



**EDITOR'S NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Federal Courts Reports*.

## EMPLOYMENT INSURANCE

Applications for judicial review of two decisions by Social Security Tribunal, Appeal Division (Appeal Division) — At issue was eligibility of two defendant-claimants for Employment Insurance Emergency Response Benefit (EI-ERB) established under *COVID-19 Emergency Response Act*, S.C. 2020, c. 5, Part 18 — Applications raised interpretation and scope of *Employment Insurance Act*, S.C. 1996, c. 23 (Act), s. 153.9 — Both defendants (Messrs. Gagnon and St-Louis) did not participate in appeal, made no representations before Court — Faced with disastrous consequences brought about by COVID-19 pandemic for Canadian economy and workers, Canadian government quickly adopted two income replacement programs on March 25, 2020 — First program was created by *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5 (CERB Act), s. 8; second program, EI-ERB, temporarily replaced benefits claimants could have claimed under Act — Minister of Employment and Social Development issued Interim Emergency Orders to mitigate economic impact of pandemic — In his first Interim Order, Minister added ss. 153.5 and 153.9(1),(2),(3) to Act; subsequently second Interim Order was issued adding s. 153.9(4) to Act — Under s. 153.8, any “claimant” may apply for EI-ERB for any two-week period beginning on a Sunday and ending between March 15 and October 3, 2020 — S. 153.9(1) governing eligibility requirements — Moreover, s. 153.9(2) provides that claimant is not eligible to receive EI-ERB if receiving other listed types of benefits — Defendant Mr. Gagnon submitted initial claim for employment insurance benefits effective March 15, 2020 — Benefits claimed were converted to EI-ERBs by virtue of ss. 153.5 and 153.9(1)(b) — Although his last paid day was April 23, 2020, Mr. Gagnon declared being without pay from March 15, 2020, to May 16, 2020 — Mr. Gagnon informed Commission of having received remuneration from his employer on April 2, 2020, explaining employer had decided to continue paying him even though he had not worked — He subsequently informed Commission in October 2020 that he had been paid by his employer until April 25, 2020 — He then asked whether he would be required to repay benefits already received between March 15 and April 25, 2020 — Commission reviewed Mr. Gagnon’s file, sent him notice of debt due to remuneration received from employer between these dates — Initial overpayment for this period was \$1,376 — Mr. Gagnon contested this amount — Commission concluded that Mr. Gagnon was indeed ineligible for benefits for entire period from March 15, 2020, to May 9, 2020 — Mr. Gagnon again contested amount of \$1,376 claimed from him, but Commission upheld its initial decision, modifying amount of overpayment to \$2,752 — This calculation was based on amounts received by Mr. Gagnon from his employer during two four-week blocks from March 15 to May 9, 2020 — Mr. Gagnon appealed Commission’s decision to General Division — General Division agreed with Commission’s position, concluded that Mr. Gagnon was not eligible to receive EI-ERB between March 15 and May 9, 2020, since he had received amount in excess of \$1,000 during four-week periods between these two dates — Mr. Gagnon applied for leave to appeal this decision, which was granted by Appeal Division — Mr. St-Louis submitted initial claim for employment insurance benefits effective March 23, 2020 — This claim was converted into an EI-ERB claim, took effect on March 22, 2020 — Mr. St-Louis received advance payment of \$2,000 (equivalent to four weeks of benefits), paid to him on April 6, 2020 — Contacted by Commission on July 23, 2020, Mr. St-Louis requested that his declarations for period of March 22 to April 4, 2020 be deleted and not processed by Commission, to avoid overpayment — Initially, Commission informed Mr. St-Louis he was not entitled to \$2,000 payment and had to repay this sum, which constituted a repayable loan, as there was no four-week period in which he had earned \$1,000 or less — Although he received no remuneration for weeks of March 29, April 5 and

April 12, 2020, he had earned \$1,200 during week of March 22 — General Division dismissed Mr. St-Louis' appeal, adopted Commission's interpretation — Appeal Division concluded in both cases, for almost identical reasons, that General Division had erred in law by erroneously interpreting provisions of Act dealing with eligibility for EI-ERB — As a result, it rendered decision it considered should have been rendered by General Division, concluding that both claimants were eligible for EI-ERB — Whether Appeal Division's interpretation of Act, ss. 153.9(1) and (4) reasonable — Applicant argued that Appeal Division's interpretation of these two provisions was unreasonable and inconsistent with text, context, and legislative intent — He first argued that text of s. 153.9(4) was open to several interpretations — Contrary to applicant's arguments, there was no ambiguity in text of ss. 153.9(1),(4) — First subsection deals with eligibility conditions, including requirements for loss of income — In all cases covered by this provision, a claimant will be eligible if claimant meets a certain number of conditions — S. 153.9(4) provides an exception to loss-of-income requirement — If claimant receives employment income of \$1,000 or less during a four-week period, claimant is "deemed" to have met loss-of-income requirement of s. 153.9(1) — This is only a presumption — S. 153.9(1) setting out requirements for loss of income; s. 153.9(4) exists only to provide an exception — If claimant not meeting this exception, s. 153.9(1) continues to apply; claimant will continue to qualify if meeting loss-of-income requirement set out in that subsection — Interpretation adopted by Appeal Division not incompatible with objectives of Act — As with Employment Insurance program, EI-ERB's goal is to help claimants who find themselves involuntarily unemployed, without distinction based on claimant's income or wealth — Consequently, interpretation adopted by Appeal Division in both cases in question not unreasonable — It was consistent with text of s. 159, context in which s. 159(4) was enacted, and with broader objective pursued by legislator not only in EI-ERB context, but also that of regular Employment Insurance benefit plan — Applications dismissed.

CANADA (ATTORNEY GENERAL) V. GAGNON (A-278-22, A-279-22, 2023 FCA 174, de Montigny J.A., reasons for judgment dated August 4, 2023, 25 pp.)