Tribunal de la sécurité sociale du Canada
Social Security Tribunal of Canada

[TRANSLATION]

Citation: *A. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 108

Date: June 15, 2015

File: GE-13-1194

GENERAL DIVISION
Employment Insurance Section

Between:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

ACE Aviation Holdings Inc.

Added Party

and

Aveos Fleet Performance Inc.

Added Party

Decision rendered by: Me Dominique Bellemare, Vice-Chairperson, General Division - Employment Insurance

Hearing in person and by teleconference in Montreal on January 27, 28 and 29, 2015, in Toronto on February 4, 2015, in Winnipeg on February 5, 2015, in Calgary on February 6, 2015, and in Vancouver on February 10 and 11, 2015.

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant decided not to participate in person or by telephone.

The Appellant was represented by counsel Hans Marotte of Mouvement Action Chômage de Montréal, who participated in the hearing.

The Respondent was represented by counsel Renée Darisse and counsel Sylvie Doire. Lucie Nepveu, Manon Richardson and Carole Robillard also participated.

The Added Party ACE Aviation Holdings Inc. (Air Canada) was represented by counsel Rachelle Henderson, but for the day of January 28 only.

The Added Party Aveos Fleet Performance Inc. (Aveos) did not participate in the hearing.

INTRODUCTION

[1] The Appellant appealed to the Social Security Tribunal of Canada (the Tribunal) from the reconsideration decision made by the Respondent, the Canada Employment Insurance Commission (the Commission), dated May 28, 2013.

[2] Between 2007 and 2011, Air Canada sold a portion of its heavy maintenance activities to an entity that later became Aveos. In 2012, Aveos closed its doors and Air Canada subsequently paid amounts to its former employees who lost their employment at Aveos, following an order from the Canada Industrial Relations Board (CIRB) and a decision by arbitrator Martin Teplitsky. The Commission subsequently determined that these amounts constituted earnings and had to be allocated, which resulted in amounts to be repaid by the claimants who had received Employment Insurance benefits following the loss of their employment.

[3] The hearing of this appeal was held in person, with the possibility of participating by telephone for the reasons stated in the Notice of Hearing dated December 19, 2014. Prior to this hearing, the Tribunal held a number of pre-hearing conferences. Following these pre-hearing conferences and comments from the parties, the Tribunal decided that the appeals would not be

dealt with jointly under section 13 of the *Social Security Tribunal Regulations* (Tribunal Regulations), but the Tribunal decided to hold a common hearing.

[4] The appeals were heard at a common hearing over nine days, but the 353 decisions are separate.

ISSUES

[5] Did the amounts received by the Air Canada Appellants constitute earnings under section 35 of the *Employment Insurance Regulations* (the Regulations)?

[6] If the amounts received are found to constitute earnings under section 35 of the Regulations, under which provisions of section 36 of the Regulations are they to be allocated, and to which date(s) are they to be allocated?

[7] Does the Tribunal have the power to write off an Appellant's debt?

APPLICABLE LAW

[8] See Appendix A for the applicable law.

EVIDENCE

Documentary evidence

[9] In 2006, Air Canada announced its plan to sell a portion of its heavy maintenance and engine maintenance and repair operations (ACTS) to a limited partnership. On October 16, 2007, Air Canada announced the conclusion of the sale of ACTS to a consortium formed by Sageview Capital LLC and KKR Private Equity Investors. This transaction resulted in the sale by Air Canada of a portion of the heavy maintenance assets and operations to a third party. The new entity, called ACTS Aero Technical Support & Services Inc., was later named Aveos Fleet Performance.

[10] The employees' union contested this decision made by Air Canada on December 14, 2006, before the CIRB. On January 8, 2009, a Memorandum of Agreement was reached between the employees' union, the International Association of Machinists and Aerospace Workers (the

Union), Air Canada and Aveos. A copy of this agreement was provided in Tab A of the Commission's submissions. The purpose of this agreement was to facilitate the transition of employees transferred by Air Canada to Aveos and to clarify the terms and conditions of employment for the transferred employees. Seven transition options were offered to the transferred ACTS employees, as indicated on pages 4 and 5 of the agreement. The options were as follows:

(a) Remain employees of Air Canada, Option 1;

(b) Accept available employment with Aveos, Option 2;

(c) Retire from Air Canada if the employees are eligible for the pension plan, Option 3;

(d) Resign from Air Canada to accept a position with Aveos, Option 4;

(e) Those who remain at Air Canada (Option 1) may choose to accept an offer of a position with Aveos if, based on their seniority, they cannot remain employed by Air Canada, Option 5;

(f) The eligible employees who choose Option 1 and who are eligible to retire from Air Canada can retire from Air Canada and accept an offer from Aveos, Option 6; and

(g) The eligible employees who choose Option 1 can resign from Air Canada and accept a position with Aveos, Option 7.

[11] The employees then had 60 days to make their choice, but if they did not make a choice, Option 2 was accepted automatically. The employees who were transferred to Aveos were removed from the Air Canada seniority list and were placed on the seniority list at Aveos, while keeping the level of seniority they had at Air Canada. The employment start date at Aveos was the same as the start date at Air Canada. The wage at Aveos was at the same rate as at Air Canada. Aveos would take over the responsibilities for certain retirement and non-retirement

benefits earned at Air Canada by the transferred employees. The benefits plans were also equivalent at Aveos and the recall rights continued with the new employer.

[12] The CIRB ratified this agreement in decision 26054-C on January 22, 2009.

[13] On March 5, 2009, arbitrator Martin Teplitsky, chosen by the parties when there were differences of opinion regarding the interpretation of the orders issued by the CIRB or certain points arising from these orders, rendered a decision on several points, only one of which is relevant to this case, namely, whether the transferred employees are entitled to a separation payment (Tab D of the Commission's submissions).

[14] Arbitrator Teplitsky replied that there is no lay-off when a business is sold and the employee accepts employment from the buyer; therefore, the employees are not entitled to a separation payment. There were subsequently three CIRB orders seeking to specify certain points of this agreement, namely, orders 9994-U, 9995-U and 9996-U.

[15] Order 9994-U, dated January 31, 2011, determined, among other things, that Aveos and Air Canada were separate employers. This decision thus rejects an application from the Union and, although the collective agreements are identical, they remain separate.

[16] Order 9995-U essentially pertains to the administrative employees and is not relevant to this case.

[17] Order 9996-U, dated January 31, 2011, determined the following:

(a) The bargaining unit of the transferred employees was replaced.

(b) The Heavy Maintenance Separation Program (Separation Program) presented by Air Canada on January 13, 2011, (Appendix A) would be implemented. Articles 3 and 4 of this program stipulate that Air Canada will provide separation packages to employees equal to two weeks' pay for each completed year of continuous service at Air Canada and Aveos, up to a maximum of 52 weeks, based on the hourly rate for a 40-hour work week. This separation payment is payable up to June 30, 2013, if insolvency, liquidation or bankruptcy occurs at Aveos and this

> situation results in the cancellation of Air Canada-Aveos contracts and in the termination or permanent lay-off of IAMAW-represented employees; or up to June 30, 2015, if Aveos ceases to be the exclusive provider of heavy maintenance services to Air Canada.

The other provisions of the order will not be mentioned in this decision.

[18] Under these agreements, the employees stopped working for Air Canada on July 23, 2011, and commenced their employment with Aveos on July 24, 2011.

[19] On March 20, 2012, faced with serious financial difficulties, Aveos ceased its operations and lay off its employees.

[20] Most of the employees submitted benefit claims to the Commission, beginning in March 2012.

[21] On September 12, 2012, arbitrator Teplitsky rendered an arbitration decision confirming that Air Canada had to issue separation payments to its former employees who were transferred to Aveos under the terms of Appendix A of order 9996-U dated January 2011, also called "Heavy Maintenance Separation Program." The total amount of these payments was $55 million. The hiring date at Air Canada was the basis for the calculation. A first amount representing 50%, or $25 million, was payable immediately (in mid-December 2012), with the balance to be paid every two weeks, minus statutory deductions. A balance of $5 million was to be kept in reserve to deal with grievances. The arbitrator specified (pages 3 and 4 of his decision) that, even though the term separation payment is used, no payment was due upon separation. It was the bankruptcy of Aveos, or the loss of the heavy maintenance contract, that constituted the last condition to be eligible for payment from Air Canada.

[22] According to the terms of the Separation Program, the employees were supposed to receive a separation payment at a rate of two weeks' pay for each completed year of combined seniority at Air Canada and Aveos, for a maximum of one year's pay.

[23] Subsequently, on September 24, 2012, arbitrator Teplitsky issued an amendment to his decision of September 12, 2012, specifying that the Separation Program had not been accepted by the Union, but rather was presented by Air Canada during a private bargaining session organized by the CIRB.

[24] Subsequent to this payment and an analysis by the Commission, the Commission determined that the payments in question constituted earnings within the meaning of section 35 of the Regulations, and that they had to be allocated in accordance with subsection 36(9) of the Regulations, as of March 20, 2012.

[25] Since the Appellants have received benefits for various amounts and periods since March 18, 2012, the Commission issued notices of debt corresponding to the overpayment amounts based on its calculations.

[26] File GE-13-1593 contains a pay stub with reference "Aveos-severance-elligible" (sic).

Testimonial evidence

A. P.

[27] The witness informed the Tribunal that he started working for Air Canada in September 1994 as a mechanic. Beginning in 1998, he was a union representative. He experienced some work interruptions and held various jobs at Air Canada and Aveos.

[28] He was part of the bargaining committee that negotiated the 2009 Memorandum of Agreement between Air Canada, Aveos and the Union. After this agreement was reached, the Union requested clarifications on it, which resulted in CIRB order 9996-U.

[29] The employees were not entitled to receive a separation payment from Air Canada because the transfer to Aveos constituted a new employment. The Union disagreed because it believed that these were different companies. The CIRB decided that employees would not be entitled to a separation payment from Air Canada, unless "something" happened. If nothing happened, no payment would be made.

[30] During the transfer of employees from Air Canada to Aveos, there was a "total" transfer, not an "artificial" transfer. On July 24, 2011, the employees went to a new workplace and a new head office, used new machines and tools, and received new uniforms. The Aveos and Air Canada work locations were separated by a fence. Aveos was responsible for heavy and regular maintenance. Emergency repairs continued to be done by Air Canada. Aveos had to obtain new government licences and permits. The employees also had to be much more versatile at Aveos than at Air Canada.

[31] He had no choice but to transfer to Aveos. He could have chosen to stay at Air Canada, but he would have been unemployed until a position became available. Wages and group insurance were the same. Air Canada told them that if they went to Aveos and the job did not last, the employees would be entitled to a separation payment.

[32] According to him, the "bankers" who bought Aveos wanted to keep this company for a few years, then resell it to another buyer more "knowledgeable" in the field. Air Canada kept a minority stake in Aveos. The service contracts with Air Canada ended in 2013 and 2015.

[33] There was a Separation Program at Air Canada and, in principle, years of seniority, group insurance and wages were preserved.

[34] From the start of operations at Aveos, the workload began to decrease because Aveos was short of parts and labour. Some units had been contracted out. The quality of employment declined. Problems occurred regarding pensions, and Aveos refused to pay the actuarial deficiencies of the pension fund. Toward the end of 2011, Aveos' financial situation went downhill. Lay-offs occurred. The situation deteriorated until March 2012, when the employees received a telephone call telling them to stay home. The following Monday morning, the employees learned through the newspapers that Aveos had closed.

[35] Even though the Separation Program took effect, the employees were not entitled to receive their money right away. They had to wait for arbitrator Teplitsky's decision in October 2012 in order for the Air Canada separation payment process to be initiated. Subsequent to arbitrator Teplitsky's decision, there were discussions between the Union and Air Canada, but he

was not present. Around December 12, 2012, a first payment corresponding to 50% of the amount owed was issued.

[36] He applied for Employment Insurance benefits in March 2012. In October 2012, he found a job at Canadian National. He therefore stopped receiving Employment Insurance benefits at that time.

[37] He knew that, when the first payment of December 2012 was issued, claimants who were former employees of Aveos contacted the Commission to find out what to do. The Service Canada officers, acting on the Commission's behalf, informed the claimants that they did not have to stop their benefits because two different employers were involved. It would seem that this position taken by the Commission was communicated to the claimants subsequent to internal meetings held by the Commission regarding the issue.

[38] In April 2013, he received a letter from the Commission informing him that he had to repay an amount of approximately $13,300 because he "should have reported his income." After receiving this letter, he called the Union. In total, he had received approximately $39,000 from Air Canada following arbitrator Teplitsky's decision of September 12, 2012. The Union's reply was that its lawyers were going to present arguments to challenge the Commission's decision.

[39] In his case, he had accumulated 17 completed years of employment with Air Canada and Aveos and was therefore entitled to the equivalent of 34 weeks' pay. Even though he had not worked all those years (from 1994 to 2012), his status at Air Canada was protected for seven years, and "that is what matters."

[40] When his Air Canada payment was received, he did not receive an amended Record of Employment. He paid his income taxes in 2012 and 2013 on the amounts received, depending on when he received them.

[41] Air Canada and the Union had different interpretations of order 9996-U, so they went before arbitrator Teplitsky.

M. B.

[42] The witness stated that Aveos waited a very long time, several months, before sending Records of Employment to employees. The company behaved in a cavalier manner with its employees. Air Canada never told employees that they could have to wait to receive any amount at all.

N. D.

[43] The witness stated that, in his case, he had no choice but to leave Air Canada. Basically, his job category was eliminated outright by Air Canada because his entire job category was at Aveos. In his case, he was eligible for an Air Canada pension, retroactively to the termination of his employment at Aveos in March 2012. Here again, he had no choice but to retire.

M. L.

[44] The witness added that in his case, he went to the Service Canada office in Vaudreuil as soon as he received his payment of 50% of the aggregate amount owed by Air Canada. They took his papers and informed him that he would receive an answer within two weeks. He called back several times but did not receive an answer. It was not until March 2013 that he received written notice from the Commission informing him that he had to repay an overpayment.

B. L.

[45] The witness stated that the change of employer was not just nominal, that is, a change of logo on a workplace. Everything changed: the workplace, the uniforms, the name. The technical methods were also different. In his case, he held only one job from 2001 to 2011 at Air Canada, and another at Aveos. These were clearly two different employers. The collective agreements were separate, even though one was used to create the other in accordance with the provisions of the Act.

[46] When he left Air Canada, he did not have a choice; his position was abolished. Yes, he made a choice, but it was the only one he could make. The Separation Program is not what made

him opt for the choice in question, but he was told that "it was what he had to do." Basically, there was only one choice to make.

[47] When he found himself unemployed, he asked the Commission questions through the Service Canada staff at the Saint-Jérôme office. The answer was that "there was internal training on this case and the payment is considered not to be income because it came from a different employer." He was told this, as were several of his co-workers. This is why they kept their benefits at the time.

P. Z.

[48] The witness stated that, in his case, because of his many years of service at Air Canada, he is receiving his "pension." But in fact, it is not a "pension" but an annuity. He receives only the cash portion of the pension, whereas, in the case of a real pension, a retiree receives pension and benefits.

O. A. M.

[49] The witness stated that he was laid off by Aveos in March 2012, when he was 59 years of age. In December 2012, the company offered him a pension, but it was only an annuity because he was not entitled to receive benefits. When he received his first payment, he reported it to the Commission. However, it was not until March 2013 that he was told he had to repay the amount received. He does not understand why $14,501 is being claimed from him as overpayment, when he received a total of $8,252 in Employment Insurance benefits.

M. M.

[50] The witness stated that he is an Appellant presently before the Appeal Division. He was involved in the Union at Air Canada and during the transfer of employees to Aveos. According to him, the payments made by Air Canada were in exchange for waiving the right to be reinstated.

Specific testimony of the Appellant A. B.

[51] The Appellant did not testify before the Tribunal.

SUBMISSIONS OF THE PARTIES

[52] The Appellants made various submissions.

Earnings under subsection 35(1) of the Regulations

[53] Counsel Marotte did not make any submissions on this point.

Argument made by counsel Boudreault (the Appellant's representative in file GE-13-1123):

[54] The amount received from Air Canada does not constitute earnings under section 35 of the Regulations. The entire income must arise out of the employment and not out of a simple consequence related to this employment. According to this representative, the CIRB, in order 9996-U, had to respond to the employees' concerns regarding the viability of the maintenance contract with Air Canada and employees' job security. Civil law is supplementary on this issue, particularly articles 1497 et seq. of the *Civil Code of Québec*, which deals with conditional obligations. Specifically, article 1506 stipulates that the fulfillment of a condition has a retroactive effect to the day on which the debtor obligated himself conditionally. According to this representative, this qualification is important. Arbitrator Teplitsky's decision of March 2009 confirms that if a business is sold there is no lay-off, and Air Canada owed nothing to employees. The payment became effective in arbitrator Teplitsky's decision of September 12, 2012, only because the condition was fulfilled. Since Aveos was in business for only a short time, it owed nothing to the employees.

Position presented by several unrepresented Appellants:

[55] The payments were received after they had stopped receiving benefits, so they do not have to repay them. Moreover, since the payment came from Air Canada, which was their former employer, and not from the last employer, Aveos, two employers and two separate jobs were involved. The Records of Employment contained in the file were issued by different employers, that is, Air Canada up to July 24, 2011, and Aveos from July 25, 2011, to March 20, 2012.

Exception to the concept of earnings under section 35 of the Regulations

Alternative argument made by counsel Boudreault:

[56] Subsequently, if the Tribunal does not accept his first argument, the situation that interests the Tribunal is one of the exceptions to the concept of "earnings" within the meaning of section 35 of the Regulations, since the amount paid constituted compensation for waiving the right to be reinstated.

Argument made by Mr. Simpson:

[57] The amount paid by Air Canada was in exchange for waiving the right to be reinstated. The Memorandum of Agreement of March 5, 2009, refers to the fact that the employees waived their right to be recalled. Even though the terms used in the Memorandum of Agreement of March 5, 2009, or the other subsequent documents do not specifically refer to the right to be reinstated, the description given is such that it corresponds to and has all the characteristics of a waiver of the right to be reinstated. Furthermore, the Commission ignored the CIRB's decision and decided to request repayment of the overpayments from the Appellants. See arbitrator Teplitsky's decision; CIRB order 9996-U; CUB 60715, *Attorney General of Canada v. Warren*, A-53-05 (Federal Court of Appeal (FCA)); *Attorney General of Canada v. Bielich*, A-280-11 (FCA).

[58] He further submits that *Staikos v. Canada (Attorney General)*, 2014 FCA 31**,** *supra*, submitted by the Commission, does not apply. In *Staikos*, *supra*, the amounts were paid by the same employer and, in addition, were paid immediately, whereas in the case before the Tribunal, different employers are involved. In addition, still according to *Staikos*, *supra*, there is no indication that the amounts were received in exchange for waiving the right to be reinstated.

The allocation under subsection 36(9) of the Regulations must be applied as of July 24, 2011

Alternative argument made by counsel Boudreault and by several unrepresented Appellants:

[59] If the Tribunal determines that the amount paid by Air Canada constitutes earnings, and if the Tribunal concludes that the allocation must be applied under subsection 36(9) of the Regulations, then the amount must be allocated as of July 24, 2011. According to article 1506 of the *Civil Code of Québec* (conditional obligations), once the condition is fulfilled, it has a retroactive effect to the day on which the debtor obligated himself conditionally, therefore to July 24, 2011.

The earnings under subsection 36(9) of the Regulations must be prorated by the years spent at Air Canada and Aveos:

Alternative argument made by counsel Boudreault and by several unrepresented Appellants:

[60] If the Tribunal determines that the amount paid by Air Canada constitutes earnings, and if the Tribunal concludes that the allocation must be applied under subsection 36(9) of the Regulations, and if the entire amount does not have to be allocated as of July 24, 2011, then the allocation must be made proportionally to the time spent at Air Canada and at Aveos, that is, one portion as of July 24, 2011, and one portion as of March 20, 2012.

Allocation under subsection 36(19) of the Regulations

Argument made by counsel Marotte:

[61] The amount paid by Air Canada cannot be allocated under subsection 36(9) of the Regulations. Once it is established that the amount paid constitutes earnings under section 35 of the Regulations, section 36 of the Regulations must be consulted to know where to allocate it. According to the Commission, subsection 36(9) of the Regulations should apply. This interpretation would therefore imply that the amounts paid by a previous employer should be allocated upon separation from a subsequent employment. According to this analysis, the allocation therefore should commence within: "... the week of the lay-off or separation from

employment ... *"* However, the Commission made the allocation effective not during the week of the lay-off or separation from employment, but rather on the date on which Aveos closed, which is incorrect. "The Commission must advise the Board of Referees that it erred with respect to the allocation period. The allocation of the separation payments began in the week of March 11, 2012. However, the allocation should have begun in the week of March 18, 2012, given that the reason that the separation payments were issued was the closing of the company Aveos on March 20, 2012." (Emphasis added by counsel Marotte.)

[62] The very wording of subsection 36(9) of the Regulations clearly indicates that only the amounts paid by the last employer may be allocated under this section. A careful reading of subsection 36(9) of the Regulations reveals that the only earnings that may be allocated under this section are the earnings from the last employment lost, not from a previous employment.

> Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.
>
> (Emphasis added by counsel Marotte)

[63] If Parliament had wanted subsection 36(9) of the Regulations to apply to amounts paid by a previous employer after separation from the last employment, it instead would have worded this subsection as follows: in such a manner that the total earnings of the claimant by reason of the lay-off or separation from that employment (emphasis added by counsel Marotte).

[64] If Parliament had wanted subsection 36(9) of the Regulations to apply in cases of amounts paid by a previous employer, it would have stated this outright using different wording. For the allocation to begin in the week of the lay-off or separation from employment, notwithstanding the period for which it is purported to be paid or payable, Parliament ensured that the wording of this section specifies this intention:

> Sous réserve des paragraphes (10) à (11), toute rémunération payée ou payable au prestataire en raison de son licenciement ou de la cessation de son emploi est, abstraction faite de la période pour laquelle elle est présentée comme étant payée ou payable, repartie sur un nombre de semaines qui commence par la semaine du licenciement ou de la

> cessation d' emploi, de sorte que la rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive, sauf la dernière, soit égale à sa rémunération hebdomadaire normale provenant de cet emploi.
>
> (Emphasis added by counsel Marotte)

The English version is just as clear:

> Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.
>
> (Emphasis added by counsel Marotte)

[65] If Parliament's intention was to take into account the amounts paid by a previous employer for the application of subsection 36(9) of the Regulations, it then would have added: "regardless of the source of the earnings" (emphasis added by counsel Marotte).

[66] The Commission's Digest of Benefit Entitlement Principles (the Digest) also expressly states that the term "that employment" in subsection 36(9) of the Regulations refers to the lost employment. The Commission informed several Appellants that the amounts from Air Canada would not be considered because they did not come from the last employer. This way of seeing things not only complies with the wording of subsection 36(9), as mentioned above, but also corresponds to the Commission's own interpretation of this subsection. Indeed, the Digest, which is the interpretation tool supplied to public servants in order to apply the Act, indicates that the total earnings from "that employment" according to subsection 36(9) of the Regulations refer to the earnings from the lost employment:

> Some earnings are allocated in such a manner that the total earnings from that employment [i.e. the lost employment], in each consecutive week except the last, are equal to the claimant's normal weekly earnings from that employment.
>
> (Emphasis added by counsel Marotte)

[67] The Digest also states that the amounts paid by a previous employer must not be considered as earnings from the lost employment (that employment).

> Earnings resulting from a different employer are not considered as earnings from that employment [the lost employment].
>
> (Digest, Chapter 5.6.3.1, para. 4.)

[68] It is therefore evident that the information that many Appellants received was consistent not only with the wording of the Regulations but also with the reference tool that the Commission's officers have on hand, that is, the Digest.

[69] The historical analysis of this regulatory provision further confirms this interpretation. The provisions regarding the allocation of the earnings paid on separation from employment have existed in the regulations for a very long time. Research back to the early 70s reveals that, for many years, the wording of several previous provisions considered to be the precursors to the current section 36 specifically included the amounts paid by a previous employer:

> ... such that the claimant's earnings for each of these weeks, except the last, <u>received from the employer or from the former employer</u>, ...
>
> (Emphasis added by counsel Marotte.)
> (section 173 of the 1971 Regulations; section 58 of the 1980 Regulations.)

[70] Section 36 of the Regulations as it is now written no longer refers to the two concepts, that is, the employer or the former employer, but only to the "... total earnings from that employment ..." This change in the wording of the section confirms that Parliament's intention changed and that section 36 of the Regulations now expressly excludes amounts from a previous employer.

[71] An analysis of the scheme of the Regulations confirms that Parliament does not want amounts from a previous employer to negatively affect the benefits received on the basis of a new employment. For example, Parliament has ensured in subsection 35(7) of the Regulations that the pension received by a claimant from a first employer is not considered as earnings when the claimant qualifies with new employment.

[72] Another example is found in paragraph 35(7)(*d*) of the Regulations, which stipulates that retroactive increases in wages or salary do not constitute earnings, regardless of which employer pays them.

[73] A provision that limits a right must be narrowly interpreted. The Supreme Court of Canada has stated this principle in several matters, particularly concerning the *Unemployment Insurance Act* in a decision by the Honourable Justice L'Heureux-Dubé:

> In my view, the purpose of the section (to disentitle strikers from benefits) as well as the purpose of the Act as a whole (to provide benefits to involuntarily unemployed persons) dictate that a narrow interpretation be given to the disentitlement provisions of that section.
>
> (*Hills v. Canada, (Attorney General)*, [1988] 1 S.C.R. 513, paragraph 96)

[74] The goal of subsection 36(9) of the Regulations is to delay the payment of benefits when a claimant receives earnings at the end of his or her employment. This has the effect of preventing this claimant from collecting his or her benefits quickly, thus limiting the right to receive benefits. This limitation must be interpreted narrowly according to the jurisprudence of the Supreme Court of Canada and the rules of statutory interpretation (*Interpretation Act*, section 12).

[75] Since the Act is social in nature, its provisions should be interpreted broadly and liberally and any doubt should benefit the claimants. According to counsel Marotte, there is no ambiguity with respect to the interpretation that is to be given to subsection 36(9) of the Regulations. If the Tribunal arrives at a different conclusion, we submit that, as the Supreme Court of Canada stated:

> Since the overall purpose of the Act is to make benefits available to the unemployed ... any doubt arising from the difficulties of the language should be resolved in favour of the claimant.
>
> (*Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, p. 6)
>
> Moreover ... a law dealing with social security should be interpreted in a manner consistent with its purpose.

> (*Canadian Pacific Ltd. v. Attorney General of Canada*, [1986] 1 S.C.R. 678, paragraph 25)

[76] The amount paid by Air Canada can be allocated only under subsection 36(19) of the Regulations. Since subsection 36(9) does not apply, upon reading all of section 36 of the Regulations, the only paragraph that can apply is paragraph (19)(*b*).

[77] The amounts paid by Air Canada were obviously not received in exchange for services but resulted from a very specific transaction, that is, arbitrator Teplitsky's decision of September 12, 2012. It was not until that date that Air Canada had a legal obligation to pay the amounts owed under the Separation Program it had established with the Union. Here again, the Digest supports this analysis:

> Earnings are payable when the claimant is in the position at law to enforce payment. Earnings are payable for EI purposes only when the obligation to pay is immediate and not when the obligation to pay is some time in the future. As a result, earnings are only considered payable when the claimant can access them, that is, when the right to receive the earnings is immediate.
>
> (Digest, Chapter 5.6.1.2, paragraph 2)

[78] Each Appellant should therefore have these earnings received from Air Canada allocated according to paragraph 36(19)(*b*) of the Regulations to the week of September 9, 2012, only, this date being the Sunday preceding arbitrator Teplitsky's decision of September 12, 2012.

Alternative argument made by counsel Boudreault:

[79] If the Tribunal determines that the amount constitutes earnings under section 35 of the Regulations, the allocation must be carried out under subsection 36(19) of the Regulations because the conditional obligation has a retroactive effect under article 1506 of the *Civil Code of Québec*. In this case it would be a transaction, and the total amount would have to be allocated to the week of September 12, 2012. See *Staikos v. Canada (Attorney General)* 2014 FCA 31. Moreover, the Commission's argument that section 189 of the *Canada Labour Code* decrees that

the employment between the two employers is continuous is nothing but a legal fiction intended to protect certain rights, such as the rights to separation payments, leave, etc.

The Appellants are entitled to receive benefits because they never have before

[80] A number of Appellants mentioned that, since they had never received Employment Insurance benefits in their entire life, they were therefore entitled to receive them because they have this obvious right.

The Tribunal must write off the amounts corresponding to the overpayment amounts

[81] A number of unrepresented Appellants submitted that the Tribunal must write off (cancel) the amounts of the overpayments because their repayment would cause serious financial hardship for the Appellants.

Specific submissions of the Appellant A. B.

[82] The Appellant did not make any specific submissions.

Main submission of the Commission

[83] The Commission submits that the purpose of Employment Insurance is to compensate unemployed workers for loss of income from their employment and to provide them with economic security for a time, thus assisting them in returning to the labour market. See *Reference re Employment Insurance Act (2005)* 2 S.C.R. 669, at p. 680 (paragraph 18).

[84] A related objective of the Employment Insurance program is to avoid paying benefits to workers who receive an income from another source until this income ceases. In other words, the Act does not permit double compensation. This objective is obvious in the wording of section 19 of the Act. The FCA has confirmed this objective repeatedly. See *Canada (Attorney General) v. Walford* [1979] 1 FC 768 (FCA); *Canada (Attorney General) v. Savarie* A-704-95 (FCA); *Staikos v. Canada (Attorney General)* 2014 FCA 31; *Canada (Attorney General) v. King* A-486-95 (FCA); and *Chartier et al. v. Canada (Attorney General)* 2010 FCA 150.

[85] Sections 35 and 36 of the Regulations should be interpreted and applied in accordance with the goals and objectives of Employment Insurance. Severance pay constitutes earnings in accordance with section 35 of the Regulations because it is the equivalent of a separation payment or was paid by reason of the employment held by the Appellants. It is not in dispute that the separation payments received by the Appellants were issued by Air Canada in accordance with the Separation Program based on Appendix A of CIRB order 9996-U of January 31, 2011. The evidence demonstrates that the severance payouts correspond to separation payments made after their termination or lay-off from Aveos in March 2012. The best evidence concerning the severance pay is found in Appendix A of CIRB order 9996-U (Separation Program), which is entitled "Heavy Maintenance Separation Program" and which uses the term "separation payment."

[86] Paragraph 2 of the Separation Program states that a separation payment under this program shall be an amount representing two weeks' pay for each completed year of continuous service at Air Canada and Aveos. See Appendix A of CIRB order 9996-U of January 31, 2011. Paragraphs 3 and 4 of the Separation Program clearly stipulate that the separation payments would be paid in case of termination or lay-off from Aveos. Paragraph 4 provides that the separation packages will be made available in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts, and in the event that Union-represented employees are permanently laid-off, or terminated or a temporary lay-off becomes permanent, if such events occur before June 30, 2013. In the case of the Appellants, the conditions of paragraph 4, i.e. the insolvency involving Aveos and the Appellants' lay-off from Aveos in March 2012, resulted in the severance payouts. See Appendix A of CIRB order 9996-U of January 31, 2011.

[87] Paragraph 9 of the Separation Program states that the separation package "... is inclusive of and in complete satisfaction of any and all payment in lieu of notice of termination or lay-off and severance pay to which an employee in receipt of the separation package may be entitled from Air Canada or Aveos under the Canada Labour Code and the applicable collective agreement." See Appendix A of CIRB order 9996-U of January 31, 2011. Other evidence concerning the nature of the severance pay is found on the copy of a pay stub in appeal file

GE-13-1593 (page GD2-6), which describes the severance pay as "Aveos-severance..." For the reasons set out above, the Commission submits that the severance payments received by the Appellants constitute separation payments, not only because of the name use, but also because of the nature of the payment. The law holds that severance payments or separation payments constitute earnings arising out of employment. See *Canada (Attorney General) v. Savarie* A-704-95 (FCA); *Lemay v. Canada (Attorney General)* 2005 FCA 433; *Staikos v. Canada (Attorney General)* 2014 FCA 31; *Guilbault v. Canada (Employment and Immigration Commission)* A-1235-84 (FCA); *Canada (Attorney General) v. Tremblay* A-106-96 (FCA); *Girard v. Canada (Employment and Immigration Commission)* A-51-97 (FCA).

[88] The Commission submits that, to determine whether the severance payments constitute earnings in accordance with section 35 of the Regulations, it is not relevant whether Air Canada made the payments instead of Aveos. Whether Air Canada issued the severance pay as a former employer or another person is irrelevant because the severance payment was clearly issued because of the employment. In view of the foregoing, the Commission submits that the evidence, the Act, the Regulations and the jurisprudence supports its position according to which the severance payments received by the Appellants constitute earnings in accordance with section 35 of the Regulations because the amounts represent income arising out of their employment. A payment may come from another person, and although the term "including" used in subsection 35(1) of the Regulations is not limiting (see *National Bank of Greece v. Katsikonouris,* [1990] 2 S.C.R., 1029, at pages 1039 to 1041), it refers to a trustee in bankruptcy, but another employer comes under this category.

[89] The severance payments must be allocated in accordance with subsection 36(9) effective from the week of the lay-off or the termination from Aveos. Once it is determined that the claimant received earnings in accordance with section 35 of the Regulations, these earnings must be allocated in the manner set out in section 36 of the Regulations.

[90] The FCA has determined that a payment is made by reason of separation from employment within the meaning of ss. 36(9) of the Regulations:

> ... when it becomes due and payable at the time of termination of employment, when it is, so to speak, "triggered" by the expiration of the period of employment, when the obligation it is

> intended to fulfil was simply a potentiality throughout the duration of the employment, designed to crystallize, becoming liquid and payable, when, and only when, the employment ended. The idea is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment.
>
> See *Savarie, supra* at pages 4-5; also see *Lemay, supra*, at paras. 3-5.

[91] Subsection 36(9) of the Regulations puts the emphasis on the reason for which the earnings were paid, not when they are paid or payable. The FCA has upheld the decision to allocate, from the week following the termination of employment, the earnings paid or payable well after separation or lay-off. See *Brulotte v. Canada (Attorney General)* 2009 FCA 149; *Lemay*, *supra*; *Guilbault*, *supra*; *Tremblay*, *supra*; *Girard*, *supra*. In this case, the evidence demonstrates that the severance payments were issued after the events described in paragraph 4 of the Separation Program, namely, the insolvency involving Aveos, the cancellation of the Air Canada-Aveos contracts, and the lay-off or termination of the Appellants in March 2012. The Commission submits that the severance payments were therefore issued because of the lay-off or termination from Aveos and must be allocated in accordance with subsection 36(9) starting from the week of the lay-off or termination from Aveos.

[92] The Commission submits that, in the case of the Appellants, the employment referred to in subsection 36(9) of the Regulations corresponds to a combination of the employment at Air Canada and at Aveos. The Commission submits that there was continuity of employment because of the legal consequences of the sale of the Heavy Maintenance Group to Aveos. It follows that the employment lost when the Appellants were laid off from Aveos includes the employment at Air Canada and at Aveos. The Separation Program reflects this interpretation. Unchallengeable and unchallenged is the fact that there was a sale of Air Canada's heavy maintenance operations and that an entity renamed Aveos was the buyer of the business and the successor employer. See the Memorandum of Agreement of January 8, 2009, between Air Canada, Aveos Fleet Performance Inc. and the International Association of Machinists and Aerospace Workers; the CIRB order dated January 22, 2009; Appendix A of CIRB order 9996-U of January 31, 2011, at paragraphs 3-4; arbitrator Teplitsky's decision dated March 5, 2009, pages 7 and 8; and CIRB order 9994-U dated January 31, 2011.

[93] Arbitrator Teplitsky, in his decision of March 5, 2009, determined that Air Canada did not have to issue the separation payment to the employees who had accepted employment with Aveos because there had been a sale of business and, consequently, there was no lay-off from Air Canada that could justify a separation. He said:

> It seems clear to me based on a plain reading of the legislation and as was found in *Bebeau v. Bank of Montreal* [2001] C.L.A.D. No. 447 and other authorities, that there is no lay-off when the sale of a business occurs if the employee accepts employment by the purchaser. Accordingly, employees who accept employment with Aveos are not entitled to severance pay.

[94] The *Bebeau* decision to which arbitrator Teplitsky referred applied section 189 of the *Canada Labour Code*, which stipulates:

> 189. (1) Where any particular federal work, undertaking or business, or part thereof, in or in connection with the operation of which an employee is employed is, by sale, lease, merger or otherwise, transferred from one employer to another employer, the employment of the employee by the two employers before and after the transfer of the work, undertaking or business, or part thereof, shall, for the purposes of this Division, be deemed to be continuous with one employer, notwithstanding the transfer.
>
> *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 189

[95] Section 189 of the *Canada Labour Code* applies to various benefits, including the severance pay provided for in section 235 of the *Canada Labour Code*. This is also found in section 237. The effect of arbitrator Teplitsky's decision of March 5, 2009, and the application of sections 189, 235 and 237 of the *Canada Labour Code* is that no separation payments were owed when the Appellants were transferred from Air Canada to Aveos in July 2011 because their employment was deemed to be continuous. By purchasing the heavy maintenance operations, Aveos became the successor employer and, consequently, the Appellants' employment with both employers before and after the transfer of business was deemed to be continuous with a single employer, despite the transfer.

[96] The fact there were two employers in this case in no way influences the analysis that is to be done for the purposes of subsection 36(9) of the Regulations. It is very important to recognize that this subsection refers to the loss of "employment" and not to the loss of an "employer." Consequently, the facts must be analyzed with regard to the employment that, in the case at hand, is employment with two employers, rather than with one to the exclusion of the other. If

the Tribunal considered that the distinction between the terms "employer" and "any other person" used in subsection 35(1) of the Regulations is relevant for allocation purposes, the Commission submits that precedents have been established in the jurisprudence allocating earnings under subsection 36(9) of the Regulations when they had been received from a source other than an employer. See *King*, *supra*, and *Canada (Attorney General) v. Roch* 2003 FCA 356, at paragraphs 43 and 62.

[97] The Commission submits that the evidence, the legislation and the jurisprudence support its position that the severance payments must be allocated in the manner prescribed in section 36(9) of the Regulations, effective from the week of the termination or lay-off from Aveos in March 2012.

The Commission's arguments in response to the alternatives proposed by the Appellants

[98] During the hearing, various interpretations were presented by the Appellants as a possible conclusion regarding the three issues raised by this appeal. The summary that follows constitutes the Commission's understanding of each of these positions and its response.

Severance payments do not constitute earnings because they are compensation for loss of job security at Air Canada

[99] Some Appellants testified that the amounts were received as compensation for the loss of job security at Air Canada or as a separation bonus in consideration of the concerns regarding the viability of Aveos. These Appellants consider that, for this reason, the amounts paid do not constitute earnings because they do not arise out of employment and are not related to their work. The Commission submits that the Appellants' testimony on this issue is insufficient to alter the clear terms of articles 2, 4 and 9 of the Separation Program regarding the reason for the severance payments. If the intention of the parties or the CIRB regarding the reason for payment of the amounts was the intention alleged by the Appellants, they could have stipulated this in the Memorandum of Agreement of January 9, 2009, or in the Separation Program. Moreover, arbitrator Teplitsky's decision of March 5, 2009, clearly indicates that the Appellants were not owed anything because of their transfer to Aveos.

The severance payments do not constitute earnings because they were paid in exchange for waiving the right to be reinstated or recalled

[100] Other Appellants claimed that the severance payments were received as compensation for waiving the right to be reinstated, which they liken to the right to be recalled. They allege that, according to the FCA decisions in *Plasse* and *Meechan*, the amounts paid do not constitute earnings within the meaning of section 35 of the Regulations. The Commission submits that the evidence does not support the conclusion that the amounts were paid in exchange for waiving a right to be reinstated or recalled. *Plasse, supra*, and *Meechan, supra*, therefore do not apply to these appeals. In any event, the federal law is such that a right to be reinstated is not equivalent to a right to be recalled. See Appendix A of CIRB order 9996-U of January 31, 2011; *Canada (Attorney General) v. Cantin* 2008 FCA 192, paras 31-33.

The separation payments should be allocated in the manner set out in subsection 36(19) of the Regulations

[101] Some Appellants argued that the amounts paid should have been allocated under subsection 36(19) of the Regulations, (a) from the week when arbitrator Teplitsky rendered his decision of September 12, 2012; or (b) from the week when the Appellants received the first instalment of the separation payment in December 2012. The Commission's position is that severance pay cannot be allocated under subsection 36(19) of the Regulations. Subsection 36(19) is triggered only if no other provision applies. See *Brulotte, supra*, at paras 12-14. In any event, it is not arbitrator Teplitsky's decision of September 12, 2012, that resulted in the Appellants' entitlement to severance pay. Rather, it was the events of March 2012 that gave rise to this entitlement. Moreover, the timing of the first severance payment is irrelevant. Subsection 36(9) of the Regulations indicates that the earnings paid or payable by reason of a lay-off or separation shall be allocated "... regardless of the period in respect of which the earnings are purported to be paid or payable ... "

The severance payments should be allocated under subsection 36(9) of the Regulations from the week of July 23, 2011

[102] The Commission's understanding of this argument is that it is based on the premise that Air Canada made severance payments only in respect of the years of service at Air Canada, payments that were apparently owed at the time of the transfer. The severance payments were made because of the termination of employment at Aveos in March 2012, and the Separation Program clearly states that they were not limited to the years of service at Air Canada. Moreover, the Appellants were not owed anything based on their years of service at Air Canada at the time of the transfer. Even though the Appellants testified about their impressions regarding the reasons for the severance payments, the Commission submits that these testimonies are insufficient to change the terms of the Separation Program and arbitrator Teplitsky's conclusions. Moreover, the fact that the severance payments came from Air Canada rather than Aveos is irrelevant for the purposes of determining the manner of allocation. The source of the earnings is not relevant to the analysis under subsection 36(9) of the Regulations. When amounts are considered as "earnings" within the meaning of section 35 of the Regulations, they must be allocated regardless of their source. If the earnings are paid or payable by reason of lay-off or separation from employment, they must be allocated in accordance with subsection 36(9) of the Regulations.

The severance payments should be allocated under subsection 36(9) of the Regulations, proportional to the length of the Appellants' employment at Air Canada and Aveos

[103] The Commission's understanding of this argument is that the allocation should be divided between the time worked at Air Canada and at Aveos based on whether the time worked at Aveos counted in the establishment of a "completed year of continuous service" under the terms of article 2 of the Separation Program. Article 2 of the Separation Program states that the separation payments are calculated by "completed year of continuous service at Air Canada and Aveos." Therefore, the operationalization of article 2 of the Separation Program means that, depending on the month when they were hired at Air Canada, the Appellants' completed years of continuous service may or may not include the time worked at Aveos. However, this result does not justify the conclusion suggested by the Appellants. Subsection 36(9) of the Regulations

cannot be applied differently from one Appellant to another based on their hiring date. The allocation of the severance payments cannot be divided because the Appellants' employment was deemed to be continuous. The Appellants' employment at Air Canada and at Aveos was deemed to be continuous and was considered to be the same employment. Therefore, only one employment was terminated. The employment that was terminated includes the employment at Air Canada and at Aveos. Consequently, the allocation under subsection 36(9) of the Regulations must start in the week of the lay-off or separation from Aveos, which occurred in March 2012.

[104] Moreover, the Separation Program clearly indicates that the severance payments are not payable by reason of termination or lay-off from Air Canada. Rather, they were payable only in case of insolvency involving Aveos and lay-off or termination from Aveos. Consequently, the allocation under subsection 36(9) of the regulations cannot be applied from the week of the transfer to Aveos.

Errors made by the Commission

[105] Some Appellants testified or indicated in their notice of appeal to the Tribunal that the Commission or Service Canada had given them incorrect information about how the severance payment would affect their Employment Insurance benefits. For this reason, the Appellants argued that the Commission should not allocate the severance payments resulting in an overpayment. The Commission submits that, despite the answers that may have been given to the Appellants based on the information they provided to the Commission or to Service Canada, the Commission and the Tribunal are bound by the Act and the Regulations. Any advice or information that may have been given to the Appellants by the Commission or Service Canada regarding the impact of the severance payment on the Appellants' eligibility for benefits does not bind the Tribunal. See *Canada (Attorney General) v. Granger*, (1986) 3 FC 70 upheld by (1989) 1 S.C.R 141.

Write-off

[106] Some Appellants asked the Tribunal to write off the debt resulting from the overpayment of benefits. The Commission submits that the Tribunal does not have the jurisdiction to make a decision in this regard. The power to write off under section 56 of the Regulations is under the

exclusive authority and discretion of the Commission and cannot be exercised by the Tribunal. Moreover, the issue of whether the Tribunal has the authority to decide an appeal from the Commission's decision regarding the write-off of any amount owed is premature because the Commission has not yet rendered a decision on this issue. Therefore, the issue cannot be presented to the Tribunal.

ANALYSIS

Note: In its analysis, the Tribunal will first deal with the common points. The arguments specific to the Appellants will be addressed at the end of this section.

General points

[107] The Tribunal is satisfied that the principles of natural justice have been respected: the parties received their notices of hearing, and, although the Appellant did not participate in the hearing, his representative did. Hearing days were set in or near the cities where the Appellants resided, different choices and opportunities to choose another date were offered to the Appellants, and some availed themselves of these choices and opportunities.

[108] Given the multiple possibilities argued by the various Appellants during the nine-day hearing, the Tribunal is of the view that the possibilities must be analyzed individually, even though the Tribunal's decision may make some of the possibilities moot.

[109] The Tribunal will therefore have to start by determining whether the amounts paid by Air Canada constitute earnings in accordance with section 35 of the Regulations. If the Tribunal concludes that these amounts constitute earnings, it will then have to determine under which paragraph of section 36 these earnings must be allocated, and to what date. Lastly, the Tribunal will have to determine whether it has the power to order a write-off of the amounts that may be owed by the Appellants.

Earnings – section 35 of the Regulations

[110] The Tribunal must first determine whether the amounts received by the Appellants from Air Canada constitute earnings according to the wording of section 35 of the Regulations. The

qualification of these payments has been interpreted in various ways by the Appellants. Some refer to “severance payments,” others to “lump sums,” and others to “penalties that the company paid to move jobs out of Canada” or “payments made for waiving the right to be reinstated.”

[111] According to the wording of subsection 35(1) of the Regulations, “income” is defined as “any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.” Employment is defined as “any employment ... under any express or implied contract of service …” Subsection 35(2) states that “the earnings to be taken into account ... are the entire income of a claimant arising out of any employment...” The jurisprudence also refers to this concept of “income.” According to the principles established in *Roch, supra,* it is important for there to be a sufficient connection between the income and the employment held; in other words, the income should result from the work or be given in compensation for work done.

[112] Later on the Tribunal will discuss the issue of “different employers” or “different employments.” These concepts are not theoretical because their determination will have a considerable influence on the decision. However, for the purposes of the present analysis on the issue of earnings, all the parties agree that Air Canada was an “employer,” just like Aveos. Also, all the parties agree that the employees held an “employment.”

[113] It is worth looking at the parties’ intention to determine whether the amounts received constitute earnings within the meaning of section 35 of the Regulations.

[114] The Separation Program reveals the parties’ intention, at least in part. Although this program was not the subject of a formal agreement, it was presented by Air Canada at the hearings before the CIRB that resulted in order 9996-U, based in part on this program. See arbitrator Teplitsky’s corrected decision of September 24, 2012. The arbitrator’s decision is binding on the parties.

[115] Paragraph 9 of the Separation Program states that the separation package “is inclusive of and in complete satisfaction of any and all payment in lieu of notice of termination or lay-off and severance pay to which an employee in receipt of the separation package may be entitled from Air Canada or Aveos under the *Canada Labour Code* and the applicable collective agreement.”

The Tribunal agrees with the arguments presented by the Commission on this point. The amounts paid by Air Canada were clearly paid following the termination of the employees' employment, as compensation or otherwise for a future lack of income, even if for a short period of time, variable according to the employees' seniority. The amounts were paid in relation to the employment held by the employees and the work performed by them over the previous years. In other words, they were paid as separation bonuses or payment in lieu of notice of termination or lay-off. The very payment structure, paid every two weeks, suggests this. The principles established in the jurisprudence support this assertion and are found in *Roch*, *supra*, *King*, *supra*, and especially *Chartier et al v. Attorney General of Canada*, 2010 FCA 150, which clearly established that these types of payments constituted earnings.

[116] The Commission also argued that the wording found on an Air Canada pay stub in file GE-13-1593, which indicates "Aveos-severance-eligible," represents additional evidence. In the Tribunal's opinion, it is difficult to draw any conclusion from this exhibit. This expression can mean several things. It could simply be an internal nomenclature at Air Canada. This term may have been used incorrectly or may mean something else. The Commission chose not to ask any questions to the multiple witnesses who testified before the Tribunal on this subject and chose not to produce its own witnesses. There are not even any notes from the Commission's investigators in the files on this subject. For these reasons, the Tribunal does not accept this exhibit as having any weight for the qualification of the amounts received.

[117] The Tribunal does not accept the arguments presented on this point by counsel Boudreault and by some unrepresented Appellants. In particular, the Tribunal cannot accept the thesis that there is no direct connection between the amounts paid by Air Canada and the employment. On the contrary, *Roch, supra*, holds that the income must arise directly out of the employment relationship and not merely be a consequence of that relationship. An amount paid after the termination of an employment relationship that is meant to be a form of temporary replacement of employment income clearly constitutes earnings under section 35 of the Regulations. In this case, the amount was paid in direct relation to the Appellants' employment at Air Canada, and is not merely a consequence of this employment. The amount was paid after a loss of employment and replaced the pecuniary losses incurred, even though its application is

time-limited. Counsel Boudreault applied the appropriate test, but did not connect it to any specific evidence in the file. It is important to remember at this stage of the analysis that the Tribunal must determine whether the amounts paid by Air Canada constitute earnings, and they clearly do.

[118] The argument raised regarding the status of the *Civil Code of Québec,* which could be used on a supplementary basis, is interesting and perhaps worth analyzing, but not in the context of this analysis on the issue of earnings. Even if the payment were subject to a conditional obligation, once the conditions are fulfilled the amounts paid by Air Canada remain earnings within the meaning of section 35 of the Regulations. The presence of an obligation conditional on the payment of an amount in no way changes the nature of the payment that produces the obligation.

[119] Some Appellants indicated that the amounts paid by Air Canada did not constitute earnings, but instead corresponded to a "penalty" paid by Air Canada for transferring jobs to other countries. Some Appellants may feel cheated to some degree, but there is no evidence on record to this effect.

[120] The Tribunal cannot accept the argument made by many unrepresented Appellants to the effect that the Air Canada payment made after receipt of Employment Insurance benefits cannot influence the amount of the benefits previously received. The date on which an amount is received is irrelevant to the qualification and determination of earnings in this discussion. What is determinative is at which time the amount must be allocated, and that issue will be dealt with later in this decision. As for the issue of whether the amounts come from their last employer or their employer before that, it will be addressed later. In this part of the analysis, the Tribunal is seeking to determine whether the amount constitutes earnings.

[121] As previously stated, the Tribunal is of the view that the amounts paid by Air Canada indeed constitute earnings within the meaning of section 35 of the Regulations. What remains, therefore, is to determine whether an exception applies to exclude these earnings from the principles set out in section 35 of the Regulations.

Exception to earnings - section 35 of the Regulations

[122] Subsection 35(7) of the Regulations contains a certain number of exclusions that, if they apply, mean that the amounts in question should not be considered and treated as earnings. None of the situations described in section 35 of the Regulations apply to the amounts paid by Air Canada. Some exceptions have been recognized by the jurisprudence, and some Appellants based their argument on the exception of an amount paid in exchange for waiving the right to be reinstated. See *Meecham, supra,* and *Plasse*, *supra***.**

[123] Counsel Boudreault and Mr. Simpson, who represented some Appellants, raised this point. They alleged that the amounts were paid for waiving the right to be reinstated. Mr. Simpson pointed out that, even though none of the documents entered into evidence, specifically, the Memorandum of Agreement of March 5, 2009 between Air Canada, Aveos and the Union, the Separation Program, the CIRB orders and arbitrator Teplitsky's decisions, explicitly mention waiving the right to be reinstated, the employees waived their right to be recalled and the description of the various waivers to certain recourses is such that the whole would constitute *de facto* a waiver of the right to be reinstated.

[124] The Tribunal disagrees with this interpretation. The jurisprudence is clear on the fact that, for this exception to apply, the waiver of the right to be reinstated must be unequivocal and clearly expressed. The employees were represented by a Union during the negotiations and, if the parties' intention was for the amount paid by Air Canada to constitute a waiver of the right to be reinstated, it all would have been clearly expressed in the various agreements. Yet the documents presented as evidence do not contain any references to this effect. A right to recall is a very different concept. A worker may be a recipient of Employment Insurance benefits and remain on a recall list. This right is one of preference related to seniority if the employer has additional labour needs.

[125] The Commission also argued the principle stated in *Cantin*, *supra*:

> In federal law, however, the right to reinstatement is an employee's right to resume his or her position following a wrongful dismissal, if the employee is granted reinstatement. In this case, the Board of Referees erred by applying *Plasse* and *Meechan*, in which the

> claimants received compensation to relinquish their right to reinstatement following a wrongful dismissal. The Umpire erred in not recognizing the Board's error.

[126] There is no doubt that the *Canada Labour Code* applies to the Appellants' situation. Nowhere in the documentation or the testimony is there an allegation of unjust dismissal. The Tribunal is bound by the very clear and unequivocal analysis made by Justice Desjardins in *Cantin, supra*.

[127] The amounts paid by Air Canada did not constitute amounts paid for waiving the right to reinstatement. Consequently, there is no exception applicable to this situation regarding the possible exclusion of a portion of the amounts paid by Air Canada from the consideration as earnings. Consequently, the amounts paid by Air Canada constitute earnings under section 35 of the Regulations.

Allocation of earnings – section 36 of the Regulations

[128] Any amount that constitutes earnings must be allocated under the various possibilities listed in section 36 of the Regulations. Under subsection 36(1) of the Regulations, earnings are allocated to a given number of weeks in the manner prescribed in this section and constitute the claimant's earnings for those weeks, for the purposes of subsection 36(2) of the Regulations.

Allocation of earnings under subsection 36(9) of the Regulations

[129] Central to this discussion is the meaning that must be given to the wording of subsection 36(9) of the Regulations, which reads as follows:

> Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

Review of the Commission's submissions:

[130] The Commission presented a very complete position according to which the earnings must be allocated under subsection 36(9) of the Regulations. Some Appellants also raised this

possibility informally, but mainly to argue that the allocation date may differ from the date determined by the Commission. Counsel Boudreault did the same in one of his alternative arguments, but again to make an argument regarding the date of the said allocation. Since the Tribunal will address the issue of the allocation date in another section of this analysis, this issue will not be covered in the present section.

[131] The Commission further argued that subsection 36(9) of the Regulations is the one that must be used to determine the allocation of the earnings. The reasons given are, first, that the Aveos employees were laid off because of the employer's bankruptcy, which resulted in a loss of employment, as indicated in CIRB order 9996-U. Based on *Savarie*, *supra*, and *Lemay*, *supra*, the allocation must be applied when the contract of employment ends and the unemployment begins.

[132] Based on the decisions in *Brulotte*, *supra*, *Lemay*, *supra*, *Guilbault*, *supra*, *Tremblay*, *supra*, and *Girard*, *supra*, the Commission indicated that the allocation must be applied at the time of the combined actions of employers Air Canada and Aveos to terminate the Appellants' contracts of employment. In the case of Air Canada, this means the transfer of employees to Aveos and, in the case of Aveos, it was when the company went out of business.

[133] The Commission also argued that, regardless of when amounts are paid, from the moment they are paid after a lay-off or a separation from employment, they must be allocated in accordance with subsection 36(9).

[134] The Commission admitted that the employers were different, but it submitted that the employment was the same. The Commission based its submissions on section 189 of the *Canada Labour Code*, which reads as follows:

> 189. (1) Where any particular federal work, undertaking or business, or part thereof, in or in connection with the operation of which an employee is employed is, by sale, lease, merger or otherwise, transferred from one employer to another employer, the employment of the employee by the two employers before and after the transfer of the work, undertaking or business, or part thereof, shall, for the purposes of this Division, be deemed to be continuous with one employer, notwithstanding the transfer.
>
> (Emphasis added.)

[135] According to the Commission, this provision of the *Canada Labour Code* means that when an employee is transferred after a sale, a lease or a merger, the employment is deemed to be continuous or it is deemed that there would be continuity of employment. Therefore, there could exist a situation where there are two employers, but only one employment. A division of Air Canada was sold to Aveos, and the Appellant employees were transferred from Air Canada to Aveos. Subsequently, the Appellants lost their employment at Aveos, which resulted in the payment of severance by Air Canada. These payments were conditional on a cessation of Aveos' operations before July 1, 2013. Arbitrator Teplitsky's conclusions support this because, since the employees accepted employment at Aveos, they were not entitled to severance pay. Consequently, according to the Commission, the conditions of subsection 36(9) of the Regulations are met.

Review of counsel Marotte's submissions:

[136] According to counsel Marotte, subsection 36(9) of the Regulations does not apply. It is argued that only the amounts paid by the last employer can be allocated under subsection 36(9). According to him, if Parliament had wanted subsection 36(9) of the Regulations to apply to amounts paid by a previous employer, it would have worded subsection 36(9) of the Regulations differently.

[137] Counsel Marotte also argued that provisions similar to subsection 36(9) of the Regulations have evolved over time. Section 173 of the 1971 Regulations and section 58 of the 1980 Regulations referred to "his employer or his former employer." According to the principle that Parliament does not speak gratuitously, if "former employer" was removed from the provision, it is because Parliament no longer wanted to consider the former employer.

[138] Counsel Marotte submitted that the use of the phrase "from that employment" in subsection 36(9) means this was employment from which an employee was laid off or that ceased to exist, in this case the employment at Aveos, not employment with a previous employer, namely, Air Canada.

[139] Counsel Marotte also based his position on the Commission's Digest, which reads as follows:

> Some earnings are allocated in such a manner that the total earnings from *that employment* [i.e. the lost employment], in each consecutive week except the last, are equal to the claimant's *normal weekly earnings* from *that employment*.

The Digest also states:

> Earnings resulting from a different employer are not considered to be earnings from *that employment* [the lost employment]. Digest, Chapter 5.6.3.1, paragraph 4.
>
> (Emphasis added by the Tribunal)

[140] According to counsel Marotte, it is clear that the Commission's interpretations suggest that when there are two employers and two different employments, subsection 36(9) cannot apply.

The determination of the Tribunal:

[141] The Tribunal will therefore have to break down the parts of subsection 36(9) to determine whether, as submitted by the Commission, this subsection applies or whether, as submitted by counsel Marotte, it does not apply and, consequently, the allocation should be done in accordance with subsection 39(19).

[142] For the purposes of the analysis of section 36 of the Regulations, the Tribunal should also determine why the amounts were paid, by whom they were paid, and by virtue of what employment.

[143] First, according to subsection 36(9): "Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment..." The issue here is to determine why the amount is paid. The Tribunal answered this question in its analysis of section 35 of the Regulations, and in particular in its review of possible exceptions. It has already been determined that the amount was paid as a separation bonus or payment in lieu

of notice of termination or lay-off. If this were the only point in dispute, it is true that subsection 36(9) would apply in this case.

[144] According to the second part of subsection 36(9): "regardless of the period in respect of which the earnings are purported to be paid or payable..." This refers to the Commission's argument that the payment may occur subsequent to the termination of employment, even several years later, as in the situation in *Brulotte*, *supra*. However, this issue is irrelevant in the present analysis for the reasons set out below.

[145] According to the third part of subsection 36(9): "be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment" (emphasis added by the Tribunal).

[146] The parties agree that the payment was made by Air Canada. Therefore, the Tribunal must determine whether this case involves two different employers and two different employments. It is clear that if only one employer and one employment were involved, the case would be on a much smaller scale.

[147] The Commission has already conceded, in its oral submissions during the hearing, that there are two separate employers in this case. However, this is a very small "concession," especially since CIRB order 9994-U clearly states that this matter involved different employers. Some witnesses, including witnesses A. P. and B. L., stated that, after they were transferred from Air Canada on July 24, 2011, they had new workplaces, new tools, a new employer name, new uniforms, and so on.

[148] The Tribunal accepts the assertion that Air Canada and Aveos were two different employers.

[149] The Commission also bases its argument on the fact that section 189 of the *Canada Labour Code* creates a presumption of continuity of employment when there is a transfer of employees following a sale, a lease or a merger. The Tribunal cannot accept the Commission's brief interpretation of the *Canada Labour Code*. The wording of section 189 very specifically

states that this section is "for the purposes of this Division" (emphasis added by the Tribunal). The Commission rightly mentions that sections 235 and 237 of the *Canada Labour Code* refer to this section. It is also found in other parts of the *Canada Labour Code* in sections 209(5), 210(4), 234, 239(5), 239.1(11) and 246(1).

[150] The Tribunal is of the view that the Commission is generalizing a specific provision, if not limited to certain clearly defined divisions of the Code. If Parliament's intention had been to make this a general provision, it would have worded it in a way other than limiting its scope to only the sections containing (or referring to) section 189 of the Code. Not only did Parliament not make this a general provision, but it chose to make it a specific provision eight times. There is little jurisprudence on this question, but the Nova Scotia Court of Appeal addresses it in *Conrad v. Imperial Oil Limited and McColl-Frontenac Petroleum Inc.*,1999 CanLII 4342 (NS CA). This decision does not pertain to an Employment Insurance issue, but deals with the scope of section 189 of the *Canada Labour Code*. Justice Freeman states:

> Section 189 occurs in Division IV dealing with annual vacations, but it is specifically incorporated into a number of other divisions as follows: Division VII, "Reassignment, Maternity Leave and Paternity Leave" (Section 209(5); Division VIII, "Bereavement Leave" (s. 210(4)); Division X, "Individual Terminations of Employment" (Section 234); Division XI, Severance Pay"; Division XIII, "Sick Leave", (Section 239(5)); Division XIII.1, "Work Related Illness and Injury" (Section 239.1(11)) and Division XIV, "Unjustified Dismissal" (Section 246 (1)).
>
> The absence of a provision incorporating s. 189 into Division IX appears to be the strongest argument put forward by the appellant that the relocation of the Imperial work force with Algoma must be considered a termination rather than a transfer. The significance of the omission cannot be ignored, as Mr. Conrad's counsel emphasizes. It would be contrary to sound principles of statutory interpretation to treat its absence as an oversight and to read it into Division IX. Rather, it must be seen as having been excluded to serve a purpose known to Parliament.
>
> (Emphasis added by the Tribunal)

[151] Consequently, the Tribunal is of the view that it is not because the employment was transferred following a sale, a lease or a merger that the employment is continuous. Rather, it is for the purposes of protecting various benefits accumulated by an employee with his or her previous employer, such as a right to severance pay, maternity leave, sick leave, and so on, that

this presumption exists in section 189 of the *Canada Labour Code*. It is therefore in such cases and only for the protection of certain rights that employment is deemed to be continuous.

[152] Broadly speaking, the employment itself is not continuous. There is therefore no "continuous" employment if there are two different employers for the purposes of the provisions in question. In *Conrad*, *supra*, Justice Freeman clearly indicates that it would be an error of interpretation to treat the absence of section 189 elsewhere in the *Canada Labour Code* as an oversight. In other words, the scope of section 189 of the *Canada Labour Code* must not be generalized.

[153] Consequently, the Tribunal is of the view that this case involves two different employments. There is no jurisprudence concerning this situation when two employments and two different employers are involved for the purposes of applying subsection 36(9) of the Regulations. The Tribunal considers that the situations and the facts contained in *Savarie*, *supra*, *Lemay*, *supra*, *Brulotte*, *supra*, *Guilbault*, *supra*, *Tremblay*, *supra*, and *Girard*, *supra*, differ from the present situation because, in those cases, there was only one employer.

[154] The reference to "that employment" in the third part of subsection 36(9) is a reference to the employment at Aveos, not at Air Canada, which is the previous employer. The amounts that must be allocated were paid by Air Canada, the previous employer, and the "employment" at Air Canada did not correspond to "that employment" referred to in the third part of subsection 36(9).

[155] The Tribunal finds that, if Parliament had wanted the wording of the third part of subsection 36(9) to apply to an employment previous to the one from which the employee was laid off or that the employee lost, Parliament would have mentioned it specifically.

[156] According to the Tribunal, for subsection 36(9) of the Regulations to apply, not only must earnings have been paid by reason of lay-off or separation from employment, but the amount must also have been paid for the separation from the employment lost, not only for the earnings paid by a previous employer, even if the loss of employment is one of the conditions for obtaining the amount in question from the previous employer.

[157] Though some Appellants saw their eligibility period under the Separation Program increase by one year because of the few months worked at Aveos, they received this amount as former employees of Air Canada. It is true that, if the payment had been made by Aveos, application of subsection 36(9) of the Regulations would be clear. However, in this case, the payments were made by Air Canada, which did not lay off the employees or terminate their employment. Moreover, arbitrator Teplitsky, in his initial decision of March 5, 2009, decided that the employers were not entitled to any amount whatsoever from Air Canada. It was only later, after the negotiations, that Air Canada agreed to pay certain amounts. Therefore, while it is true that one of the conditions was the lay-off of employees by Aveos, Air Canada paid this amount.

[158] It is also important to recall that, where there is doubt, the interpretation must favour the claimants. See *Hills*, *supra*, *Abrahams*, *supra*, and *Canadian Pacific*, *supra*.

[159] A provision that limits a right must be narrowly interpreted. The Supreme Court has stated this principle on several occasions, in particular concerning the Act. See *Hills*, *supra*.

[160] Since the Act is social in nature, its provisions should be interpreted broadly and liberally and any doubt should benefit the claimants. This principle was supported by the Supreme Court of Canada:

> Since the overall purpose of the Act is to make benefits available to the unemployed ... any doubt arising from the difficulties of the language should be resolved in favour of the claimant.
>
> (See *Abrahams v. Attorney General of Canada*, *supra*)

[161] The Commission also tacitly approved this principle by arguing that the purpose of the Act and the goal of Employment Insurance "is to compensate unemployed workers for loss of income from their employment and to provide them with economic security for a time, thus assisting them in returning to the labour market." See *Reference re Employment Insurance (2005)*, *supra*.

[162] The *Interpretation Act* repeats this same principle: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects," *Interpretation Act*, R.S.C. (1985) c. I-21.

[163] Furthermore, the Commission's Digest is clear in stating that earnings paid by another employer are not considered as earnings from the lost employment (Digest, Chapter 5.6.3.1). It is true that the Digest does not have the same legal status as the Act, Regulations or jurisprudence, but it is nonetheless a source of interpretation of the Commission's intention, and here the intention seems clear.

[164] The Commission also submitted that the income sources may come from different people, invoking the use of the term "including" in subsection 35(1) of the Regulations in the definition of "income." It is true that the use of the term "including" is not restrictive, and it is very regrettable that Parliament used only one example, that of the trustee in bankruptcy. The Commission referred to *Roch, supra*, which states in paragraph 43 that:

> It is true that, herein, money received came from a third party and not from employer, although paid by the employer This factor, however, does not detract from employment relationship as Regulations, s. 35(1) provides that money may be received "from an employer or any other person" (definition of "income") In this, it must be noted that the Employer who received this money from Emploi-Québec was bound to make payments in accordance with the Plan (section 14 of the Memorandum of Understanding), i.e., to those employees who agreed to free up hours of work for benefit of other employees.

[165] However, in *Roch, supra*, an important distinction is that this was no more or less than an employment grant, paid by Emploi-Québec to the company, which then had to remit it to its employees. But it involved a single employer that had received money from a third party. The Commission also referred to *King, supra*, where the situation was somewhat similar to *Roch, supra*, but where the benefit came from a provincial program that pays a certain amount to employees in the event that the employer fails to comply with its legal obligations. Moreover, the Ontario program even grants the Ontario Government a legal subrogation that can be exercised against any delinquent employer to recover amounts not paid to the employees. The FCA does not state that the Ontario program is a form of wage insurance, but it has all the characteristics of one. The situation is not the same in this case; rather, it concerns a severance or separation payment made by a former employer to its former employees. There is no temporal connection

between the two events, that is, the termination of employment and the payment made by Air Canada nine months later. The Tribunal therefore finds that *Roch*, *supra*, and *King*, *supra*, differ from this situation and are not applicable here.

[166] The only example in the use of the term "including" refers to a trustee in bankruptcy. As indicated above, it is regrettable that Parliament used only one example, but in the case of a trustee in bankruptcy, while it is true that a trustee is a different person with a separate legal entity created under the *Bankruptcy Act*, it nonetheless constitutes a form of "continuity" of the employer because it pays a dividend to the creditors under the *Bankruptcy Act* and to the employees from the former employer's assets. For example, a testamentary executor, a fiduciary or an interim administrator could very well come under the "including" in the definition of "income" in subsection 35(1) of the Regulations.

[167] Since this case involves two different employers and two separate employments, subsection 36(9) of the Regulations cannot apply. All the situations described in the jurisprudence cited refer to either a single employer, a government employment grant program or a government supplement in the case of a bankrupt employer, or a payment made by a trustee in bankruptcy.

[168] In addition to the arguments presented by the parties on the application of subsections 36(9) and 36(19) of the Regulations, the Tribunal reviewed all the allocation possibilities set out in this section and determined that the other subsections do not apply. Consequently, the allocation of earnings must be applied under subsection 36(19) of the Regulations

Allocation of earnings under subsection 36(19) of the Regulations

[169] Subsection 36(19) of the Regulations reads as follows:

> Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated
>
> (a) if they arise from the performance of services, to the period in which the services are performed; and
>
> (b) if they arise from a transaction, to the week in which the transaction occurs.

[170] This subsection therefore includes two possibilities, that the earnings in question arise either from the performance of services or from a transaction. There is little jurisprudence on the issue. Some decisions rendered by the Office of the Umpire, for instance, CUB 34087, have declared that certain earnings, such as corporate directors' compensation, came under subsection 36(19) and constituted a form of "service," or even CUB 41845 (retroactive payments). Since the earnings currently in question, that is, the amounts paid by Air Canada, were not paid as a result of a service, since this is not a "performance of service" but a separation payment, this can only be the result of a "transaction" within the meaning of paragraph 36(19)(*b*) of the Regulations. Therefore, a "transaction" is involved, and the date of the transaction has to be determined.

The calculation date of the allocation of earnings

[171] Now that the Tribunal has determined that the earnings must be allocated according to paragraph 36(19)(*b*) of the Regulations, the date of the allocation of earnings still has to be determined.

[172] In the case of a transaction, the entire amount is allocated to the week of the transaction. The Commission made no submissions regarding the transaction date in the case of an allocation of earnings in accordance with paragraph 36(19)(*b*) of the Regulations. Counsel Marotte and counsel Boudreault suggested the week of September 12, 2012, the date on which arbitrator Teplitsky issued his decision ordering Air Canada to pay the severance.

[173] It could also be argued that the allocation should be applied to the week in which the payment was made, that is, from December 2012, or to the week when all the conditions were fulfilled, that is, March 20, 2012, or to another date. The Tribunal could not accept the proposal of counsel Marotte and counsel Boudreault. Rather, the determining factor is when the obligation to pay existed or arose. Arbitrator Teplitsky's first decision rejected the Appellants' claim for severance pay. Subsequently, according to witness A. P., other negotiations were held between the Union and the employers. Eventually, during a private bargaining session organized by the CIRB, as stated by arbitrator Teplitsky in his corrected decision of September 24, 2012, a conditional separation program was offered by Air Canada. Although the employees had not

agreed to it, the program was ratified by the CIRB in order 9996-U. The conditions giving rise to the separation payment were contained in the Separation Program found in Appendix A of CIRB order 9996-U. The conditions therefore applied at any time up to June 30, 2013: "in the event of an insolvency, liquidation or bankruptcy involving Aveos resulting in the cancellation of Air Canada-Aveos contracts and in the termination and permanent lay-off of IAMAW-represented employees." (Emphasis added by the Tribunal)

[174] The failure of Aveos and the cancellation of the contracts occurred in March 2012, but since Air Canada did not seem to want to pay, the parties had to go before arbitrator Teplitsky, who issued his decision on September 12, 2012. According to the Tribunal, and as indicated by the Commission during the hearing, it was not arbitrator Teplitsky who triggered the payment, but, rather, he determined that all the conditions required for the Separation Program to apply were fulfilled, namely, the failure of Aveos and termination or permanent lay-off of the employees by Aveos. The Tribunal is of the view that the conditions were fulfilled on March 20, 2012.

[175] There is also a possibility that the date of the transaction is the date of payment. The date of payment is not a single date, because the payments were spread out over several weeks. But arbitrator Teplitsky specifically mentioned that the reason for which the payment was spread out was the large amount payable by Air Canada. The aggregate amount was $55 million, which is a very large sum. This amount must therefore be considered as payable in one payment, but spread out for management and capital flow purposes for the payer.

[176] The Tribunal does not accept this possibility, which was not brought up by any Appellant. The date of payment is not a determining factor. Rather, it is when the payment should have been made, and according to arbitrator Teplitsky, Air Canada should have paid this amount at the time of the loss of employment that occurred on March 20, 2012.

[177] Consequently, the date of the transaction is March 20, 2012, and it is on that date and to that week that the full amount of the earnings must be allocated under subsection 36(19).

Splitting of the earnings calculation date

[178] Counsel Boudreault's argument regarding the application of the Civil Code is interesting, but since the Tribunal has determined that subsection 36(9) is not applicable to this situation, it is unnecessary to address the issue of splitting, even though some employees have made this argument.

The errors committed by the Commission do not bind the Commission

[179] Witnesses A. P., M. L. and O. A. M. stated that the Commission officers at the Service Canada offices told them to continue collecting their benefits because the amounts they received were from a different employer. The Commission stated that errors made by Commission employees do not bind the Commission, according to the principles established in *Granger*, *supra*. The Tribunal agrees with the Commission on this point, and *Granger*, *supra*, is relevant.

[180] However, the Commission was very clumsy in how it dealt with the files of certain Appellants by replying to them in this way.

The Appellants are entitled to receive benefits because they have never received them before

[181] The Tribunal does not accept this argument made by some Appellants according to which they are entitled to receive benefits solely because they have never claimed any during their entire adult lives and they are entitled to them because of simple "justice." The Employment Insurance fund is not equivalent to an RRSP or a TFSA. It is insurance that provides compensation when certain conditions are fulfilled. The Act and the Regulations are clear on the fact that when a claimant receives a benefit to which he or she is not entitled, the amounts must be repaid.

Does the Tribunal have the power to write off an overpayment?

[182] Some Appellants asked the Tribunal to write off their overpayment. Write-off is covered in section 56 of the Regulations, specifically in subparagraph 56(1)(*f*)(ii), which states that the repayment of the overpaid amounts would result in undue hardship to the debtor. Without this

indication by the Appellants, write-off requests made to the Tribunal are generally based on the position of Justice Stratas in *Steel v. Attorney General of Canada*, 2011 FCA 153.

[183] The Tribunal agrees with Justice Stratas' position in *Steel*, *supra*, to the effect that it would be desirable for the "competent and specialized" Tribunal to be able to deal with this issue, just as it has the power to uphold, cancel or amend a penalty imposed by the Commission.

[184] However, a federal administrative tribunal is not a court of law. The powers and authorities it exercises arise from Acts created by the Parliament of Canada, or are based on an authority that a higher court may have recognized or assigned to it. In the case of write-off, the provision has existed for some time (1996), and with the exception of *Steel*, *supra*, and to a certain extent in *Bernatchez v. Attorney General of Canada*, 2013 FC 111, the jurisprudence is consistent on the matter of not intervening in the case of a request for write-off. The position of Justice Stratas, as interesting as it may be, is not the *ratio decidendi* (or more concretely, the reason for judgment) in *Steel*, *supra*, but, rather, a position specific to his concurring reasons that is not shared by his colleagues in *Steel*.

[185] The Tribunal, as Justice de Montigny submits in *Bernatchez*, *supra*, considers that it would be desirable for a decision refusing a write-off to be heard and decided by the Tribunal, but until this power is clearly conferred on the Tribunal by the Federal Court of Appeal or the Parliament of Canada, the Tribunal does not have this power.

[186] Consequently, the Tribunal is of the view that, as long as this power is not granted to it by the Parliament of Canada or by a higher court, it does not have the jurisdiction to review the Commission's decision regarding a write-off. Moreover, even if the Tribunal had the power to review the Commission's decisions, the write-off decisions would have to be submitted to the Tribunal. Since a request for write-off was not made, the Tribunal has no jurisdiction because for the Tribunal to have jurisdiction, a reconsideration decision would have to be issued by the Commission under section 113 of the Act. Since the Tribunal has concluded that it does not have the power to decide this issue, this point is largely academic.

[187] However, the Tribunal could still issue a write-off recommendation if a request were submitted by an Appellant.

CONCLUSION

[188] The appeal is allowed in part. The amounts received by the Appellants from Air Canada constitute earnings under section 35 of the Regulations and must be allocated in accordance with the principle set out in paragraph 36(19)(*b*) of the Regulations, as of March 20, 2012.

Me Dominique Bellemare, Vice-Chairperson,
General Division - Employment Insurance

APPENDIX A

APPLICABLE LAW

[1] Subsections 35(1), (2) and (7) of the Regulations read as follows:

35. (1) The definitions in this subsection apply in this section.

"employment"

"employment" means

(*a*) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

(*b*) any self-employment, whether on the claimant's own account or in partnership or co-adventure; and

(*c*) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan. (emploi)*

"income"

"income" means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. *(revenu)*

"pension"

"pension" means a retirement pension

(*a*) arising out of employment or out of service in any armed forces or in a police force;

(*b*) under the Canada Pension Plan; or

(*c*) under a provincial pension plan. *(pension)*

"self-employed person"

"self-employed person" has the same meaning as in subsection 30(5). *(travailleur indépendant)*

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(*a*) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(*b*) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(*c*) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

(ii) a paid sick, maternity or adoption leave plan,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act, or

(v) a leave plan providing payment in respect of the care or support of a critically ill child;

(*d*) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not

taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

(*e*) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

(*f*) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

…

(7) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2):

(*a*) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(*b*) payments under a sickness or disability wage-loss indemnity plan that is not a group plan;

(*c*) relief grants in cash or in kind;

(*d*) retroactive increases in wages or salary;

(*e*) the moneys referred to in paragraph (2)(e) if

(i) in the case of a self-employed person, the moneys became payable before the beginning of the period referred to in section 152.08 of the Act, and

(ii) in the case of other claimants, the number of hours of insurable employment required by section 7 or 7.1 of the Act for the establishment of their benefit period was accumulated after the date on which those moneys became payable and during the period in respect of which they received those moneys; and

(*f*) employment income excluded as income pursuant to subsection 6(16) of the Income Tax Act.

[2] Section 36 of the Regulations reads as follows:

36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

(3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.

(4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

(5) Earnings that are payable to a claimant under a contract of employment without the performance of services or payable by an employer to a claimant in consideration of the claimant returning to or beginning work shall be allocated to the period for which they are payable.

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

(6.1) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from a transaction shall be allocated

(*a*) if the aggregate amount of earnings that arise from a transaction occurring in a week is greater than the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the weeks in which the work that gave rise to the transaction was performed, in a manner that is proportional to the amount of work that was performed during each of those weeks or, if no such work was performed, to the week in which the transaction occurred; or

(*b*) if the aggregate amount of earnings that arise from a transaction occurring in a week is less than or equal to the maximum yearly insurable earnings referred to in section 4 of the Act divided by 52, to the week in which the transaction occurred or, if the claimant demonstrates that the work that gave rise to the transaction occurred in more than one week, to the weeks in which the earnings were earned, in a manner that is proportional to the amount of work that was performed during each of those weeks.

(6.2) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings were earned.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(*a*) if they arose from a transaction, in accordance with subsection (6.1); and

(*b*) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(*a*) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant’s normal weekly earnings from that employment; and

(*b*) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

(9) Subject to subsections (10) to (11), all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to a number of weeks that begins with the week of the lay-off or separation in such a manner that the total earnings of the claimant from that employment are, in each consecutive week except the last, equal to the claimant's normal weekly earnings from that employment.

(10) Subject to subsection (11), where earnings are paid or payable to a claimant by reason of a lay-off or separation from an employment subsequent to an allocation under subsection (9) in respect of that lay-off or separation, the subsequent earnings shall be added to the earnings that were allocated and, regardless of the period in respect of which the subsequent earnings are purported to be paid or payable, a revised allocation shall be made in accordance with subsection (9) on the basis of that total.

(10.1) The allocation of the earnings paid or payable to a claimant by reason of a lay-off or separation from an employment made in accordance with subsection (9) does not apply if

(*a*) the claimant's benefit period begins in the period beginning on January 25, 2009 and ending on May 29, 2010;

(*b*) the claimant contributed at least 30% of the maximum annual employee's premium in at least seven of the 10 years before the beginning of the claimant's benefit period;

(*c*) the Commission paid the claimant less than 36 weeks of regular benefits in the 260 weeks before the beginning of the claimant's benefit period; and

(*d*) during the period in which the earnings paid or payable by reason of the claimant's lay-off or separation from an employment are allocated in accordance with subsection (9) or, if the earnings are allocated to five weeks or less, during that period of allocation or within six weeks following the notification of the allocation, the claimant is referred by the Commission,

or an authority that the Commission designates, under paragraph 25(1)(a) of the Act, to a course or program of instruction or training

(i) that is full-time,

(ii) that has a duration of at least 10 weeks or that costs at least $5,000 or 80% of the earnings paid or payable by reason of the claimant's lay-off or separation from employment,

(iii) for which the claimant assumes the entire cost, and

(iv) that begins during one of the 52 weeks following the beginning of the claimant's benefit period.

(10.2) If any of the conditions under which the Commission may terminate the claimant's referral under paragraph 27(1.1)(b) of the Act exists, the earnings paid or payable to the claimant by reason of a lay-off or separation from an employment shall be re-allocated under subsection (9).

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

(12) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable:

(*a*) payments in respect of sick leave, maternity leave or adoption leave or leave for the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act;

(*b*) payments under a group sickness or disability wage-loss indemnity plan;

(*c*) payments referred to in paragraphs 35(2)(d) and (f);

(*d*) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(*e*) payments in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act; and

(*f*) payments in respect of the care or support of a critically ill child.

(13) A payment paid or payable to a claimant in respect of a holiday or non-working day that is observed as such by law, custom or agreement, or a holiday or non-working day immediately preceding or following a holiday or non-working day that occurs at the establishment of the employer or former employer from whom the claimant receives that payment, shall be allocated to the week in which that day occurs.

(14) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant on a periodic basis shall be allocated to the period for which they are paid or payable.

(15) The moneys referred to in paragraph 35(2)(e) that are paid or payable to a claimant in a lump sum shall be allocated beginning with the first week that those moneys are paid or payable to the claimant in such a manner that those moneys are equal in each week to the weekly amount, calculated in accordance with subsection (17), to which the claimant would have been entitled if the lump sum payment had been paid as an annuity.

(16) The moneys allocated in accordance with subsection (14) or (15) shall not be taken into account in the allocation of other earnings under this section.

(17) For the purposes of subsection (15), the weekly amount shall be calculated as the amount of the lump sum payment divided by 1,000 and multiplied by the weekly annuity equivalent, as set out in Schedule II, corresponding to the age of the claimant at the date the lump sum is paid or payable.

(18) Earnings that are payable to a claimant under a government program intended to encourage re-employment and that are payable to the claimant as a supplement to earnings arising from a contract of employment shall be allocated to the period for which they are payable.

(19) Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(*a*) if they arise from the performance of services, to the period in which the services are performed; and

(*b*) if they arise from a transaction, to the week in which the transaction occurs.

(20) For the purposes of this section, a fraction of a dollar that is equal to or greater than one half shall be taken as a dollar and a fraction that is less than one half shall be disregarded.

[3] Section 56 of the Regulations reads as follows:

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.

(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.