



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *F. A. v Canada Employment Insurance Commission*, 2019 SST 1312

Tribunal File Number: GE-19-3228

BETWEEN:

**F. A.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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

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DECISION BY: Candace R. Salmon

HEARD ON: October 3, 2019

DATE OF DECISION: October 16, 2019

## **DECISION**

[1] The appeal is allowed. I find the Claimant was outside of Canada, but has proven that his situation falls within the exception at paragraph 55(6)(a) of the *Employment Insurance Regulations* for a Claimant who resides in a state contiguous to Canada and is available for work in Canada and able to attend a Commission office if directed to do so.

## **OVERVIEW**

[2] The Claimant lived in Prince Edward Island (PEI). He was laid off from his employment on December 31, 2018, and made a claim for regular employment insurance (EI) benefits in January 2019. The Claimant moved to Washington, United States of America (USA), in April 2019, to live with his wife while looking for work in both Canada and the USA.

[3] The Canada Employment Insurance Commission (Commission) determined the Claimant was not entitled to EI benefits from April 29, 2019, onwards because he was not in Canada. The Commission upheld this decision after reconsideration. The Claimant appeals the decision to the Social Security Tribunal (Tribunal), arguing the Commission failed to apply the correct provision of the law to his appeal.

## **PRELIMINARY MATTERS**

[4] At the hearing, the Claimant listed some of his job search history during the relevant period. I asked the Claimant if he could provide his job search history between April 29, 2019, and October 1, 2019. On October 7, 2019, the Claimant submitted a two-page post-hearing document listing his job search history from late April 2019 until October 1, 2019. I accepted this document as the material is relevant to the appeal and, while I do not believe the material prejudices the Commission's position, any potential prejudice to the Commission is minimal in comparison to the importance of the information.

[5] At the hearing, the Claimant submitted that the Commission's file did not include an accurate record of all of his conversations with Commission agents. The Claimant argued that some of the missing correspondence might be relevant to his appeal. On October 3, 2019, I requested the Commission review its file and provide any additional records that related to the

Claimant's conversations with Commission agents, or any evidence that he contacted the Commission. The Commission replied on October 9, 2019, providing a 38-page document including supplemental representations and additional file records. These documents were provided to the Claimant.

## ISSUE

[6] Is the Claimant entitled to be paid EI benefits while outside of Canada?

## ANALYSIS

[7] To be entitled to receive regular EI benefits, claimants have to prove that they are capable of and available for work and unable to obtain suitable employment.<sup>1</sup>

[8] The *Employment Insurance Act* is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.<sup>2</sup> To this end, the *Employment Insurance Act* states that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada.<sup>3</sup>

[9] The *Employment Insurance Regulations* provide some exceptions to this rule, and include that a claimant who is not a self-employed person is not disentitled from receiving benefits if outside of Canada for, "a period of not more than seven consecutive days to attend a bona fide job interview" or "for a period of not more than 14 consecutive days to conduct a bona fide job search."<sup>4</sup>

[10] The *Employment Insurance Regulations* also state that a claimant who resides outside Canada is not disentitled from receiving EI benefits for the sole reason of their residence outside Canada if the claimant is available for work in Canada, is able to report, and does report, to a Commission office in Canada when requested, and resides in a state of the United States that is contiguous to Canada.<sup>5</sup>

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<sup>1</sup> *Employment Insurance Act*, section 18(1)(a).

<sup>2</sup> *Canada (Attorney General) v. Cornelissen O'Neill*, A-652-93.

<sup>3</sup> *Employment Insurance Act*, section 37(b).

<sup>4</sup> *Employment Insurance Regulations*, paragraphs 55(1)(e) and 55(1)(f).

<sup>5</sup> *Employment Insurance Regulations*, paragraph 55(6)(a).

[11] The Claimant made a claim for regular EI benefits on January 19, 2019. On the initial claim form, he stated that he resided in PEI, gave a PEI residential address, and stated his residential address was the same as his mailing address. The claim was established, and the Claimant started making biweekly EI reports.

[12] In the biweekly EI report for the weeks from April 28 to May 11, 2019, the Claimant reported that he was outside Canada. On an availability questionnaire filed on May 12, 2019, the Claimant stated he was outside of Canada for more than 24 hours, for the purpose of looking for work, and was available to “return home within 48 hours if offered a job.” He stated he left Canada on April 28, 2019, and did not know his expected date of return.

[13] On the biweekly reports for the weeks of May 12 to May 25, 2019, and May 26 to June 8, 2019, the Claimant reported that he had not returned to Canada during the period of the report. The Claimant spoke to a Commission agent on June 4, 2019, and stated he was still in the USA looking for work, and did not know when he would return to Canada.

[14] On June 24, 2019, the Claimant told the Commission he was “staying with family while looking for work,” and reiterated that he left Canada on April 28, 2019, and did not have a date of return. The Commission’s notes show the Claimant stated he would be staying in Seattle until he found a job, and was looking for work in both countries. The Commission asked the Claimant to provide a job search, showing the places he had applied or was interviewing in the USA. The Commission recorded that the Claimant “refused to provide further details surrounding his availability.”

[15] On June 25, 2019, the Commission issued a decision finding the Claimant was not entitled to EI benefits from April 29, 2019, onwards because he was not in Canada. On the same day, the Claimant filed an online questionnaire stating he had returned to Canada and was available for work. The Commission’s notes show that it did not believe the Claimant had legitimately returned to Canada, because he submitted the questionnaire and changed his status within “a couple hours of being told of the decision.” It also submitted the Claimant made clear statements that he had no intention of returning to Canada until he found a job, so it found his new statements were less credible because they were inconsistent with his previous statements that he did not have a return date.

[16] The Commission submits that the Claimant has, throughout the claim, provided conflicting dates when asked of his return date to Canada. It notes that when he spoke with an agent on June 24, 2019, he stated he had no return date planned, but on June 25, 2019, submitted he had returned to Canada. He later stated to an agent that he returned on June 10, 2019, but submitted on an availability questionnaire that he returned on June 25, 2019. The Claimant told the Commission on August 7, 2019, that he returned to Canada for two or three days on June 9, 2019, for a job interview, and returned to Canada again on June 25, 2019, so he reported the returns. He added that he was going back and forth between the USA and Canada the entire time since he had moved to Washington, USA.

[17] At the hearing, the Claimant testified that he initially misunderstood the Commission's meaning when it asked him for the date he planned to return to Canada. He stated that the Commission initially asked him when he planned to return to PEI and he did not have a date, so he reported that he had no date planned to return because he thought the Commission meant returning to PEI. He testified that he later learned that returning to Canada simply meant crossing the border into Canada, which he stated he was doing the entire time he was living in the USA. He testified that he crossed the border almost daily, to do simple things like get milk, in addition to job searches and interviews. He explained that the discrepancies between his reporting occurred because of this misunderstanding. He added that because he crossed the border so often, he could not tell the Commission on which exact days he was in Canada, because it was so frequent and just part of his daily life. The Claimant also testified that his wife works in Canada but they choose to live in the USA because rent is less expensive.

[18] I find the Claimant's explanation for the inconsistencies with respect to his dates for being outside Canada is reasonable, and is supported by his evidence at the hearing that he lives in a town bordering Canada.

[19] The Claimant requested the Commission reconsider its decision, submitting that he temporarily resided in a state contiguous to Canada and was available for work in Canada and able to report personally to a Commission office when requested.

[20] The Commission submits that the Claimant has provided contradictory information regarding his residential address, stating at various points that he was in Seattle, Washington, north

of Seattle in X, Washington, and in north Vancouver, British Columbia. The Commission also noted that the Claimant provided a copy of a lease agreement in his appeal documents, showing his address as being X, Washington, though throughout the claim he maintained that his residence was in PEI.

[21] The Claimant appears to have told the Commission that he was living in all of the places noted above. He also stated, in a call on August 2, 2019, that he was looking for work in Vancouver and Victoria, and had family and friends in both cities where he would have a place to stay if he got a job. On August 7, 2019, he reiterated to the Commission that his address was in PEI, but he considered the USA his primary residence because he stays consistently at one address when there, instead of multiple addresses when he is in Canada. On August 22, 2019, he told the Commission that he was living in northern Vancouver, and later in the same call stated that he lives five minutes across the USA border and was able to report to Canada at any time.

[22] With the Notice of Appeal, the Claimant submitted a copy of his lease agreement for a property in X, Washington, USA. The lease appears to have been signed by the Claimant on December 1, 2018, for tenancy between February 1, 2019 and February 1, 2020. He testified that, at the time he made a claim for EI benefits, he was living in PEI but later moved to X, Washington, to follow his wife, who had already moved and was working in British Columbia. He testified that he did not tell the Commission he lived in X or Seattle, Washington, but told them that he lived north of Seattle, and said he lived in a community near X, Washington, which was written into the notes on his file as saying he lived in X, Washington. The Claimant testified that since he moved to the USA in April 2019, he has lived at the same address in X, Washington, which is approximately a five-minute drive from the border with Canada. The Claimant added that he still has an apartment in PEI, but his mailing address should be the address in X because it is the address where he consistently lives with his family. The Claimant added that when he is in Vancouver on a job search he stays with friends or rents a room, but does not maintain his own residence there.

[23] It is clear the confusion about the Claimant's residence was reasonable, as he continues to maintain that his residence is PEI because he has an apartment there. However, the Claimant lives in X with his wife and has a lease agreement. The Claimant was consistent in stating that the location where he physically resides is X, Washington. While he stated that he sometimes stays in

Canada, he testified that he does so in hotels or AirBNB locations, and does not maintain a residence in British Columbia.

[24] I find the Claimant was outside of Canada, because he testified that he moved from PEI to Washington, USA, on April 28, 2019. I further find the Claimant has resided in Washington, USA, since April 28, 2019. The general rule is that a claimant is not entitled to receive EI benefits for any period when the claimant is not in Canada.<sup>6</sup>

[25] The Commission argued that the Claimant does not qualify for EI benefits. It states that the Claimant could perhaps have qualified for 7 to 14 days of benefits, because he was outside of Canada for reasons of a job search and/or interview, but failed to qualify because he could not support the dates when he was and was not in Canada. The Claimant submits that he qualifies for EI benefits because he lived in a state contiguous to Canada, was available for work in Canada, and was able to report to a Commission office at any time.

[26] The Commission added, in its submissions, that the Claimant was advised of the possibility of being provided benefits via an interstate claim, but he refused to file an interstate claim. I note that the Commission spoke to the Claimant about this on June 26, 2019, and he is recorded as having said he did not want an interstate claim.

[27] The Commission determined the Claimant did not meet the exception to the rule that he was not entitled to EI benefits while he was outside Canada, because he did not show when he was in and not in Canada, and did not provide a job search or records of interviews to support that he was out of the country pursuing a job. While the Commission added that the Claimant's eligibility for benefits could be possible under paragraph 55(6)(a) of the *Employment Insurance Regulations*, it states that he cannot benefit from this provision because he did not file an interstate claim. The Commission told the Claimant on August 7, 2019, that the exception in the *Employment Insurance Regulations* at subsection 55(6)(a) "applies only to interstate clients." The Claimant did not agree, and said that he did "not know what an interstate claim is" but thought it may have something to do with commuting.

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<sup>6</sup> *Employment Insurance Act*, paragraph 37(b).

[28] The Commission spoke to the Claimant on August 22, 2019, and stated that, “since [the Claimant] has been outside of his home area for more than 4 weeks he must transfer his claim.” The Claimant testified that he did not know much about interstate claims, but was told by one Commission agent that if he commuted to work in the USA then it would be an interstate claim. The Claimant said that this was not his situation, because he was not living in Canada and working in the USA, but living in the USA and looking for work in both Canada and the USA.

[29] It is unclear to me where the Commission finds the basis for its statement that paragraph 55(6)(a) of the *Employment Insurance Regulations* applies only to Claimants on interstate claims. This may be an internal policy of the Commission, but I find that it is not a reflection of the *Employment Insurance Act* or the *Employment Insurance Regulations*. Therefore, I am not obligated to apply this reasoning because I am not bound by Commission policy.<sup>7</sup>

[30] The Claimant testified that the Commission did not ask him to provide his job search for Canadian companies, but wanted to know where he was applying in the USA, where he lived, and when he was returning to PEI. He submitted the Commission was focused on whether he qualified for a week or two of benefits because he was outside of Canada conducting a job search or interviewing, and did not consider whether he qualified for EI benefits because he lived in a contiguous state.

[31] I find the Claimant has proven that he meets the criteria for an exception to the general rule that a Claimant is not entitled to EI benefits when outside Canada. The Claimant testified, and the evidence supports, that he has lived in X, Washington since April 28, 2019. This is a state contiguous to Canada, because Washington, USA shares a border with British Columbia, Canada. I further find the Claimant was available to attend a Commission office at their request, because he testified that he is approximately a five-minute drive from Canada, and within a couple hours’ drive of Vancouver, Canada. He also testified that he was available to personally report to a Commission office if directed to attend. I find as fact that the Claimant lived in close enough proximity to Canada to be available if the Commission directed him to attend an office.

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<sup>7</sup> The Commission did not support its submission that only interstate claims can benefit from the exception at paragraph 55(6)(a) of the *Employment Insurance Regulations*, therefore I presume that its position is based on internal policy.



### **Availability in the USA**

[32] The Claimant submitted the Commission asked only about his interviews and job search in the USA, and was not interested in his job search in Canada. This may be because the Commission was considering the exceptions under *Employment Insurance Regulations* paragraph 55(1)(e) and (f), instead of paragraph 55(6)(a). However, the Commission may also have considered a line of decisions that I find are no longer an accurate reflection of the law.

[33] There are not many previous cases dealing with similar facts to this situation. The only Federal Court of Appeal case I was able to find specifically addressed only the meaning of the word contiguous.<sup>8</sup> In the current case, the state of Washington, USA is contiguous to Canada because it shares a geographical border. I note that there are previous decisions from Canadian Umpire Benefits (CUB) hearings that did deal with similar circumstances; however, while these decisions may be persuasive, they are not precedent and I am not required to follow their principles.

[34] In a review of the commentary and case law in *The 2019 Annotated Employment Insurance Act*,<sup>9</sup> I noted that the provisions of *Employment Insurance Regulations* paragraph 55(6)(a) are said to apply only if the Claimant is available for work in the USA, has a valid work permit and resides temporarily in the USA. The legal support for this comes from a number of CUB decisions, all decided pre-1995. In CUB 12206, decided on June 4, 1986, the decision maker listed three required criteria for the exception to apply, including that the Claimant had to be available for work in the USA and have a valid work permit.<sup>10</sup> This decision was echoed in CUB 12946,<sup>11</sup> decided on November 28, 1986, where the decision maker adopted the same criteria in dealing with a case where the Claimant was not available for work in the USA.

[35] While few recent cases address the application of *Employment Insurance Regulations* paragraph 55(6)(a), I have considered the previous cases in this area and the current version of the law. I find the paragraph in question requires only that a claimant reside, temporarily or permanently, in a state of the USA that directly borders Canada, meet the requirements for availability in Canada, and is able to, and does, personally present to a Commission office if

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<sup>8</sup> *Canada (Attorney General) v. Bendahan*, 2012 FCA 237.

<sup>9</sup> T. Stephen Lavender, "The 2019 Annotated Employment Insurance Act," Thomson Reuters, 2018. Page 808.

<sup>10</sup> Bessi, [CUB 12206](#).

<sup>11</sup> Nadeau, [CUB 12946](#).

directed to attend. There is no requirement that the Claimant meet a test for availability in the USA or have a valid work permit to engage the exception.

### **Availability in Canada**

[36] The Claimant has proven that he was available for work in Canada. Two different sections of the law require claimants to show that they are available for work.<sup>12</sup> I will first consider whether the Claimant has proven that his efforts to find a job were reasonable and customary,<sup>13</sup> and then will consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.<sup>14</sup>

[37] The law sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.<sup>15</sup> I have to look at whether his efforts were sustained and whether they were directed toward finding a suitable job. I also have to consider the Claimant's efforts in the following job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies.

[38] On August 2, 2019, the Claimant told the Commission that he was looking for work online, using websites like Indeed and LinkedIn, had prepared a resume and cover letter, and registered for online job banks. He also stated that he contacted prospective employers through websites, and submitted approximately three or four job applications per week to Canadian employers, and approximately ten applications per week to American jobs. He also said that he had two interviews with Canadian companies and several with American companies, but had not yet found a job.

[39] After the hearing, the Claimant submitted a copy of his job search from April 2019, until October 1, 2019. He included the company name, job title and date he applied for the positions.

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<sup>12</sup> Subsection 50(8) of the *Employment Insurance Act* provides that the Commission may require the claimant to prove that he is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period when he fails to prove that on that day he was capable of and available for work and unable to obtain suitable employment.

<sup>13</sup> *Employment Insurance Act*, subsection 50(8).

<sup>14</sup> *Employment Insurance Act*, paragraph 18(1)(a).

<sup>15</sup> *Employment Insurance Regulations*, section 9.001.

The Claimant listed 23 jobs in total, and stated that some of his job search was lost after he thought his EI benefits were denied. I note that in the supplemental documents provided by the Commission, of records not previously included in the file it provided to the Tribunal, the Claimant discussed his availability with a Commission agent on April 30, 2019. At that time, he stated that he had applied to many jobs and was involved in multiple Canadian federal government candidate pools for positions. He also stated he was in a dispute with his former employer and hoped that he would be rehired into that position. He added that he belongs to a professional X association, which gives him some networking opportunities, and listed some of the employers where he had applied for jobs.

[40] The Claimant submitted to the Commission that, due to the length of time he waited for an EI decision, some of his work search records between April and August 2019 were “lost.” The Claimant provided a list of 15 companies where he applied for jobs, but did not list the dates on which he applied or to what positions he applied.

[41] I find the Claimant is not disentitled from receiving EI benefits for failing to prove he made reasonable and customary efforts to obtain suitable employment.<sup>16</sup> The Claimant has shown that he made a sustained job search effort and engaged many of the reasonable and customary efforts included in the *Employment Insurance Regulations*.

[42] With respect to being capable of and available for work, the Claimant has to prove three things to show he was available under this section:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might have unduly limited his chances of returning to the labour market<sup>17</sup>

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<sup>16</sup> *Employment Insurance Act*, subsection 50(8).

<sup>17</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[43] I have to consider each of these factors to decide the question of availability,<sup>18</sup> looking at the attitude and conduct of the Claimant.<sup>19</sup>

Did the Claimant have a desire to return to the labour market as soon as a suitable job was available?

[44] I find the Claimant has shown a desire to return to the labour market as soon as a suitable job is available. The Claimant has provided a job search that lists 23 job applications he has made between late April and October 1, 2019. The Claimant also testified that he is looking to work in X, which is high level and specialized employment. He stated that there are not significant quantities of jobs available in this field, so he is applying to other project management jobs as well. Given the Claimant's experience and the type of jobs he is seeking, I find 23 jobs is a reasonable number of positions to have applied to between late April and October 1, 2019.

Has the Claimant made efforts to find a suitable job?

[45] I find the Claimant has made efforts to find a suitable job. While they are not binding when deciding this particular requirement, I have considered the list of job-search activities outlined above for guidance in deciding this second factor. As recorded in evidence above, the Claimant's efforts to find a new job included preparing a resume and cover letter, searching for jobs on the internet, registering with job sites, contacting prospective employers, networking with his X professional body, applying for jobs, sitting qualifying exams, and attending interviews. These efforts are enough to meet the requirements of this second factor because the Claimant has proven on a balance of probabilities that his efforts were numerous and directed towards finding suitable employment.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[46] I find the Claimant did not set personal conditions that might have unduly limited his chances of returning to the labour market. The Claimant says he did not limit his chances of returning to the labour market because he applied for jobs throughout southern British Columbia

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<sup>18</sup> *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

<sup>19</sup> *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

and his local region in Washington, USA. He also testified that while he preferred to work as a X, he applied for work in multiple areas, such as X, because he knew he had the skills to work at those positions.

[47] The Commission says the Claimant did set personal conditions that might have unduly limited his chances of returning to the labour market because he said he would not accept a salary below \$100,000 per year. The Commission reviewed the Statistics Canada wage report for an X and found the average wage per hour for the Vancouver Island region to be \$38 to \$72 per hour, and for the lower mainland and southwest region to be \$40 to \$80 per hour. The Commission told the Claimant on August 7, 2019, that his minimum salary poses a restriction to his job search because the average salary of a X in construction is around \$80,000 per year. The Claimant stated to the agent that he is looking for work as an X in construction, not just a X, which has an average salary closer to \$120,000 per year.

[48] At the hearing, the Claimant testified that he is looking for X jobs, and is open to construction positions. He stated that he has a master's degree in X, has multiple certifications in addition to the degree, and confirmed he will not accept less than \$100,000 per year in salary. He added that he did not know how the Commission arrived at \$80,000 as an average salary for his field, but reiterated that based on his knowledge and experience in the industry it is too low.

[49] I find that the Claimant's salary expectations do not constitute a personal condition that might unduly limit the Claimant's chances of returning to the labour market. The Commission quoted wage report information for an X, which is neither an X in construction nor a X, and found the average wage per hour to be between \$38 to \$72 per hour on Vancouver Island, or \$40 to \$80 per hour on the lower mainland of British Columbia. If I look at the lower band, on Vancouver Island, the wage of \$38 per hour for an average 40 hours per week and 52 weeks per year equals approximately \$79,000 per year. This, however, is only part of a range and is the low end. The higher range of \$72 per hour on Vancouver Island, equals almost \$150,000 per year with the same conditions. The average salary between those two values is \$115,000 per year.

[50] The Commission has failed to calculate the proper average salary, and is relying on information that may not reflect the types of positions for which the Claimant is applying. I find

the Claimant's salary expectation is therefore not unreasonable, or a limiting condition to his search for employment.

***Was the Claimant capable of and available for work and unable to find suitable employment?***

[51] Considering my findings on each of the three factors together, I find that the Claimant did show that he was capable of and available for work and unable to find suitable employment.<sup>20</sup> This means he is not disentitled from receiving EI benefits from April 29, 2019, onwards.

**OTHER ISSUES**

[52] The Claimant asked for a remedy beyond receiving EI benefits. He seeks interest on the monies owed to him, an apology, compensation for stress, and a promise that the Commission will establish programs to educate employees about the *Employment Insurance Act* and have the Commission either record the conversations it has with Claimants or enable Claimants to record the conversations to avoid discrepancies and miscommunications. I advised the Claimant at the hearing that I do not have the jurisdiction to award any of these additional remedies.

[INTENTIONALLY BLANK]

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<sup>20</sup> *Employment Insurance Act*, paragraph 18(1)(a).

**CONCLUSION**

[53] The appeal is allowed. While I find the Claimant was outside of Canada, he is not disentitled from EI benefits for this reason because he meets the exception included at paragraph 55(6)(a) of the *Employment Insurance Regulations*.

Candace R. Salmon

Member, General Division - Employment Insurance Section

HEARD ON:	October 3, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	F. A., Appellant