Court of Appeal for Saskatchewan
Docket: CACV4147

Citation: *Custer v Saskatchewan Government Insurance*, 2024 SKCA 18
Date: 2024-02-27

Between:

Arthur Emil Custer

Appellant
(Plaintiff)

And

Saskatchewan Government Insurance

Respondent
(Defendant)

Before:	Barrington-Foote, Tholl and McCreary JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Court
On appeal from:	2023 SKKB 13, Prince Albert
Appeal heard:	January 12, 2024
Counsel:	Jonathan Abrametz for the Appellant Lauren Wihak, Heather Laing, K.C., and Alyssa Phen for the Respondent

The Court

I. INTRODUCTION

[1] Arthur Custer was involved in a motor vehicle accident and received income replacement benefits [IRB] from Saskatchewan Government Insurance [SGI]. This benefit was calculated solely on the wage that he had been receiving from his employment at a remote resort. As part of that employment arrangement, Mr. Custer's employer had also provided him with room and board. SGI categorized this as sustenance that should not be taken into account in the IRB benefit calculation. Mr. Custer asserted that it should have been included as a benefit when determining the amount of his IRB.

[2] Mr. Custer appealed SGI's decision to the Court of Queen's Bench and the parties agreed to have the matter determined under Rule 7-1 of *The Queen's Bench Rules*. The appeal was dismissed: *Custer v Saskatchewan Government Insurance*, 2023 SKKB 13, 32 CCLI (6th) 93 [*Chambers Decision*]. Mr. Custer now appeals to this Court, asserting that the Chambers judge erred by misinterpreting or failing to follow the relevant jurisprudence and by following non-binding decisions of the Automobile Injury Appeal Commission [AIAC].

[3] For the reasons that follow, the appeal is dismissed.

II. BACKGROUND

[4] Mr. Custer began his employment in 1999 at a remote resort in Saskatchewan. He did various tasks such as carpentry, mechanical work, plumbing, general repairs, tending to boats, and other maintenance work. Mr. Custer was required to be at the resort continuously from Monday to Friday. He was paid for eight hours per day, after which, he was on call. There is no indication that he received any standby pay or overtime as part of this arrangement. Mr. Custer had his own permanent residence, where he lived while not at work.

[5] In his employment, Mr. Custer was paid $7.00 per hour and was provided room and board. The evidence regarding how this arrangement worked was sparse, consisting of only the following from the agreed statement of facts:

> 4. THAT Mr. Custer was paid $7.00 per hour, plus room and board valued at $5.00 per hour, or $40.00 per day / $200.00 per week, which included three meals per day, lodging and housekeeping, and that the value of the room and board so calculated is reasonable.

[6] While the parties did not shine any further light on these bare facts, they agreed at the appeal hearing that there were no transactions between Mr. Custer and his employer regarding the room and board. It distills down to the fact that Mr. Custer was required to stay at his employer's premises for 24 hours per day during the week, and his employer provided him meals, lodging, and housekeeping services while he was there.

[7] On July 31, 1999 – which was a Saturday – Mr. Custer was involved in a motor vehicle accident and was injured. At some undisclosed point, he filed an application for injury benefits with SGI pursuant to Part VIII of *The Automobile Accident Insurance Act*, RSS 1978, c A-35 [*AAIA*]. In a decision rendered November 27, 2019, SGI determined that Mr. Custer was entitled to an IRB, but calculated it only on his base employment rate of $7.00 per hour. He has been paid that IRB, less advances and a deduction for a period of absence, from August 7, 1999, to the present. The amount has been indexed annually for inflation since December 7, 2019. There is no explanation in the material for the twenty-year lag between the accident and the decision by SGI.

[8] Mr. Custer asserted that he was also entitled to have $5.00 per hour for room and board included in the calculation of his IRB. SGI disagreed, contending that this payment was the equivalent of an employer reimbursing an employee for expenses. The parties were unable to resolve the matter at mediation. On April 21, 2021, Mr. Custer filed a statement of claim with the Court of Queen's Bench, in which he appealed SGI's decision to not include the cash value of the room and board, calculated at $40.00 per day, in his IRB. The jurisdiction for his appeal to the Court of Queen's Bench is found in s. 191 of the *AAIA*.

[9] The parties agreed to have the matter determined under Rule 7-1 of *The Queen's Bench Rules*:

> **Application to resolve particular questions or issues**
> **7-1**(1) On application, the Court may:
>
> > (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of:
> >
> > > (i) disposing of all or part of a claim … .
>
> …

> (2) If the question is a question of law, the parties may agree on:
>
> (a) the question of law for the Court to decide;
>
> (b) the remedy resulting from the Court's opinion on the question of law; and
>
> (c) the facts, or may agree that the facts are not in issue.
>
> (3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may:
>
> …
>
> (b) give judgment on all or part of a claim and make any order it considers necessary;
>
> (c) make a determination on a question of law; and
>
> (d) make a finding of fact.
>
> …
>
> (5) A determination of a question or issue mentioned in subrule (1) is final and conclusive for the purposes of the action, subject to the determination being varied on appeal.

[10] Mr. Custer filed his Rule 7-1 application along with a short agreed statement of facts, which was not supplemented by affidavits or any other evidence from either party. The question agreed to by the parties for determination in the Court of Queen's Bench was as follows: Should the cash value of the plaintiff's room and board be included in the plaintiff's yearly employment income pursuant to s. 20 of *The Personal Injury Benefits Regulations*, RRS c A-35 Reg 3 [*Regulations*]?

III. COURT OF KING'S BENCH DECISION

[11] The Chambers judge described the issue, reviewed the pertinent facts, and then set out the relevant portions of the *AAIA* and the *Regulations* that were in force at the time of the accident:

> (a) the *AAIA* on July 31, 1999 –
>
> **Full-time earners**
>
> **112**(2) The insurer shall calculate the income replacement benefit pursuant to clauses (1)(a) and (b) on the basis of:
>
> (a) the gross yearly employment income the full-time earner earned from his or her employment, if the full-time earner holds employment in the employ of another at the time of the accident … .

(b) the *Regulations* on July 31, 1999 –

Determination of Gross Yearly Employment Income
Gross yearly employment income not derived from self-employment

20 Subject to these regulations, a victim's gross yearly employment income not derived from self-employment at the time of the accident is the sum of the following amounts:

(a) in the case of a full-time earner, the salary or wages, excluding benefits or commissions in clauses (d) and (e), received or receivable with respect to employment that the full-time worker held or would have held if the accident had not occurred and that are the greater of:

(i) the salary or wages received or receivable for the pay period in which the accident occurred, multiplied by the number of pay periods in the year … .

…

(d) any of the following benefits, to the extent that the benefit is not received as a result of the accident and to the extent that the benefit is regularly payable to the claimant:

(i) a bonus received or earned in the 52 weeks before the date of the accident;

(ii) tips, in the amount that is greater of:

(A) the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred; and

(B) the amount reported in the victim's personal income tax return for the calendar year in which the accident occurred.

(iii) remuneration for overtime hours that is received or earned in the 52 weeks before the date of the accident;

(iv) the cash value from a profit-sharing plan allocation received or earned in the 52 weeks before the date of the accident;

(v) the value of the personal use of a motor vehicle provided by an employer at the time of the accident, in the amount reported in the victim's personal income tax return for the calendar year before the year in which the accident occurred or, where no amount was reported, in an amount calculated pursuant to subsection 6(1) of the *Income Tax Act* (Canada) as an annualized benefit;

(vi) the cash value of premiums of employer funded benefit plans paid to the victim in the 52 weeks before the date of the accident;

> (vii) the cash value of any other benefit received or that the victim was entitled to receive in the 52 weeks before the date of the accident, excluding employer funded benefit plans … .

[12] The Chambers judge reviewed *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95, [2016] 11 WWR 655 [*Holtby-York*]. In recounting the arguments made by each party, he also referred to two cases from the AIAC, *V.L. v Saskatchewan Government Insurance*, 2010 SKAIA 43 [*V.L.*], and *S.V. v Saskatchewan Government Insurance*, 2010 SKAIA 26 [*S.V.*], where the AIAC had determined that sustenance payments were not a benefit for the purposes of an IRB calculation. The Chambers judge then conducted the following analysis in reaching his decision that SGI was not required to include the $5.00 per hour room and board in Mr. Custer's IRB (*Chambers Decision*):

> [16] In the *V.L.* case the Commission reasoned at para. 48:
>
> > … The basis of such payments is to be revenue neutral, to reimburse the employee for the expenses incurred while working for the employer. We recognize that individual employees because of their personal circumstances or decisions could reduce their sustenance costs and reap a windfall, but that is not the way the program is designed.
>
> …
>
> [19] The sustenance was provided to the Plaintiff by the employer. I doubt there are many sustenance arrangements where the employer pays a sustenance amount, then provides the sustenance and, in effect, charges the employee for the room and board [in] an amount equal to the allowance making the arrangement, in effect, revenue neutral to the employer.
>
> [20] But I cannot see how those novelties change the overall purpose of the arrangement. It is designed for reimbursement of the Plaintiff for his expenses associated with having to stay at his employer's premises. It is expressly agreed in the Agreed Statement of Facts that the value of $5 per hour attributed to the three meals per day, housekeeping, and board was reasonable. It is not disputed that the Plaintiff utilized the housekeeping and room and consumed the three meals provided to the Plaintiff. If so, the payment cannot be characterized as anything but a reimbursement of those expenses.
>
> [21] Fundamentally, a benefit must either provide a fund that the recipient has the discretion to spend as the recipient sees fit or pay expenses that allow the recipient to use other income for discretionary spending.
>
> [22] In addition, that a benefit must provide an advantage to a recipient is another common denominator found in the benefits listed in s. 20(d) of the *Regulations*. Overtime, tips, bonuses, profit sharing plans provide funds for discretionary spending. Personal use of a vehicle provided by an employer or the payment of premiums by the employer for benefit plans means that the employee does not have to spend a portion of the salary on those items and thereby has additional funds for other discretionary spending.

> [23] A sustenance payment which provides no net benefit to the recipient does not, as is the case with Canada Pension Plan disability benefits, fit into that mold, *Holtby-York* at para 16.
>
> [24] Nor, when the purpose and intent of the *Act* is considered does an allowance that is revenue neutral result in an income loss to the recipient. There is no loss to be indemnified, *Holtby-York* at para 17.
>
> **Conclusion**
>
> [25] The room and board allowance paid to the Plaintiff was not a benefit under s. 20(d)(vii) of the *Regulations*.
>
> [26] This appeal is dismissed with costs to the Defendant.

IV. ISSUES

[13] Leave to appeal the *Chambers Decision* was granted by Caldwell J.A. on April 28, 2023. The sole ground of appeal upon which leave was granted is as follows (*Custer v Saskatchewan Government Insurance* (28 April 2023) Regina, CACV4147 (Sask CA)):

> [13] …
>
> > The Chambers judge incorrectly interpreted the meaning of benefit for the purposes of determining yearly employment income pursuant to s. 20 of *The Personal Injury Benefits Regulations*, RRS c A-35 Reg 3, because he:
> >
> > > (i) misinterpreted *Holtby-York v Saskatchewan Government Insurance*, 2016 SKCA 95 at paras 16 and 17;
> > >
> > > (ii) failed to follow *Daum v Schroeder*, [1996] 8 WWR 432 (Sask QB); and
> > >
> > > (iii) followed *V.L. v Saskatchewan Government Insurance*, 2010 SKAIA 43, and *S.V. v Saskatchewan Government Insurance*, 2010 SKAIA 26.

We note that the citation for *Daum v Schroeder*, [1996] 8 WWR 432 (Sask QB), as referenced in the leave decision and in Mr. Custer's factum is incorrect. From Mr. Custer's discussion of the case in his factum, and the uncited version attached at tab 4 of his factum, it is clear that he is referring to *Daum v Schroeder* (1996), 143 Sask R 192 (QB) [*Daum-QB*], rev'd (1997), 152 Sask R 161 (CA) [*Daum-CA*].

V. ANALYSIS

[14] Mr. Custer submits that the Chambers judge erred in law by failing to apply *Holtby-York*, arguing that, in that case, this Court determined that *benefit* in s. 20(d)(vii) means benefits "directly

related to compensation or benefits received from employment" (at para 16). He agrees that this does not include sustenance payments for employees working in isolated areas. He claims that the Chambers judge not only ignored *Holtby-York*, but incorrectly introduced the additional criterion that the "benefit must either provide a fund that the recipient has the discretion to spend as a recipient sees fit or pay expenses that allow the recipient to use other income for discretionary spending" (*Chambers Decision* at para 21). Mr. Custer also argues that the Chambers judge erred in law by following *S.V.* and *V.L.* and by failing to apply *Daum-QB.*

[15] Mr. Custer further contends that the Chambers judge erred in characterizing the lodging, three meals per day, and housekeeping as a sustenance payment. He asserts that these amounts were something tangible provided to him as consideration for his services as an employee and had a cash value. These do not constitute allegations that the Chambers judge erred in law but, rather, that he made errors of mixed fact and law and, as such, are not properly before this Court on an appeal under s. 194 of the *AAIA*.

[16] For its part, SGI submits that the room and board was properly categorized as a reimbursement for an expense and was not a benefit within the meaning of s. 20(d)(vii) of the *Regulations.* It contends that this provision does not include payment for expenses, whether on an allowance or reimbursement basis, as it is properly interpreted as extending only to a loss of income.

[17] The Court's task on this appeal is to determine the meaning of *benefit* in s. 20(d)(vii) of the *Regulations* and, in particular, whether it may include room and board provided by an employer to an employee. This issue of statutory interpretation, like any question of law appealed to this Court under s. 194(1) of the *AAIA*, is subject to the standard of review of correctness: *Regina Bypass Design Builders v Supreme Steel LP*, 2021 SKCA 82 at para 22. The principles of statutory interpretation articulated in *Regina Bypass* at paragraphs 23 to 28, and *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38 at paras 19–20, 457 Sask R 254 [*Ballantyne*], govern this exercise. In addition, the associated words rule is relevant: *Holtby-York* at paras 14–16.

[18] In *Holtby-York*, this Court addressed the interpretation of related sections of the *AAIA* and the *Regulations* in circumstances where SGI declined to include certain payments as income for the purposes of calculating the benefit to be paid to a survivor. There, an individual was fatally injured in a motor vehicle accident. At the time of his death, he was in receipt of disability benefits from the Canada Pension Plan [CPP] and was also receiving workers' compensation benefits. When Ms. Holtby-York, the spouse of the deceased, applied for survivor benefits under s. 144 of the *AAIA*, SGI refused to include the CPP payments as employment income when calculating the benefit. On appeal, the AIAC agreed with SGI. Ms. Holtby-York further appealed to this Court.

[19] In dismissing Ms. Holtby-York's appeal, Ryan-Froslie J.A. commented as follows on the interpretation of s. 17(2)(b) (formerly s. 20(d)) of the *Regulations*:

> [3] Paragraph 17(2)(b) sets out a list of benefits, which are to be included when calculating an insured's "yearly employment income", namely: (i) bonuses; (ii) tips (iii) overtime; (iv) the cash value of a profit-sharing plan; (v) the value of personal use of a vehicle; (vi) the cash value of premiums of an employer-funded benefit plan; and (vii) *the cash value of any other benefit received or that the insured was entitled to receive in the 12 month period prior to the accident, excluding employer-funded benefit plans.*
>
> [14] It is a well-known rule of statutory interpretation that words (or phrases) used in a list must be interpreted by reference to the other words or phrases included in the list … .
>
> …
>
> [16] In my view, the associated words rule is applicable to the interpretation of s. 17(1)(b)(vii). While standing on its own, that provision could be attributed the broad meaning suggested by the appellant and thus include CPP disability benefits; when it is read in conjunction with the other benefits listed in the provision, a narrower interpretation is warranted. *The common denominator linking the benefits listed in s. 17(2)(b) is that they are all directly related to compensation or benefits received from employment*. CPP disability payments do not fit that mold. As pointed out earlier in these reasons, they are not related to remuneration or benefits pertaining to an insured's employment but, rather, are akin to insurance payable as a result of loss of earning capacity.
>
> [17] Moreover, limiting the scope of s. 17(2)(b)(vii) to benefits directly related to an insured's employment is consistent with the overall scheme and purpose of the no-fault benefit provisions of the *Act*, which are *intended to indemnify an insured, amongst other things, for income loss attributable to the accident.* While Mr. York's death resulted in the termination of his CPP disability benefits, it also triggered the appellant's entitlement to survivor benefits pursuant to that plan. In other words, Mr. York's CPP benefits were not terminated by the accident but, rather, changed from disability benefits to survivor benefits.
>
> (Emphasis added)

[20] As can be seen from this excerpt, s. 17(2)(b)(vii) of the *Regulations* – which is identical in relevant wording to s. 20(d)(vii) (in force at the time of the accident) – was interpreted by this Court in the manner proposed by Mr. Custer: that is, as being limited to benefits "directly related to compensation or benefits received from employment" (*Holtby-York* para 16). However, it also found that, in determining whether a benefit exists within the meaning of s. 20(d)(vii), a court must also consider whether the item in question "indemnif[ied] an insured, amongst other things, for income loss attributable to the accident" (at para 17). This reflects the requirement in s. 112 of the *AAIA*, and in the residual category in s. 20(d)(vii) of the *Regulations*, that, for an item to be included in the IRB calculation, it must be a benefit that is regularly paid and earned from employment.

[21] The Chambers judge was aware of the interpretation of s. 20(d)(vii) in *Holtby-York*. He did not ignore those principles. To the contrary, he applied them. That said, we do agree with Mr. Custer that the finding by the Chambers judge that "[f]undamentally, a benefit must either provide a fund that the recipient has the discretion to spend as the recipient sees fit or pay expenses that allow the recipient to use other income for discretionary spending" was – if it were meant as a necessary condition to be met in every case – an overstatement (*Chambers Decision* at para 21). That is not to say that those factors would not be relevant circumstances when determining whether something provided by an employer was income and directly related to compensation or benefits received from employment; it is to say, that these factors can be readily accommodated when applying the analytical framework specified in *Holtby-York* – to the extent they are relevant in the particular circumstances of the case.

[22] This is very similar to the question posed by the AIAC in *V.L.*: that is, whether a payment is – in the words of the AIAC in *V.L.* – intended to be "revenue neutral, to reimburse an employee for the expenses incurred while working for the employer" (at para 48). Put differently, factors of this kind may, depending on the facts, be of assistance in assessing consideration provided to an employee in light of the purpose of the IRB portions of the statutory scheme, which is "to compensate insured persons for actual and future loss of income which results from their injuries" (*Ballantyne* at para 26). This fits with "the overall scheme and purpose of the no-fault benefit provisions of the [*AAIA*], which are intended to indemnify an insured, amongst other things, for income loss attributable to the accident" (*Holtby-York* at para 17).

[23] For its part, SGI submits that a payment by an employer for expenses that would not have been incurred by an employee but for their job requirements, whether on an allowance or reimbursement basis, cannot be a benefit, as it is not a payment for income loss. With respect, we would not draw a bright line in these terms. A mileage allowance paid to reimburse an employee for the cost of driving to and from a workplace that is not a remote workplace, for example, could in some circumstances constitute income and a benefit received from employment. To reiterate, the question of whether this or any other consideration provided by the employer – such as that provided to Mr. Custer – falls within the definition is one of mixed fact and law, to be determined based on the statutory criteria and the circumstances of the case.

[24] Mr. Custer further argues that the Chambers erred in ignoring or failing to distinguish *Daum-QB*. In that case, a person who worked two jobs, one being on a dairy farm, was injured in a motor vehicle accident. In her employment at the dairy farm, Ms. Daum was paid $350 per month, plus meals and accommodation. She was unable to continue that employment after the accident. The trial judge in that matter awarded the plaintiff an amount of $150 per month for the loss of the food and lodgings. Mr. Custer says that Ms. Daum was able to recover that amount for the exact same type of benefit from employment, so he should also be able to do so. In our view, this case is of no assistance to Mr. Custer: (a) the case was litigated under the tort law regime and does not purport to interpret the *Regulations* related to the calculation of an IRB under the no-fault system, (b) the trial judge awarded the amount without conducting any analysis of whether the inclusion of such a benefit was proper, and (c) the decision was overturned in its entirety on appeal, albeit not on this ground, and a new trial was ordered (*Daum-CA*). The Chambers judge was not required to consider *Daum-QB*.

[25] Further, even if *Daum-QB* had not been overturned, and it could be said that the Chambers judge had erred by failing to consider it, that would be of no moment on this appeal. The issue here, as noted above, is the correct interpretation of s. 20(d)(vii) and not whether *Daum-QB* is distinguishable on the facts from this case. That raises a question of mixed fact and law. The same reasoning applies to the allegation that the Chambers judge erred by following the AIAC decisions in *S.V.* and *V.L.* In the result, the Chambers judge was correct in his interpretation of s. 20(d)(vii), but for his comment that "a benefit must either provide a fund that the recipient has the discretion to spend as the recipient sees fit or pay expenses that allow the recipient to use other income for

discretionary spending". However, it is our view that this statement, which could be said to have over-emphasized considerations that would properly inform the application of the *Holtby-York* test to the facts, had no impact on his reasoning. In the final analysis, the Chambers judge referred to and relied on the principles specified in *Holtby-York* and correctly interpreted the legislation to find that this was not compensation or a benefit received from employment and that there was no income loss to be indemnified, as the allowance for sustenance was revenue neutral.

VI. CONCLUSION

[26] The appeal is dismissed with costs to SGI for the leave application and the appeal, fixed in the total amount of $1,500.

"Barrington-Foote J.A."
Barrington-Foote J.A.

"Tholl J.A."
Tholl J.A.

"McCreary J.A."
McCreary J.A.