeal.

[60] Although subsection 114(1) and section 115 of the current Act are broader in that they allow an “other person” to appeal, our Court has continued to follow the position in *Cornish-Hardy* and *Filiatrault*: *Buffone v. Canada (Minister of Human Resources Development)*, 2001 CanLII 22143 (F.C.A.); *Canada (Attorney General) v. Mosher*, 2002 FCA 355; *Canada (Attorney General) v. Villeneuve*, 2005 FCA 440 [...].

[61] In each of *Buffone*, *Mosher* and *Villeneuve*, this Court regarded the jurisdictional issue as settled. The reasons of each case suggest that the Court had not received any submissions on the relevant statutory provisions. In each case, the Court had before it a benefits recipient without legal representation.

...

[69] Consider, as an example, the plight of Mr. Steel. The majority of this Court will decide this case without determining the jurisdictional issue he has placed before us. Then the Commission will rule on whether Mr. Steel is entitled to a write-off. Assuming the Commission rules adversely to him, he will have to choose a route of review without the benefit of a determination on the jurisdictional issue. If he chooses the wrong route of review, he will be forced to go back to where he was before and start all over again. In a case like this, too great a devotion to judicial minimalism can ensnare benefits recipients in a frustrating game of “snakes and ladders”.

...

[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 section 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 person[s]" 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 section 118, could apply for judicial review in this Court. Therefore, this Court has jurisdiction.

(Emphasis added)

[31] Regrettably, the Tribunal finds that the Respondent is effectively ensnared in a frustrating game of "snakes and ladders." However, it cannot ignore that a majority of the Federal Court of Appeal in *Steel* did not rule on the jurisdictional issue, despite the legislative amendment adopted in 1996.

[32] The Federal Court has recently had the opportunity to consider the issue of jurisdiction over write-offs in *Bernatchez v. Canada (AG)*, 2013 FC 111. The Court stated the following:

[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: see, *inter alia*, *Cornish-Hardy v Canada (Board of Referees)* (1979), [1979] 2 FC 437 (available on QL) (CA), aff'd by 1980 CanLII 187 (SCC), [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 (CanLII) at para 2, 117 ACWS (3d) 650; *Canada (Attorney General) v Villeneuve*, 2005 FCA 440 (CanLII) at para 16, 352 NR 60.

(Emphasis added)

[33] The Tribunal is also of the opinion that Justice Stratas' reasoning appears unassailable. However, it is true that Justice Stratas' reasons are *obiter dictum* with which the majority of the Federal Court of Appeal did not agree.

[34] The Tribunal has no choice other than to find that it is not bound by the comments of Justice Stratas "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.”

[35] The Tribunal must therefore intervene to correct an error of law made by the Board of Referees under subsection 115(2) of the Act.

## **CONCLUSION**

[36] The appeal is allowed, the Board of Referees’ decision dated November 28, 2012, is set aside, and the Respondent’s appeal to the Board of Referees is dismissed for lack of jurisdiction.

*Pierre Lafontaine*

Member, Appeal Division