

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20091022**

**Docket: A-75-09**

**Citation: 2009 FCA 306**

**CORAM: SHARLOW J.A.  
RYER J.A.  
TRUDEL J.A.**

**BETWEEN:**

**HAROLD MACNEIL**

**Applicant**

**and**

**CANADA EMPLOYMENT INSURANCE COMMISSION**

**Respondent**

Heard at St. John's, Newfoundland and Labrador, on September 17, 2009.

Judgment delivered at Ottawa, Ontario, on October 22, 2009.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

SHARLOW J.A.  
TRUDEL J.A.

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20091022**

**Docket: A-75-09**

**Citation: 2009 FCA 306**

**CORAM: SHARLOW J.A.  
RYER J.A.  
TRUDEL J.A.**

**BETWEEN:**

**HAROLD MACNEIL**

**Applicant**

**and**

**CANADA EMPLOYMENT INSURANCE COMMISSION**

**Respondent**

**REASONS FOR JUDGMENT**

**RYER J.A.**

[1] This is an application for judicial review of a decision (CUB 71590) of the Honourable David G. Riche, acting as an umpire, in which he allowed the appeal of the Employment Insurance Commission (the “Commission”) from a decision of the Board of Referees, dated May 8, 2008.

[2] The central question in this application is whether the monthly payments that Mr. Harold MacNeil received from the United Association of Plumbers, Pipefitters and Welders, Local 682 Pension Plan (the “Pension Plan”) constitute earnings, within the meaning and for the purposes of sections 35 and 36 of the *Employment Insurance Regulations*, SOR/96-332 (the “Regulations”), that

must be deducted from the benefits payable to Mr. MacNeil on the basis provided for in section 19 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the “Act”).

[3] In the circumstances of this application, the resolution of this issue depends on whether the pension to which Mr. MacNeil is entitled under the Pension Plan is a retirement pension arising out of Mr. MacNeil’s employment, as contemplated by the definition of pension in subsection 35(1) of the Regulations.

[4] The relevant provisions of the Act and the Regulations are reproduced in the appendix to these reasons.

## **BACKGROUND**

### *Mr. McNeil’s Circumstances*

[5] Mr. MacNeil was a member of the United Association of Plumbers, Pipefitters and Welders, Local 682 (the “Union”) from November 1, 1966 to September 1, 2007. He became a member of the Pension Plan on January 1, 1982.

[6] Mr. MacNeil left his employment with Lockerbie and Hole Industrial Inc. (the “Employer”) on July 7, 2007 and established a benefit period effective November 18, 2007.

[7] In his application for benefits, Mr. MacNeil advised the Employment Insurance Commission (the “Commission”) that he was receiving a monthly pension from the Pension Plan of

\$995.53. In response, the Commission determined that these monthly amounts constituted earnings that would reduce the benefits payable to him under the Act. Dissatisfied with that determination, Mr. MacNeil appealed to the Board of Referees.

*The Collective Agreement and the Pension Plan*

[8] The Pension Plan was established in 1979 as a result of negotiations between a number of Cape Breton unions, including the Union, and the employers of the day. The Pension Plan is registered under the Nova Scotia *Pension Benefits Act*, R.S.N.S. 1989, c. 340, under registration number 0925834 (applicant's record page 75).

[9] The specific agreement that mandated the establishment of the Pension Plan is not in the record. However, excerpts from agreements stipulating the terms and conditions of Mr. MacNeil's employment for various years (each a "Collective Agreement") were put into evidence before the Board of Referees.

[10] The versions of the Collective Agreement in the record contain provisions agreed upon between the Employer and the Union with respect to the Pension Plan. In particular, those provisions stipulate that:

- (a) the Pension Plan is to be governed by a trust agreement under which the Pension Plan is to be controlled by trustees, half of whom are to be appointed by the Union and half by the employers;

(b) contributions to the Pension Plan under the Collective Agreement covering industrial projects, effective July 1, 2005 to June 30, 2008, which counsel for Mr. MacNeil confirmed to be applicable to Mr. MacNeil, are as follows:

(b) The employer shall make contributions for Journeymen at the rate per hour paid as follows:

- Five dollars and twenty-five cents (\$5.25) for Journeymen; and
- Three dollars and seventy-five cents (\$3.75) for Apprentices

(Applicant's record pages 52 and 53)

and;

(c) if the Pension Plan is discontinued, the prospective contributions that would otherwise have been made to the Pension Plan are to be added to the employees' hourly wages and shall then become part of the wage package.

[11] A letter dated February 8, 2008, from a representative of the employers (the "February 8, 2008 Letter") indicates a practice that certain amounts payable by employers can be allocated by the Union among the various benefit packages that are available to employees, including the Pension Plan. This is evident from paragraph 2 of that correspondence (applicant's record page 63) which reads as follows:

In every round of bargaining there has been an agreed monetary package increase, and the employers have consistently told the unions that they may distribute the increase amongst the various elements of the hourly wage package as they see fit, provided only that the total negotiated hourly package does not increase by a sum greater than that agreed to in the bargaining process. By way of an example, if the parties agreed that the wage package should increase by one dollar (\$1.00), then each union would have the choice as to how they wished to distribute that dollar amongst the elements of their wage package. They could place ninety-one cents (\$0.91) on their hourly wage rate and nine cents (\$0.09) on their holiday and vacation pay to account for the dollar. Alternatively, they could place the entire

dollar onto their health and welfare package, or onto their pension package. Or they could distribute it in whatever amounts they wished between the hourly rate, the holiday and vacation allowance, health and welfare package, the pension and/or the assorted training funds that various unions have incorporated into their collective agreements.

(Applicant's record page 63 -- Emphasis added)

The record contains no excerpt from any Collective Agreement that sanctions this apparent practice.

[12] The Pension Plan is summarized in a booklet entitled "U.A. Local 682 Cape Breton Plumbers & Pipefitters Pension Plan Members' Booklet, January 2001" (the "Pension Booklet").

The introduction to the Pension Booklet states the purpose of the Pension Plan as follows:

It was established to provide you with a measure of financial security upon your retirement.

(Applicant's record page 84)

[13] The Pension Booklet stipulates that a member of the Union automatically becomes a member of the Pension Plan after working 1,000 hours. However, if the employee leaves the Union before completing two years of continuous service, no pension benefits are payable to him. In addition, the Pension Booklet specifies the benefits to which a retiree is entitled as follows:

- \$.0015 per month for each hour worked from January 1, 1979 to December 31, 1982,

plus

- \$.0252 per month for each hour worked from January 1, 1983 to June 30, 1990,

plus

- \$.0186 per month for each \$1.00 of contribution made on your behalf by your Employer from July 1, 1990 to December 31, 1996,

plus

- \$.0169 per month for each \$1.00 of contribution made on your behalf by your Employer from January 1, 1997 forward.  
(Applicant's record page 87)

### **THE DECISION OF THE BOARD OF REFEREES**

[14] The majority of the Board of Referees determined that the Pension Plan is a private pension fund and, for that reason, it does not fall within the definition of a pension in subsection 35(1) of the Regulations. While the majority did not spell out what they meant by the term private pension fund, they referred to two decisions of umpires (CUB 15310 and CUB 16101) that indicate that a private pension plan is one voluntarily established by an employee that is in the nature of a savings account that might or might not be funded out of employment earnings. The majority of the Board of Referees based their conclusion upon the following findings:

It is our understanding from reading Ex 9-19 that the Union entered into an agreement with the employer. Information from Ex 9-19 indicates that the policy from 1979 up to the filing of benefits dealing with Harold MacNeil is that contributions to the Union pension were made in wage packages and it was up to the Union to disperse the moneys as they saw fit. The Union put money in a pension package and administered the pension in the same way from 1979 up to the present time 2008 until an appeal from Harold MacNeil was received. The Union has administered the plan consistently over the years and there was only one.  
(Applicant's record page 104)

[15] The reference in these findings to Ex 9 – 19 is to a letter from a representative of the Union that refers to “an agreement with the employer”. In that letter, the representative refers to the “collective agreement” (applicant's record page 66), thus indicating that certain of these findings of

the Board are interpretations of the Collective Agreement. These findings also refer to the "pension" and the "plan", and can be taken as interpretations of the Pension Plan.

### **THE DECISION OF THE UMPIRE**

[16] The Umpire allowed the Employment Insurance Commission's appeal, stating:

. . . It is my view that this pension is not a private pension but one that arises out of employment and should be allocated. If there was no employment, there would be no pension. The pension arises out of employment because this was negotiated by the union whereby the claimant's earnings would be partially put into a pension fund by the employer. These monies would only become available to the claimant if the pension fund was discontinued. Then presumably he would receive a larger hourly rate. It does not, however, provide for him to own the specific amount that he has deposited into it. The pension fund presumably is for all of the workers and it arises out of his working arrangements within the union with his co-workers.

(Applicant's record tab 2, page 3)

[17] This excerpt from the Umpire's decision indicates that he concluded that the amounts received by Mr. MacNeil constituted earnings that had to be allocated in accordance with sections 35 and 36 of the Regulations because those amounts were paid to him out of a Pension Plan that fell within the definition of pension in subsection 35(1) of the Regulations. In allowing the Commission's appeal, the Umpire disagreed with the findings of the Board of Referees, quoted in paragraph 14 of these reasons, and concluded that the Pension Plan is not a private plan. In holding that the Pension Plan arose out of Mr. MacNeil's employment, the Umpire determined that the Pension Plan was put in place as a result of negotiations undertaken between the Union and the employers that established the terms of Mr. MacNeil's employment. He went on to find that if Mr. MacNeil had not been employed as he was, he would not have been able to join the Pension Plan. In



addition, the Umpire found that unlike an RRSP or a savings account, Mr. MacNeil did not own or control the specific amounts that had been put into the Pension Plan on his behalf.

## **ISSUE**

[18] The issue in this application is whether the Umpire erred in reversing the decision of the Board of Referees on the basis of his conclusion that the Pension Plan arose out of Mr. MacNeil's employment and therefore fell within the definition of pension in subsection 35(1) of the Regulations.

## **DISCUSSION**

### **1. Did the Umpire select the correct standard of review?**

#### *Standard of Review by this Court*

[19] This Court is required to determine if, in his review of the decision of the Board of Referees, the Umpire erred in the selection of the correct standard of review and its application to that decision. (See *Stone v. Canada (Attorney General)*, 2006 FCA 27, [2006] 4 F.C.R. 120; *Meechan v. Canada (Attorney General)*, 2003 FCA 368, 126 A.C.W.S. (3d) 267.

[20] It is well settled that the selection of the standard of review is a question of law (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19). It is also well settled that this Court will review determinations by Umpires on questions of law using the correctness standard (see *Canada (Attorney General) v. Sveinson (C.A.)*, 2001 FCA 315, [2002] 2 F.C. 205; *Canada (Attorney General) v. Kos*, 2005 F.C.A. 319, [2005] F.C.J. No. 1650 (QL)).

*The Umpire's Selection of the Standard of Review*

[21] The Umpire did not stipulate the standard of review upon which he reviewed the decision of the Board of Referees on the question of the classification of the Pension Plan. It would have been helpful if he had done so.

[22] In my view, the Umpire reviewed that question on the correctness standard, as argued by counsel for Mr. MacNeil. Nothing in the reasons of the Umpire indicates that he showed any degree of deference to the Board of Referees in his review of its conclusion that the Pension Plan did not arise out of Mr. MacNeil's employment and the findings upon which that conclusion was based.

*Did the Umpire Err in Selecting the Correctness Standard?*

[23] Counsel for Mr. MacNeil argues that the Umpire should have applied the reasonableness standard because the question that the Umpire was reviewing – whether the Pension Plan arose out of Mr. MacNeil's employment – is a question of mixed fact and law. I do not agree.

[24] The application of a legal standard to a set of factual findings is typically regarded as a question of mixed fact and law which is reviewed on a standard of reasonableness, unless there is a readily extricable question of law (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 52).

[25] In this application, it is undisputed that the legal standard is the definition of pension in subsection 35(1) of the Regulations. It is equally clear that the monthly payments that the Commission classified as earnings for the purposes of sections 35 and 36 of the Regulations were received by Mr. MacNeil under the Pension Plan, a contractual agreement that was put in place as a result of another contractual agreement, the Collective Agreement, both of which were binding upon Mr. MacNeil and the Employer. As a result, the application of the statutory definition in these circumstances is essentially determined by interpretations of the Collective Agreement and the Pension Plan.

[26] In my view, interpretations of contracts such as these are questions of law (see *Signature Plaza Sport Inc. v. Canada* (F.C.A.), [1994] F.C.J. No. 253, 169 N.R. 321 at para. 14; *Alberta Giftwares Ltd. v. The Queen*, [1974] S.C.R. 584 at p. 588, 36 D.L.R. (3d) 321 at p. 324; and in the context of a collective agreement *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 at paras. 27 and 29).

[27] Accordingly, it follows that the Umpire was required to review the Board of Referees' determination of whether the Pension Plan arose out of Mr. MacNeil's employment on the standard of correctness and in selecting that standard, he made no error.

## **2. Did the Umpire properly apply the correctness standard of review?**

*Standard of Review by this Court*

[28] Having determined that the Umpire correctly chose the correctness standard as the basis for his review of the decision of the Board of Referees, it is now incumbent upon me to determine whether the Umpire properly applied that standard of review. Accordingly, the question is whether the Umpire was correct in deciding that the Pension Plan arose out of Mr. MacNeil's employment.

[29] In the circumstances under consideration, the Umpire essentially substituted his view for that of the Board of Referees on matters of interpretation of two contracts, the Collective Agreement and the Pension Plan. As previously indicated, interpretations of contracts are questions of law. Accordingly, in reviewing the application of an umpire's determination of these questions of law, it is my view that the applicable standard of review is correctness.

[30] In interpreting the provisions of the Collective Agreement and the Pension Plan, the Umpire found that the Pension Plan was not a private plan that was in the nature of a savings plan or an RRSP and that Mr. MacNeil had no legal right to control contributions made to the Pension Plan on his behalf. I agree with these legal conclusions and that they support the Umpire's determination that the Pension Plan arose out of Mr. MacNeil's employment.

[31] In my view, the Umpire's determination that the Pension Plan arose out of Mr. MacNeil's employment is further supported by other provisions of the Collective Agreement and the Pension Plan.

[32] First, the provision of the Collective Agreement that is reproduced in paragraph 10 of these reasons stipulates that the employer must contribute a specific amount to the Pension Plan for every hour worked by Mr. MacNeil. This provision admits of no discretion or control on the part of Mr. MacNeil or the Union as to whether or not the stipulated amounts actually go into the Pension Plan or are otherwise deployed. While the February 8, 2008 Letter might be interpreted as indicating a contrary practice, that letter is merely an attempt to demonstrate that the Collective Agreement has been altered by the suggested practice. In my view, that letter cannot be accepted as contradicting the legal substance and clear wording of the Collective Agreement. Furthermore, the “practice” referred to in the February 8, 2008 Letter simply refers to negotiated increases in the monetary package. Thus, even if that letter were to be considered, it does not contradict the specific contractual obligation of the Employer to contribute a specific amount to the Pension Plan for each hour worked by Mr. MacNeil. The specific contractual obligation demonstrates that contributions made by the Employer into the Pension Plan on Mr. MacNeil’s behalf vary directly with the amount of work that he does. In my view, this contractual obligation provides a clear causal connection between Mr. MacNeil’s employment and the Pension Plan out of which he received the monthly payments in issue.

[33] Secondly, as indicated in the excerpt from the Pension Plan that is reproduced in paragraph 13 of these reasons, the amount of Mr. MacNeil’s pension depends upon the number of hours that he worked over the years that he was a member of the Pension Plan. This also provides a clear and direct linkage between Mr. MacNeil’s employment and the Pension Plan.

[34] The legal interpretations of the Collective Agreement and the Pension Plan made by the Umpire together with my additional interpretations of those contracts that I have made lead me to conclude that the Umpire made no error in applying the correctness standard to his review of the decision of the Board of Referees and that he was correct in reversing that decision.

[35] I would add that even if the standard of review of the question of whether the Pension Plan arose out of Mr. MacNeil's employment was reasonableness, as contended by counsel for Mr. MacNeil, in my view, the findings of the Umpire, together with my additional findings, are more than sufficient to demonstrate that the Board of Referees made an unreasonable decision in concluding that the Pension Plan did not arise out of Mr. MacNeil's employment.

#### **DISPOSITION**

[36] For the foregoing reasons, I would dismiss the application for judicial review, with costs.

"C. Michael Ryer"

---

J.A.

"I agree  
K. Sharlow J.A."

"I agree  
Johanne Trudel J.A."

## APPENDIX

### ***Employment Insurance Act, S.C. 1996, c. 23***

Earnings in periods of unemployment

Rémunération au cours de périodes de chômage

**19.** (2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds:

**19.** (2) Sous réserve des paragraphes (3) et (4), si le prestataire reçoit une rémunération durant toute autre semaine de chômage, il est déduit des prestations qui lui sont payables un montant correspondant à la fraction de la rémunération reçue au cours de cette semaine qui dépasse 50 \$, ou vingt-cinq pour cent de son taux de prestations hebdomadaires si celui-ci est de 200 \$ ou plus.

(a) \$50, if the claimant's rate of weekly benefits is less than \$200; or

[...]

(b) 25% of the claimant's rate of weekly benefits, if that rate is \$200 or more.

...

Regulations

Règlements

**54.** The Commission may, with the approval of the Governor in Council, make regulations

**54.** La Commission peut, avec l'agrément du gouverneur en conseil, prendre des règlements:

...

[...]

(s) defining and determining earnings for benefit purposes, determining the amount of those earnings and providing for the allocation of those earnings to weeks or other periods;

(s) définissant et déterminant la rémunération aux fins du bénéfice des prestations, déterminant le montant de cette rémunération et prévoyant sa répartition par semaine ou autre période;

...

[...]

### ***Employment Insurance Regulations, SOR/96-332***

Determination of Earnings for Benefit Purposes

Détermination de la rémunération aux fins du bénéfice des prestations

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

**35.** (1) Les définitions qui suivent s'appliquent au présent article.

...	[...]
"pension" means a retirement pension	« pension » Pension de retraite provenant de l'une des sources suivantes :
(a) arising out of employment or out of service in any armed forces or in a police force;	(a) un emploi ou un emploi à titre de membre des forces armées ou de toute force policière;
...	[...]
(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 has occurred and the amount to be deducted from benefits payable under section 19 or subsection 21(3) or 22(5) 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	(2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour déterminer s'il y a eu un arrêt de rémunération et fixer le montant à déduire des prestations à payer en vertu de l'article 19 ou des paragraphes 21(3) ou 22(5) de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :
...	[...]
(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;	(e) les sommes payées ou payables au prestataire, par versements périodiques ou sous forme de montant forfaitaire, au titre ou au lieu d'une pension;
...	[...]
Allocation of Earnings for Benefit Purposes	Répartition de la rémunération aux fins du bénéfice des prestations
<b>36.</b> (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.	<b>36.</b> (1) Sous réserve du paragraphe (2), la rémunération du prestataire, déterminée conformément à l'article 35, est répartie sur un nombre donné de semaines de la manière prévue au présent article et elle constitue, aux fins mentionnées au paragraphe 35(2), la rémunération du prestataire pour ces semaines.
(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.	(2) Pour l'application du présent article, la rémunération du prestataire ne peut être répartie sur les semaines durant lesquelles elle n'avait pas valeur de rémunération ou n'avait pas été comptée comme rémunération selon



l'article 35.

...

[...]

(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.

(14) Les sommes visées à l'alinéa 35(2)(e) qui sont payées ou payables au prestataire par versements périodiques sont réparties sur la période pour laquelle elles sont payées ou payables.

...

[...]

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-75-09

**STYLE OF CAUSE:** Harold MacNeil v. Canada  
Employment Insurance  
Commission

**PLACE OF HEARING:** St. John's, Newfoundland and  
Labrador

**DATE OF HEARING:** September 17, 2009

**REASONS FOR JUDGMENT BY:** RYER J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
TRUDEL J.A.

**DATED:** October 22, 2009

**APPEARANCES:**

Ronald R. Pink, Q.C.

FOR THE APPLICANT

Julien Matte

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Pink Larkin  
Halifax, Nova Scotia

FOR THE APPLICANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE RESPONDENT