Dockets: 2013-1386(EI)
2013-1387(CPP)
2013-1388(EI)
2013-1389(CPP)

BETWEEN:

ANDREW PELLER LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent;

Dockets: 2013-1390(EI)
2013-1392(CPP)

AND BETWEEN:

ANDREW PELLER LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JENNIFER DEARBORN, PATRICIA BENSON

Intervenors.

Appeals heard together on common evidence on March 26 and 27, 2015
and June 8, 2015 at Hamilton, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Duane Milot
Counsel for the Respondent:	Jan Jensen
For the Intervenors:	The Intervenors themselves

JUDGMENT

The appeals are dismissed, without costs, and the decisions of the Minister are confirmed, in accordance with the attached Reasons for Judgment, on the basis that the tips and gratuities distributed to the workers at the Appellant's restaurants were paid by the Appellant to those workers and, consequently, form part of their pensionable and insurable earnings.

Signed at Ottawa, Canada, this 16th day of December 2015.

"Diane Campbell"

Campbell J.

Citation: 2015 TCC 329
Date: 20151216
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REASONS FOR JUDGMENT

Campbell J.

I. Introduction

[1] The Appellant appeals from assessments for unremitted Canada Pension Plan ("CPP") contributions and Employment Insurance ("EI") premiums in respect to tips and gratuities received by particular workers employed by the Appellant at

its two restaurants, Peller Estate Winery Restaurant and Trius Winery Restaurant, both located in the Niagara region.

[2] The Minister of National Revenue (the "Minister") confirmed the assessments on November 30, 2012 and determined that the tips and gratuities were insurable earnings pursuant to subsection 2(1) of the *Employment Insurance Act*, RSC 1996, c. 23 ("*EIA*") and contributory salary and wages pursuant to subsection 12(1) of the *Canada Pension Plan*, RSC 1985, c. C-8 ("*CPP*").

[3] The relevant period for all appeals is January 1, 2008 to November 30, 2011, with the exception of one worker's CPP appeal, which extends back to January 1, 2007 (2013-1389(CPP)).

[4] The appeals were heard together on common evidence. I heard testimony from three witnesses: Mark Torrance, the National Director of Estate Wineries for the Appellant; Thierry Clement, a server with over 40 years of experience working in restaurants, who worked for the Appellant at the Peller Estates Winery Restaurant from 2005 to 2009; and Jennifer Dearborn, a server who worked at Peller Estates Winery Restaurant from May, 2002 to November 22, 2014, when her employment was terminated by the Appellant. Both Jennifer Dearborn and Patricia Benson participated in these appeals as intervenors.

II. The Evidence

[5] The Appellant is a publicly-listed corporation on the TSX, registered in Grimsby, Ontario. It engages in many different businesses in Ontario and throughout Canada. It operates wineries, wholesale and retail wine sales in the Appellant's 100 retail stores, and the two restaurants which are involved in these appeals. Mr. Torrance described the Appellant as "a wine company and … Canada's largest Canadian-owned wine company." (Transcript, March 26, 2015, at page 54). The Appellant earns about $300 million in annual revenue and employs in total over 1,300 staff. The primary revenue stream is derived from the manufacture and sale of bottled wine.

[6] The restaurants are well known for high-end, fine dining that caters to patrons through a superior level of attentive service. Mr. Torrance described the level of service at these restaurants as "… a very rich, luxurious experience" (Transcript, March 26, 2015, at page 56). Consequently, the Appellant employs many different knowledgeable and experienced employees to meet this goal within a business environment which Mr. Torrance described as quite complex to operate and coordinate. During the periods under appeal, approximately 100 employees

worked at these restaurants. Gross sales were approximately $6.5 million annually, with patrons additionally leaving about $1 million in tips and gratuities each year.

[7] Mr. Torrance testified that the restaurant staff was divided into the front-of-the-house employees and the back-of-the-house (sometimes referred to as the "house") employees. Front-of-the-house was comprised of the hosts, servers, junior servers, demi-waiters, runners, bartenders and bussers. Back-of-the-house or house staff was further divided into two groups: the kitchen team, which included the executive chefs, sous chefs, demi-chefs, chefs de partie, apprentice chefs and dishwashers; and the supervisory team, which included the restaurant managers, assistant managers and supervisors. Front-of-the-house staff was employed on a part-time, hourly basis while the supervisory team was hired on a full-time, salaried basis.

[8] In addition to the walk-in dining experience, the Appellant caters "functions" such as corporate events, weddings and large and small group dining events in both restaurants. Mr. Torrance testified that functions make up a significant 37 percent of the total business of the two restaurants. A function is defined as a group of 10 or more customers that would be booked through a sales coordinator or "function booker" using a booking contract. This meant a third category of employees, the sales coordinators, was required to generate group hospitality business. A gratuity of 15 percent was automatically added to all function events and noted within the booking contract. Mr. Torrance stated that the 15 percent gratuity was not mandatory where, for example, a customer refused to accept that term. In respect to groups of 6 to 9 for *à la carte* dining, or non-function events, servers had discretion to add an automatic 15 percent gratuity, but there was no discretion to add an automatic gratuity for tables of less than 6 people.

[9] The present appeals deal only with the gratuities received by the front-of-the-house employees, that is, the servers and related support staff. At all relevant times, the Appellant withheld and remitted CPP contributions and EI premiums in respect to the full-time, back-of-the-house employees.

A. *The Appellant's Tip Policy*

[10] Mr. Torrance testified that the Appellant encouraged a coordinated team approach in both restaurants. In his view, tips were given to reward the entire dining experience – service, ambience, food, drinks, support and assistance. The management position on tips and gratuities was two-fold: first, tips should be

returned to the employees who earned them and second, tips should be distributed fairly to avoid tension and conflict among staff. The Appellant never considered that it had any ownership in the tips and gratuities because they belonged to the entire team. Mr. Torrance explained that, although most of the tips were deposited into the Appellant's general bank account, it treated that money, not as a part of revenue, but as a liability, in much the same way that it treated HST that was collected from customers. In order to distribute tips fairly, the servers were expected to share tips with the entire team. In fact, a server could not unilaterally decide to keep the tip, although Mr. Torrance noted that if a server were secretly pocketing the cash tip, there might be very little the Appellant could do. All of the gratuities received by the Appellant was transferred to the Appellant's employees and no portion was retained by the Appellant.

[11] At all times, the Appellant maintained a system for sharing the tips and gratuities between the front-of-the-house and back-of-the-house staff, although it changed over the years. Both Mr. Torrance and Ms. Dearborn testified that there had always been a "tip-out" or "house tip" in existence at the restaurants. Both before and during the periods under appeal, the tip-out was 1.7 percent of revenue, which was to be paid from the tips and gratuity amounts left by customers at the restaurants. This house tip was divided among the manager, assistant managers, sous chefs, and possibly the pastry chef. If it was a function event, an additional 1 percent of revenue was paid, from the gratuities left by customers, to the sales coordinator who had booked and organized the function event. Entitlement to participate in this "Gratuity Program" was a term of the employment contracts between the full-time, back-of-the-house staff and the Appellant.

[12] Prior to 2004, each server collected the tips from his/her assigned section and the back-of-the-house would receive its tip-out from this amount and a further portion would be shared with the other front-of-the-house staff.

[13] After 2004, following a vote by the employees, the restaurants became "pooled", that is, the tips from all of the sections in each of the restaurants were pooled among those workers who were working that particular shift. From the pooled amount, the house tip was paid and the remaining tip amount was allocated among the front-of-the-house staff, with each receiving a percentage of the balance. According to Ms. Dearborn, it was Peter Trajkovski, the restaurant manager at that time, who decided the percentage of gratuities that each of the front-of-the-house staff would receive. Although Mr. Torrance testified that he never pushed for a pooled system, he welcomed the switch as it led to fewer staff disagreements.

[14] In 2008, the tip-sharing system was changed again, from a percentage to a point system, and implemented at both restaurants. The evidence of Thierry Clement, a server for the Appellant during this period, who had experience working in European restaurants that utilized the point system, was that the new restaurant manager, Luigi Cirelli, consulted him to assist with the change. Mr. Clement fashioned this new system after his experience in Europe and Mr. Cirelli adopted the point system as he had designed it. He was the only staff member consulted about implementation of the new system.

[15] Under the new point system, the back-of-the-house and function tip, 1.7 percent and 1 percent respectively, remained, but the front-of-the-house employees were assigned a set number of points based on each individual's role in the dining experience. For example, a server would be assigned more points than a bartender or a runner. At the end of a shift or function, the gratuities were totalled, with the back-of-the-house receiving 1.7 percent of revenue out of the pool (and an additional 1 percent to sales coordinators if it was a function event) and the remaining tips divided among the front-of-the-house staff working that particular shift according to the number of points each had been assigned. Mr. Torrance stated that he received no complaints or feedback regarding this new system. This system remained in place, throughout the balance of the periods under appeal, until 2012.

B. *The Gratuity Program*

[16] The Gratuity Program was an important feature of the tip system, both before and after the periods under appeal, because the restaurant management and certain salaried employees were guaranteed a percentage of revenue to be paid out of the tip and gratuity pool. Since the program was limited to only certain full-time, salaried employees, including managers, assistant managers, sous chefs and possibly pastry chefs, not all of the back-of-the-house staff were entitled to participate in this program. In respect to function events, the total tip-out amount was determined based on 2.7 percent of the sales revenue from function events, with 1 percent going to function staff and 1.7 percent going to the back-of-the-house.

[17] Mr. Torrance described the Gratuity Program as a legal obligation, belonging to the Appellant, to pay a percentage, of gratuities collected, to a group of certain salaried employees within the back-of-the-house staff. This entitlement existed because of a term in the employment contracts of those employees.

[18] According to Mr. Torrance's evidence, the Gratuity Program was a form of "incentive-based compensation" for the managers and chefs which would allow them to participate in the growth of the business as the gratuities increased. Such employees were then locked into a specified percentage of revenue, leaving the balance of the gratuity pool to be divided among other staff.

[19] Although the hourly employees had employment contracts with the Appellant, their contracts were silent respecting tips because, as Mr. Torrance explained, the Appellant was not in a position to guarantee employee expectations in this regard. Mr. Torrance also referred to an Employee Policy Handbook which made no reference to tips for such employees. However, this booklet was not introduced into evidence.

[20] Mr. Torrance and Ms. Dearborn disagreed as to whether a server would still be responsible for the house tip-out percentage if a customer did not leave a tip. Although a rare occurrence, Mr. Torrance stated that the Appellant would be responsible for making up the difference, while Ms. Dearborn cited an example where she was still responsible to tip-out the house even though the patrons did not tip.

[21] Both Mr. Torrance and Ms. Dearborn confirmed that the Appellant continued to collect the 1.7 percent of revenue tip-out even though some positions, normally entitled to receive a tip-out, were vacant for periods of time. It is worth noting that one of the terms of an assistant manager's employment contract states that the employee is only entitled to participate in the Gratuity Program during the time that he/she is "actively employed" with the Appellant. Mr. Torrance testified that despite this practice, the Appellant never ended up with a surplus of money, when a restaurant position was vacant, because it sometimes had to cover its legal obligation under this program even when tips were insufficient to do so; for example, in the case of a function event where the customer for some reason refused to pay the automatic 15 percent gratuity that was normally applied.

C. *The Appellant's Accounting and Payment of Tips*

[22] Because of the significant amount collected annually in respect to gratuities, Mr. Torrance testified that the Appellant expended considerable effort to ensure that tips were properly accounted for and distributed according to the system in place. This required that the Appellant employ certain checks and controls to ensure that tips were correctly collected and distributed, because the Appellant's policy was that 100 percent of the tips collected in the restaurants would be returned to the team of employees.

[23] Almost 90 percent of the restaurants' business, including payment of tips, was in the form of electronic tender, that is, credit card, debit card or gift card. The Appellant used Moneris as its service provider to process all of the non-cash, card transactions on a daily basis and to then deposit all of that money daily into its general bank account. The Appellant was responsible for paying Moneris its processing fee, without deduction of any portion from the gratuities to cover these costs. The amount deposited included payment for services, taxes and tips.

[24] The Appellant used Silverware as its point-of-sale software system in both restaurants. From as early as 2001, at the end of a shift or a function, the servers were each responsible for printing a daily sales or summary report from the Silverware system, which listed the total amount of food and beverages sold and the applicable tips for a particular server in a shift. It also identified the form of tender of the total payments that were received: cash, credit card, debit card or gift card.

[25] After the point system was introduced in 2008, each server on a shift would deliver their daily sales report to a senior server who was working that shift or function. That server would then prepare a "tip-out breakdown report" (the "TOBR") in order to calculate each employee's share of the tips collected on that shift. Under the TOBR, tips were split between certain back-of-the-house employees (1.7 percent) and front-of-the-house staff based on their assigned points. If it related to a function event, tips were further split with function staff (an additional 1 percent). Under the TOBR, sales from the function events were recorded separately from the walk-in dining sales. Cash sales were also separately identified and recorded. Depending on the amount of cash received during a shift or function, the servers might be able to take home some or potentially all of their tips in cash that day. If this occurred, it was recorded in the TOBR, but in most cases there was insufficient cash to cover immediate distribution of the tips. From

viewing the TOBR, each front-of-the-house employee could assess and ascertain their individual share of the gratuities received during a shift or function.

[26] Each completed TOBR was given to the restaurant manager on duty for that shift or function to prepare and input this data into a spreadsheet. Each spreadsheet covered a period of Monday to Sunday. According to Mr. Torrance, these spreadsheets were used to track amounts collected during a period and the amounts that were owed to the employees for the same period.

[27] The spreadsheets were then forwarded to the Appellant's accounting department where the correctness of the calculations, contained in the TOBR, was reviewed to confirm the amounts that were to be transferred to each front-of-the-house employee. Separate ledgers were maintained to record the gratuities that were paid by customers to ensure that 100 percent of the tips was returned to the staff.

[28] Mr. Torrance explained that, when he began working for the Appellant, the practice was to pay the tips out of large cash floats. Over time, the Appellant transitioned to a system in which the accounting department issued a cheque to the manager, who then cashed the cheque and distributed the amount of the gratuities, in cash-filled envelopes, to each of the front-of-the-house staff. While staff were paid their wages every two weeks, the envelopes containing the tip amount were distributed weekly.

[29] In 2009, after the safe itself was stolen and cash floats disappeared, the Appellant decided to keep less cash on its premises and, at this point, the accounting department began issuing individual cheques each week directly to the employees in respect to payment for their tips. These cheques were issued from the Appellant, Andrew Peller Limited, and were paid separately from the payment of the employees' wages, which were direct deposited on a biweekly basis. In contrast, the other salaried back-of-the-house employees received their 1.7 percent tip-out amount biweekly as part of their regular paycheques, with the Appellant withholding and remitting CPP and EI on those amounts. Similarly, the Appellant paid CPP and EI on the function tip because "… we were guaranteeing this amount … as income they could rely upon …" (Transcript, March 26, 2015, at page 127).

III. The Issues

[30] There are two issues in these appeals:

1. Whether the tips and gratuities received by the workers, or front-of-the-house restaurant employees, were part of their contributory salary and wages pursuant to subsections 8(1) and 9(1) of the *CPP*; and

2. Whether the tips and gratuities received by the workers, or front-of-the-house restaurant employees, were insurable earnings pursuant to the *EIA*.

IV. The Legislation

A. *Canada Pension Plan*

[31] Subsection 8(1) of the *CPP* requires an employee, who is engaged in pensionable employment, to make contributions to the plan based on the lesser of the employee's "contributory salary and wages" and the employee's maximum contributory earnings, less certain specified amounts. The subsection states:

> 8. *Amount of employee's contribution* – (1) Every employee who is employed by an employer in pensionable employment shall, by deduction as provided in this Act from the remuneration for the pensionable employment paid to the employee by the employer, make an employee's contribution for the year in which the remuneration is paid to the employee of an amount equal to the product obtained when the contribution rate for employees for the year is multiplied by the lesser of
>
> (*a*) the employee's contributory salary and wages for the year paid by the employer, minus such amount as or on account of the basic exemption for the year as is prescribed; and
>
> (*b*) the employee's maximum contributory earnings for the year, minus such amount, if any, as is determined in prescribed manner to be the employee's salary and wages paid by the employer on which a contribution has been made for the year by the employee under a provincial pension plan.

[32] Subsection 9(1) of the *CPP* also requires an employer who pays remuneration in respect to pensionable employment to make an employer's contribution based on the lesser of the employee's "contributory salary and wages" and the employee's maximum contributory earnings, less again certain specified amounts. The subsection states:

> 9. *Amount of employer's contribution* – (1) Every employer shall, in respect of each employee employed by the employer in pensionable employment, make an employer's contribution for the year in which remuneration for the pensionable employment is paid to the employee of an amount equal to the product obtained when the contribution rate for employers for the year is multiplied by the lesser of

> (*a*) the contributory salary and wages of the employee for the year paid by the employer, minus such amount as or on account of the employee's basic exemption for the year as is prescribed, and
>
> (*b*) the maximum contributory earnings of the employee for the year, minus such amount, if any, as is determined in prescribed manner to be the salary and wages of the employee on which a contribution has been made for the year by the employer with respect to the employee under a provincial pension plan.

[33] Subsection 12(1) states that an employee's contributory salary and wages will be that person's income for the year from pensionable employment, computed in accordance with the *Income Tax Act*, RSC 1985, c. 1, (the "*ITA*").

B. *Employment Insurance Act*

[34] Section 67 of the *EIA* imposes a premium on an employee who is engaged in insurable employment based on that employee's insurable earnings. The section reads:

> 67. Employee's premium – Subject to section 70, a person employed in insurable employment shall pay, by deduction as provided in subsection 82(1), a premium equal to their insurable earnings multiplied by the premium rate set under section 66 or 66.3, as the case may be.

[35] Section 68 imposes a premium on an employer as follows:

> 68. Employer's premium – Subject to sections 69 and 70, an employer shall pay a premium equal to 1.4 times the employees' premiums that the employer is required to deduct under subsection 82(1).

[36] Subsection 82(1) requires an employer, paying remuneration to an employee engaged in insurable employment, to deduct and remit EI premiums imposed pursuant to sections 67 and 68.

[37] Subsection 2(1) of the *EIA* defines "insurable earnings" as "… the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment."

[38] Subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33, (the "*Regulations*") specifies that, for the purposes of the definition of "insurable earnings" contained in subsection 2(1), the "… total amount of earnings that an insured person has from insurable employment" is:

> (a) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and
>
> (b) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.

V. Analysis

[39] There are clear differences between the wording contained in the *CPP* and *EIA* legislative frameworks. However, one critical question is common to both the *CPP* and *EIA* legislation: who "paid" the tips and gratuities or, in respect to these particular appeals, whether or not the Appellant "paid" the tips and gratuities? Answering this key question resolves the issue with respect to the *CPP*, but with respect to the *EIA* legislation, a further question remains regarding the statutory interpretation of the "insurable earnings" wording contained in the current *Regulations*.

[40] The term "contributory salary and wages" is defined in the *CPP* as income from pensionable employment computed in accordance with the provisions of the *ITA*, with tips and gratuities being considered income for the purposes of that Act. Yet the critical question, respecting tips and gratuities, remains: did the employer pay the tips and gratuities, pursuant to paragraphs 8(1)(*a*) and 9(1)(*a*) of the *CPP*?

[41] The interpretation of the *EIA* provisions is a little more complex. Under this Act, premiums are to be levied on "insurable earnings". This term is defined in the *Regulations* as the total of all amounts (a) paid to the employee by the employer in respect of that employment and (b) gratuities that the insured person is required to declare to the employer "under provincial legislation". However, the Province of Ontario has enacted no such legislation and, in fact, Quebec is the only province to date that has this type of legislation.

[42] The additional question under the *EIA* provisions that I must address is whether the reference to "gratuities" contained in paragraph 2(1)(b) of the *Regulations* means that gratuities can or cannot fall within the scope of the meaning of "… amounts … paid to the person by the person's employer in respect of that employment," pursuant to paragraph 2(1)(a) of those *Regulations*. The Appellant's position is that the statutory interpretation principle of "*generalia specialibus non derogant*" should apply. Applying this principle here, namely that the provisions of a general statute must yield to those of a specific one unless there is some express reference to the prior legislation or some inconsistency between

the two acts, means that the paragraph 2(1)(b) reference to gratuities effectively precludes gratuities and tips from falling within the ambit of paragraph 2(1)(a) of the *Regulations*. If this is correct, gratuities could only be subject to EI premiums within those provinces that have enacted specific legislation (which, to date, is only the Province of Quebec) requiring employees to declare gratuities to the employers. The Appellant further submits that Parliament has deferred jurisdiction, over the inclusion of tips and gratuities within social security legislation, to the provinces. Since Ontario has not enacted legislation, then the Appellant submits that gratuities are not "insurable earnings" for the purposes of the *EIA* because, in contrast to Quebec, insured persons in this province are not required to declare any gratuities to their Ontario employers under provincial legislation. Consequently, according to the Appellant, there is no requirement to interpret the *EIA* provisions broadly to protect employees who receive tips and gratuities and the word "paid" should be narrowly interpreted and defined.

[43] The flip side of the Appellant's argument is that the *Regulations* could also be interpreted to mean that the term "insurable earnings" includes tips and gratuities, as part of the total of all those amounts, that were "paid" by the employer "and", in those provinces with specific legislation, tips that were paid by customers and declared to the employer.

[44] It is noteworthy, and important for my analysis, that in either case, CPP contributions and EI premiums will not be required to be paid if the employer did not "pay" the gratuities. The Appellant argued that tips and gratuities received by employees from customers are not insurable earnings or contributory salary and wages because, based on the facts and the law, the Appellant did not pay those gratuities to its employees.

[45] *Canadian Pacific Limited v Attorney General of Canada (Minister of National Revenue)*, [1986] 1 SCR 678, is the leading case on the treatment of tips and gratuities for the purposes of calculating premiums under employment insurance legislation. The issue before the Supreme Court of Canada in that case was similar to the issue before me, even though it dealt with the predecessor legislation, the *Unemployment Insurance Act*, to the present *EIA*. The issue before the Court in *Canadian Pacific* was whether, in calculating premiums due under that legislation, it was necessary to include tip amounts given to the employer for distribution to the employees. The Court held that those tips, under the legislation, were subject to premiums. The Court also noted that the term "insurable earnings" is a broader term than, for example, salary and wages and that the term can include a tip that is received by the employer for distribution to its employees. Of

particular note for the appeals before me, Justice La Forest, at page 687, went on to state that the word "paid" can "… equally well mean mere distribution by the employer or payment of a debt owing by [the employer to employees] …", for example, salary and wages. (Emphasis added).

[46] In the Court's view, only those tips that are "received personally" by the employee would remain outside the scope of the term "insurable earnings". This view is chiefly for administrative purposes and concerns due to the difficulty of dealing with levying premiums on tips that are received personally by employees. Although the Supreme Court of Canada did not define or elaborate on the meaning of "received personally", it would be logical to conclude that the Court was referring to those tips and gratuities where the employer's degree of involvement is so insignificant that he/she would never be able to ascertain the amount of the gratuity that the employee received in order for that employer to be in a position to withhold and remit an amount under the legislation.

[47] The Supreme Court of Canada, in reaching its decision, noted that the meaning to be given to the term "insurable earnings" must be consistent with the purpose of the then legislation, the *Unemployment Insurance Act*, which, similarly to the current legislation, was to assist individuals by paying them benefits when they had lost their employment. Excluding tips and gratuities from insurable earnings would be inconsistent, therefore, with the object of the legislation and would mean that those individuals, for whom tips formed a significant part of their earnings, would be in a worse position than those employees that received wages or salary. This would also mean that employers would be in a better position where the employees were partially remunerated by tips and gratuities as opposed to those employers who paid their employees a salary.

[48] The Supreme Court of Canada not only made a clear statement that "mere distribution" by an employer can constitute payment but the Court also adopted a broad approach to the meaning of "paid". In my view, the same purpose and policy considerations put forward by the Supreme Court of Canada in *Canadian Pacific* apply equally today to the present employment insurance legislation and I would also conclude to the *CPP* legislation, as both statutes are social security pieces of legislation. The principles enunciated by the Supreme Court of Canada were similarly adopted by the Federal Court of Appeal in *Lake City Casinos Ltd. v The Queen (MNR)*, 2007 FCA 100, [2007] FCJ No. 337, at paragraph 2, which stated the following:

> In order to succeed, it was incumbent upon the Appellant to show that the tips were paid by the employer in the liberal sense attributed to this word by the

> Supreme Court of Canada in *Canadian Pacific Ltd. v. Canada*, … This required a demonstration that the tips came into the possession of the employer who then remitted them to the employees. [Emphasis added]

[49] In these appeals, do the facts establish that the Appellant came into possession of all tips and gratuities, including tips left in cash, whether from function events or *à la carte* dining, so that it can be concluded that the Appellant distributed those gratuity amounts to its employees? I conclude that, based on the evidence, the Appellant, during the relevant period, not only ended up with possession of all gratuity and tip amounts, whether from electronic tender or cash, but exerted considerable control over those amounts, engaging in the redistribution of those amounts within the broad definition of "paid" as contemplated in the *Regulations*.

[50] The Appellant closely monitored, verified and accounted for the gratuities left by customers at its two restaurant establishments. At the beginning of the period under appeal until May, 2009, the distribution was accomplished through a single weekly cheque for the gratuity amount, drawn on the Appellant's general bank account, made payable to and cashed by a restaurant manager who apportioned and delivered the employees' shares in cash. This practice was changed and the Appellant began distributing the gratuities by issuing cheques weekly to each employee based on their respective points. Prior to issuing cheques to the front-of-the-house staff, the Appellant employed a variety of checks and balances ranging from servers' reports, to TOBRs, to spreadsheets and finally to verification by the Appellant's accounting department. There was no evidence that the Appellant ever segregated these monies from other funds that the Appellant had possession of and control over. Although not typical, if there was sufficient cash at the end of a shift for an employee to take home the allotted share of the tip in cash, it was still dictated by the formula that the Appellant established for sharing tips and by the information recorded in the TOBR and Silverware software. The Appellant controlled the cash portion of gratuities, estimated to be approximately 10 percent, by retaining it in its safe for deposit and eventually its bank account.

[51] The Appellant's policy was that tips and gratuities should be shared by the employees and no employee was free to personally keep a tip. In determining its formula for which gratuities would be shared by the employees, only one employee, Thierry Clement, was consulted because of his experience with the point system when he worked in Europe. According to the evidence, including that

of Ms. Dearborn, no other employees were consulted or had any input into this process.

[52] The Appellant has submitted that it did not "pay" the tips but, instead, that it was a mere facilitator or agent in collecting the tips and returning those amounts to the employees. While property and title rights are not part of the applicable test, even if that were the case, the Appellant still engaged in distribution of all of the gratuities in order to fulfil its Gratuity Program. The Appellant's actions went beyond the basic test of "mere collection" and beyond "mere distribution" of the money. For example, in implementing its Gratuity Program, the Appellant treated the gratuities as its own in order to fulfil its contractual legal obligations and its own goals regarding incentive-based compensation for some of its key salaried employees. In those cases, the Appellant contracted with some employees for a percentage of net revenue to be paid out of collected and pooled gratuity amounts as part of its gratuity incentive program. Although the Supreme Court of Canada in *Canadian Pacific* concluded that "mere distribution" would be sufficient to bring such amounts within the definition, the facts in these appeals support a conclusion that the Appellant was using the pooled gratuities, which it controlled, to fund its legally binding contractual obligation to pay some key full-time salaried employees as well as function sales coordinators. These amounts were paid first from the tips and gratuities before the formula was applied to the balance in order to determine each of the tip amounts that was owed to a worker.

[53] Clearly, the Appellant's involvement and handling of the gratuities not only meets the threshold test of "mere distribution", as contemplated by the Supreme Court of Canada in *Canadian Pacific*, but exceeds it when gratuities were used in pursuing its own goals. In any event, as Respondent counsel correctly noted, the test is not "who the tips and gratuities belong to" but, instead, the test is "who paid them".

[54] In concluding that it was the Appellant that paid the gratuities, the issue is resolved in respect to the *CPP* provisions, with the result that the tips and gratuities will be considered pensionable earnings. However, the *EIA* has its own additional considerations. The Appellant submits that there is an important difference in the wording of the Regulations, as they existed before the Supreme Court of Canada decision in *Canadian Pacific* and the wording contained in the *Regulations* in the current *EIA*, regarding the calculation of "insurable earnings". The former legislation stated that "insurable earnings" meant "… the amount of [an employee's] remuneration, whether wholly or partly pecuniary, paid by his employer in respect of a pay period and includes…" A list of inclusions followed,

one of which stated: "… any amount paid to him by his employer … in satisfaction of a bonus, gratuity …". The current *Regulations* replaces the list of inclusions formerly included with paragraph 2(1)(a), and references "… the total of all amounts … paid to the person by the person's employer in respect of that employment". Paragraph 2(1)(b) references gratuities that are required to be declared to the person's employer under provincial legislation.

[55] The Appellant also argued that the addition of subsection (a.1) to the definition of "remuneration", contained in section 100 of the *Income Tax Regulations*, CRC, c. 945, taken together with paragraph 2(1)(b) to the *EIA Regulations*, were meant to remove gratuity amounts from "contributory salary and wages" and "insurable earnings" in the absence of provincial legislation. The amendment, contained in subsection (a.1), to the definition of "remuneration" included "… any payment … in respect of an employee's gratuities required under provincial legislation to be declared to the employee's employer". These amendments were instituted after the Province of Quebec enacted its system that requires employees to declare gratuities to their employer. The decision in *Lake City*, at paragraphs 57 to 61, considered these amendments and concluded that the provisions meant that Parliament had deferred jurisdiction over the social assistance net in respect to CPP and EI to the provinces. The decision of *Lake City* was upheld by the Federal Court of Appeal. However, a reading of the reasons of the Federal Court of Appeal supports my conclusion that the court upheld *Lake City* only in respect to its factual findings and, in fact, reiterated that the proper test is the one set out in *Canadian Pacific*, that is, whether the employer distributed the tips by having possession and remitting those amounts to the employees. The Federal Court of Appeal made no comment on Justice Hershfield's conclusions respecting the amendments.

[56] Justice Hershfield's comments concerning deferral of jurisdiction over tips and gratuities by Parliament were made in *obiter* in *Lake City*. However, after canvassing the legislation and caselaw, I can find no support whatsoever for the conclusions and statements in *Lake City*. In fact, contrary to the view expressed in *Lake City*, the amendments appear to include more in the social assistance net, rather than less. This is evident from the use of the conjunction "and" used in the construction of both amendments. In other words, tips are part of "insurable earnings", as defined in Regulation 2(1), <u>if those tips were paid by the employer</u> (pursuant to paragraph 2(1)(a)) <u>and</u> if the tips were required by law to be declared to the employer (pursuant to paragraph 2(1)(b)).

[57] As Respondent counsel pointed out in his submissions, the relevant *Canada Gazette* descriptions (Part II, SOR/98-1 to 19 and SI/98-1 to 4; Part II, SOR/98-246 to 277 and SI/98-57 to 58) are consistent with my interpretation that the amendments are meant to include more, not less, in the definition of insurable earnings. If the Appellant's argument is correct, that Parliament intended to exclude tips, subject to provincial legislation, then the legislative drafters would no doubt have listed them in an exclusionary section as in subsection 2(3) of the *Regulations* to the *EIA*.

[58] The interpretation, which I am giving to these amendments, is also consistent with the recognized policy objectives underlying the social assistance legislation. The Supreme Court of Canada decision acknowledged the policy objectives of such legislation and there is nothing in the amendments that indicates an intention to overturn that decision. The notion that Parliament deferred jurisdiction, which it previously exercised, over tips and gratuities, is not only inconsistent with those policy objectives but there is no evidence that Parliament actually intended to defer that jurisdiction to the provinces.

[59] Finally, with respect to the Appellant's reliance on the interpretive principle of "*generalia specialibus non derogant*" to argue that the reference to "gratuities" in paragraph 2(1)(b) of the *Regulations* means that gratuities cannot also be included in paragraph 2(1)(a), I cannot ascertain any conflict between those two paragraphs. Essentially, this principle, that more specific legislation will prevail over a more general provision, does not apply. The wording of paragraph 2(1)(a) includes tips paid by the employer in the liberal and broad sense identified in *Canadian Pacific*. The wording in paragraph 2(1)(b) includes those tips that are required under provincial legislation to be declared by the employee to the employer. By implication, this means those tips which the employer has not "paid", otherwise there would be no need to declare them.

VI. Contradictory Jurisprudence

[60] Decisions, respecting tips and gratuities coming from this Court, seem to fall into two broad but opposing categories. The first group (including *S & F Philip Holdings Ltd v MNR*, 2003 TCC 384 ["*Sooke Harbour*"], *Union of Saskatchewan Gaming Employees, Local 40005 v MNR*, 2004 TCC 799, and *Tampopo Garden Ltd. v MNR*, 2011 TCC 110) follows a liberal interpretation of the words "paid" and "insurable earnings" in concluding that gratuities are insurable earnings and contributory salary and wages. The second group (including *Lake City* and *BLAJ Hospitality v MNR*, 2008 TCC 398, the latter relying on the decision in *Lake City*)

interprets the Supreme Court of Canada decision in *Canadian Pacific* restrictively in order to conclude that gratuities were not insurable or pensionable. As noted earlier in my reasons, much of the reasoning in *Lake City* is unsupported by the text of the legislation and contradicts caselaw from higher courts. Although the Appellant relies on so-called principles from this case, they are so entrenched in the facts of that particular case that I would be hesitant to reference any of them as principles to be followed. In addition, much of what is stated is *obiter*.

[61] Some of the other jurisprudence in this area is problematic because it adopts the Canada Revenue Agency's distinction between controlled and direct tips, which remains the Agency's interpretation of the law. For example, in *Tampopo Garden*, the Court concluded that the employer had controlled the tips and gratuities when, in fact, the operative question must be: whether the employer "paid" those amounts.

VII. Conclusion

[62] While some of the jurisprudence concerning the treatment of tips and gratuities is problematic, it is my view that there is no evidence that Parliament has deferred jurisdiction over this area to the provinces.

[63] The questions, of whether or not tips and gratuities were controlled or direct, the degree of control exercised by the employer or whether the tips and gratuities were paid by electronic tender or cash, are irrelevant because the test for determining whether those amounts are insurable earnings or contributory salary or wages is whether or not they were "paid" by the employer, as opposed to being received personally by the employee. In the latter case, where tips and gratuities are received personally by the employee, there would remain the further question of whether existing provincial legislation requires the employee to declare those amounts to the employer.

[64] The legislative wording for this test is contained in the *CPP*, stating "… the employee's contributory salary and wages for the year paid by the employer" and in the legislative wording in the *EIA*, stating "… the total of all amounts … paid to the person by the person's employer in respect of that employment". The Supreme Court of Canada decision in *Canadian Pacific* interpreted the legislation at that time in accordance with its social purpose and the realities of an employer/employee relationship. It interpreted the word "paid" in social security legislation, liberally to mean mere distribution of gratuity amounts by an employer. The Federal Court of Appeal in *Lake City* elaborated that the liberal meaning of

"paid" requires that the employer had "possession" of the tips and subsequently remitted those amounts back to the employees.

[65] As a result of my interpretation of the legislation and the relevant jurisprudence in this area, I conclude that the tips and gratuities distributed to the workers at the Appellant's restaurants were paid by the Appellant to those workers and, consequently, form part of their pensionable and insurable earnings. For these reasons, the appeals are dismissed, without costs.

Signed at Ottawa, Canada, this 16th day of December 2015.

"Diane Campbell"

Campbell J.

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