Date: 20070724

Docket: T-1721-06

Citation: 2007 FC 769

Ottawa, Ontario, July 24, 2007

Present: The Honourable Mr. Justice Harrington

BETWEEN:

BERNARD DESROSIERS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] For more than a decade now, Bernard Desrosiers has been disputing the position of government officials regarding monies he received on account of employment insurance benefits in 1993, 1994 and 1995. At that time, he was employed seasonally by Les Cultures de l'Est Inc., a business in which he was a shareholder. Two adverse decisions were subsequently made against him, and he was ordered to repay the overpayment, i.e. the employment insurance benefits paid to him that correspond to the periods for which he claimed this type of financial assistance while he was working for Les Cultures de l'Est Inc.

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[2] In January 1997, following a request by the Employment Insurance Commission for an advance ruling on the insurability of Mr. Desrosiers' employment with Les Cultures de l'Est Inc. from 1993 to 1995, Revenue Canada concluded that his employment at this company was not insurable, as the Commission had assumed, on the ground that Mr. Desrosiers directly and indirectly controlled too many shares of Les Cultures de l'Est Inc. Consequently, the insurability of his employment for the periods from May 17 to October 30, 1993, May 23 to September 10, 1994, and June 12 to November 4, 1995, was compromised retroactively because the payment of such financial assistance contravened section 5 of the *Employment Insurance Act*.

[3] As a result, a month later, the Commission cancelled the three applications for benefits that had been granted to Mr. Desrosiers for the periods of insurability during which he had been declared eligible for the employment insurance program and for which he had received the corresponding benefits. Second, the Commission ordered him to repay the monies that had been paid to him in error. However, as of today, Mr. Desrosiers refuses to repay the monies that are owed.

[4] Mr. Desrosiers appealed these two decisions, i.e. Revenue Canada's and the Commission's, but was unsuccessful. However, it is important to point out that Mr. Desrosiers voluntarily withdrew the notice of appeal of the Revenue Canada decision that he had filed with the Tax Court of Canada, and accordingly only the decisions made by the Commission are relevant for purposes of this proceeding. It also should be noted that the procedure for disputing these decisions is important and will therefore be discussed later in these reasons.

[5] Essentially, after suffering a number of reversals—the Board of Referees dismissed his appeal of the three decisions on January 24, 2002, then the Umpire dismissed his appeal of the Board of Referees' decision on September 17, 2003—Mr. Desrosiers became liable to pay the sum of $11,223.03 to the state. As a last resort, Mr. Desrosiers submitted a request to the Commission in October 2003 to write off the overpayment.

[6] In other words, he applied to the Commission in the hope that it would exercise its discretion and decide to write off the debt. However, that is not what transpired. In February 2006, the Commission decided that Mr. Desrosiers was not entitled to a write-off of the amount corresponding to the overpayment, and accordingly, that he still owed this amount to the Canadian government. In the context of this application for judicial review, it should be noted that it is a review of the Commission's discretionary decision, not its decision on the merits regarding whether or not Mr. Desrosiers was entitled to receive employment insurance benefits for the periods in question.

ISSUES

[7] In this case, it is simpler to focus first on the issues in such a way that the relevant facts related to them are grouped together rather than to chronologically follow the facts in the record, which would lead to a review of the issues.

[8] On an application for judicial review, the first issue, which of course is fundamental, is to determine the appropriate standard of review for each issue that has been raised, i.e. correctness, reasonableness *simpliciter* or patent unreasonableness.

[9] Second, with respect to this proceeding, I must determine whether this application was filed within the requisite time period. This issue was discussed at the hearing and was resolved from the bench. Under subsection 18.1(2) of the *Federal Courts Act*, a judge may use his or her discretion to allow further time to the party concerned. Mr. Desrosiers' request for an extension of time was not opposed and was granted.

[10] Third, I must review the application and interpretation of the *Employment Insurance Act* and the related Regulations. Subsection 47(3) of the Act reads as follows:

47(3) No amount due under this section may be recovered more than 72 months after the day on which the liability arose.	47(3) Le recouvrement des créances visées au présent article se prescrit par soixante-douze mois à compter de la date où elles ont pris naissance.

In this case, Mr. Desrosiers submits that his liability to repay the overpayment, which he still disputes, was determined over six years ago and, therefore, the limitation period for recovering the debts has expired, making the debts uncollectable. Although it was decided more than six years ago that he was required to pay the entire amount of the overpayment to government officials, other provisions provide that, in certain circumstances, the limitation period may be suspended and in those cases, the application of such a special scheme cannot be disregarded.

[11] Section 56 of the *Employment Insurance Regulations* provides that the Commission may write off an amount payable if the facts of a case meet one of the stated criteria. What is in dispute here is that Mr. Desrosiers allegedly made a false or misleading declaration when he applied for employment insurance benefits, that the debt represented by the overpayment is uncollectable and that repayment of this amount would result in undue hardship to Mr. Desrosiers. He maintains that there was a denial of justice with respect to procedural fairness because he was the only party required to file an affidavit and hence could not cross-examine the Commission, which had made decisions relating to this dispute. Furthermore, Mr. Desrosiers alleges that discretion was not exercised properly in this case, i.e. within the limits of the applicable legal principles.

APPROPRIATE STANDARD OF REVIEW

[12] It is not necessary to set out in detail the general principles regarding this subject because they are widely applied and because the Supreme Court of Canada has clearly defined them in a number of decisions, including *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[13] With respect to employment insurance, the respondent refers the Court to a decision of Madam Justice Tremblay-Lamer in *Côté v. Canada (Human Resources Development)*, [2001] F.C.J. No. 1273 (QL). In that case, the judge held that patent unreasonableness is the appropriate standard of review of issues involving the Commission's discretion to write off an amount payable. It is possible that this opinion was later the subject of opposing views. In *Canada (Attorney General) v. Sketchley*, 2005 FCA 404, the Federal Court of Appeal established that each decision by

a decision-maker that is the subject of the same judicial review must, respectively, be considered independently and as a result, each decision could be reviewed on a different standard. The statutory provisions here are similar to the principles of fairness under the *Income Tax Act*. In *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, the Federal Court of Appeal determined that in such circumstances the appropriate standard of review is reasonableness *simpliciter*.

[14] However, it is not necessary that I determine this issue because after reviewing the Commission's decision on the standard of review most favourable to Mr. Desrosiers, i.e. reasonableness *simpliciter*, I am of the view that the intervention of this Court would be inappropriate.

IS THE MINISTER OUT OF TIME TO ACT?

[15] Under subsection 47(3) of the Act, no amount due may be recovered more than 72 months after the day on which the liability arose. However, under subsection 47(4) of the Act, the limitation period for such amounts due does not run when there is a pending appeal or other review of the decision establishing the liability. In other words, the limitation period does not run during appeals brought by a claimant or by the Commission itself.

[16] In this case, the liability arose on February 18, 1997, when the Commission cancelled Mr. Desrosiers' three applications for benefits. At that point, he became the debtor. Subsequently, when he filed a notice of appeal of this decision with the Board of Referees almost a month later, on March 19, 1997, Mr. Desrosiers unintentionally set in motion the suspension of the limitation period

for the amount due as provided in the Act. Dissatisfied with the Board of Referees' decision of January 24, 2002, Mr. Desrosiers filed a notice of appeal of that decision with the Umpire; on September 17, 2003, the Umpire once again dismissed Mr. Desrosiers' appeal and reaffirmed the validity of the amount owing.

[17] Last, taking into account the appeals brought by Mr. Desrosiers to challenge the decision that is the basis of the amount in question, the limitation period has not expired, and the amount due is still valid.

ISSUE OF PROCEDURAL FAIRNESS

[18] As mentioned a little earlier in these Reasons, Mr. Desrosiers contends that the Commission was required to file an affidavit and has not done so. Given the circumstances of this case, Mr. Desrosiers believes it is not sufficient that the tribunal record was the only evidence filed under section 317 of the *Federal Courts Rules*. Furthermore, he asserts that the only real evidence, apart from the purely objective evidence, is his own affidavit and since he was not cross-examined on it, the affidavit should be proof of its contents, i.e. the statements therein should be accepted as fact.

[19] From a purely procedural perspective, an application for judicial review is an application under sections 300 and following of the Rules. It is not an application that gives rise to the production of affidavits by the respondent, thus opening the door to the right to cross-examine the other party on the basis of the evidence it filed in the record. In this case, it was open to the respondent to file an affidavit or not. It did not do so and it had a right to make that decision.

[20] The reasons are what they are. If they prove to be inadequate on an application for judicial review, the decision must be set aside. On the other hand, it would definitely be too late if the respondent wanted to change his mind now. Furthermore, it must be noted that, according to the jurisprudence, there is a presumption that the administrative decision-maker in question based the decision on all the evidence that was before him or her at the time the decision was made, even though the decision-maker did not explicitly refer to each piece of evidence. Quite recently, Mr. Justice Blais reaffirmed this presumption established by the jurisprudence in an immigration case: *Buttar v. Canada (Citizenship and Immigration)*, 2006 FC 1281:

> [29] I find that I cannot agree with this claim. Having already established that this legal opinion was one piece of evidence among others, it would be unreasonable to require that the panel's reasons refer to every piece of evidence considered.
>
> [30] Furthermore, the presumption established by the jurisprudence for many years that the Tribunal considered all the evidence before it in rendering its decision should apply.

WRITE-OFF

[21] Section 56 of the Regulations states that the Commission may write off in its discretion a penalty to be paid or a sum due under certain sections of the Act if one of the criteria listed therein is met. In other words, the Commission may only exercise its discretion where the facts of a given case apply to one of the criteria set out in this section of the Regulations. If one of them is met, the write-off may be granted.

[22] In this case, the Commission found that none of the six criteria had been met and that therefore it could not exercise its discretion judicially, hence legally. According to the record, it

appears that the first four criteria, such as the amount owing does not exceed twenty dollars, the debtor is deceased or is a discharged bankrupt, do not apply.

[23] Accordingly, the criteria that are the basis of the dispute in this case are restricted to what is stated in subparagraph 56(1)(*e*)(i) and paragraph 56(1)(*f*) of the Regulations, which read as follows:

56(1)(*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	56(1)e) le versement excédentaire ne résulte pas d'une erreur du débiteur ni d'une déclaration fausse ou trompeuse de celui-ci, qu'il ait ou non su que la déclaration était fausse ou trompeuse, mais découle:
(i) a retrospective decision or ruling made under Part IV of the Act, or	(i) soit d'une décision rétrospective rendue en vertu de la partie IV de la Loi,
56(1)(f) the Commission considers that, having regard to all the circumstances,	56(1)f) elle estime, compte tenu des circonstances, que:
(i) the penalty or amount, or the interest accrued on it, is uncollectable, or	(i) soit la pénalité ou la somme, y compris les intérêts courus, est irrécouvrable,
(ii) the repayment of the penalty or amount, or the interest accrued on it, would result in undue hardship to the	(ii) soit le remboursement de la pénalité ou de la somme, y compris les intérêts courus,

debtor.	imposerait au débiteur un préjudice abusif.

[24] The issue that arises under subparagraph 56(1)(*e*)(i) of the Regulations is whether Mr. Desrosiers made a false and misleading declaration or representation when he submitted his three applications for employment insurance benefits in the 1990's, regardless of the intention behind the act.

[25] In the affidavit that Mr. Desrosiers filed in support of this application, he solemnly states that he did not hold more than 21.8% of the voting shares in Les Cultures de L'Est Inc. while he was employed there or when he applied for employment insurance benefits. However not everyone is in agreement on this point. The demand by government authorities for reimbursement, which requires Mr. Desrosiers to repay the financial assistance he obtained improperly, is based on the fact that he held, directly or indirectly, a much greater number of shares in the company than he had declared and that he did so through a scheme involving capital stock of various companies while he was employed by Les Cultures de l'Est Inc. Consequently, Mr. Desrosiers was not eligible for employment insurance benefits under the Act in force by reason of non-insurability.

[26] The tribunal record highlights Mr. Desrosiers' activities linked to the business world, and the analysis of these activities led to the conclusion that he effectively controlled, through representation relating to the capital stock of several companies, more than 40% of the voting shares of his then-employer Les Cultures de l'Est Inc.

[27] In Mr. Desrosiers' opinion, this is meaningless because the Court should consider only his affidavit when assessing the evidence. His position is that it is the only real evidence in this case and that the decision that the amounts he received as employment insurance benefits are considered an overpayment was not based on any formal analysis. He also submits that, in any event, he did not have the opportunity to cross-examine the decision-maker on the negative conclusions he reached.

[28] It is inappropriate for Mr. Desrosiers to dispute the issue of the controlling shares that he may have held in Les Cultures de l'Est Inc. at a specific moment in time. This issue has already been reviewed on the merits by various administrative decision-makers, and all the claims relating to it were dismissed. Again, I reiterate that this is an application for judicial review whose purpose is to review the Commission's discretionary decision to deny Mr. Desrosiers' request for a write-off.

[29] In any event, the Court's jurisdiction is limited to exercising its role as guardian of the administrative decision that was rendered. This is a matter of preserving the integrity of the judicial decision-making process as a function of the administration of justice.

[30] If it were otherwise, the confidence of the public in the justice system that governs it would be seriously undermined. In short, Mr. Desrosiers' contention is similar to an abuse of process under the definition referred to by Madam Justice Arbour in paragraph 40 of *Toronto (City) v. C.U.P.E., local 79*, [2003] 3 S.C.R. 77:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of

> competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

[31] As for the issue raised by paragraph 56(1)(*f*) of the Regulations, the Commission's decision that the amount due is collectable and that repayment would not result in undue hardship to Mr. Desrosiers is reasonable. It should be noted that Mr. Desrosiers is seasonally employed and has a patrimony that is not without assets. Furthermore, the Commission stated that the amount owing may be paid in instalments.

[32] According to the factual framework, Mr. Desrosiers is in his fifties, is divorced and is the principal financial support for his son who is still a student. How many people find themselves in this situation today? To ask the question is to answer it. In any event, it was not unreasonable for the Commission to make the finding it did.

[33] On a final note, I would like to point out that writing off a debt is an exceptional mechanism that is intended for very specific cases, considering that the amounts in question belong to the common good.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed with costs.

"Sean Harrington"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1721-06
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