

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111116

**Dockets: A-72-11
A-73-11**

Citation: 2011 FCA 314

2011 FCA 314 (CanLII)

**CORAM: NADON J.A.
SHARLOW J.A.
DAWSON J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

**HER MAJESTY THE QUEEN
IN RIGHT OF ONTARIO**

Respondent

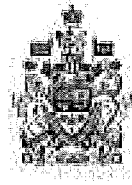
Heard at Toronto, Ontario, on November 16, 2011.

Judgment delivered from the Bench at Toronto, Ontario, on November 16, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on November 16, 2011)

SHARLOW J.A.

[1] In two decisions dated January 10, 2010, the Minister of National Revenue determined that Roger Davidson and Gail Stiffler were engaged in pensionable employment under the *Canada Pension Plan*, R.S.C. 1985, c. C-8, while they were members of the Ontario Judicial Appointments Committee (the "Committee") established by the Government of Ontario pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C43. For Mr. Davidson, the relevant period is January 1, 2005 to December 31, 2007. For Ms. Stiffler, the relevant period is January 1, 2006 to December 31, 2008.

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[2] Ontario, as the party responsible for paying the remuneration to which members of the Committee were entitled, appealed the Minister's decisions to the Tax Court of Canada, and succeeded in obtaining judgments vacating the Minister's decisions. The Minister has appealed to this Court. The two appeals were heard together.

[3] For the following reasons, and despite the able submissions of counsel for Ontario, we have concluded that these appeals should be allowed.

[4] The facts are undisputed. They are set out in the reasons for decision of the judge (reported as *Ontario v. Canada (Minister of National Revenue)*, 2011 TCC 23). For the purposes of these appeals, only a summary is necessary.

[5] The mandate of the Committee is to recruit, interview and recommend to the Attorney General candidates who are qualified and suitable to be appointed as judges of the Ontario Court of Justice. The Committee reviews applications for such appointments, conducts reference checks and interviews, and provides the Attorney General with a ranked list of qualified candidates. Appointments must be made from that list.

[6] The Committee is independent of the Ministry of the Attorney General and the provincial government. Mr. Davidson and Ms. Stiffler, as members of the Committee, were not employees. Rather, they were holders of an office. Their remuneration consisted of an amount paid for each day on which they rendered the services required of them as members of the Committee. Their days of

service were recorded by invoices submitted to the Ontario Office of Judicial Support Services. The daily rate, as set by Orders in Council, was \$100 until May 9, 2007, when it was increased to \$355.

[7] The number of days on which Mr. Davidson and Ms. Stiffler rendered services as members of the Committee varied with the number of judicial vacancies, which was unpredictable. In 2005, 2006 and 2007, Mr. Davidson worked 124 days, 135 days and 91 days respectively. In 2006, 2007 and 2008, Ms. Stiffler worked 132, 96 and 118 days respectively.

[8] It is common ground that, by the combined operation of section 6 of the *Canada Pension Plan*, the definition of “office” in section 2 of the *Canada Pension Plan*, and section 24 of the *Canada Pension Plan Regulations*, C.R.C. c. 385, a member of the Committee is engaged in pensionable employment if that position carries the entitlement to a “fixed or ascertainable stipend or remuneration” (« *lui donnant droit à un traitement ou à une rémunération déterminée ou constable* »).

[9] The question before this Court is whether an entitlement to remuneration based on a stated amount of money for each day of service is “fixed or ascertainable”. The judge concluded that because it was not possible to determine, at the beginning of a particular year, how many days of service would be required of a member of the Committee, the member’s remuneration was neither fixed nor ascertainable. He reached this conclusion after considering the case law, which he acknowledged was inconsistent, and adopting the approach taken on similar facts in *Payette v. Canada (Minister of National Revenue)*, [2002] T.C.J. No. 386 (QL).

[10] We are all of the view that this conclusion is not correct. We see nothing in the language of the definition of “office” in section 2 of the *Canada Pension Plan* read in its statutory context, that justifies the Court in interpreting the phrase “fixed or ascertainable” to require an advance determination of the total remuneration for a particular year. We agree with the Minister that a legal entitlement to a *per diem* rate of remuneration established in advance is sufficiently “fixed or ascertainable” to meet the statutory test.

[11] We see nothing in any of the decisions of this Court, including *Rumford v. Canada* (1993), 164 N.R. 315, [1994] 1 C.T.C. 239, 94 D.T.C. 6121 (F.C.A.) and *Vachon Estate v. Canada*, 2009 FCA 375, that is inconsistent with this conclusion. In those cases, the “fixed or ascertainable” test was held to be met for an office holder who was entitled to a fixed amount of remuneration for a year. Such an advance annual determination normally will be sufficient to meet the test, but that does not mean that it is necessary.

[12] The appeals will be allowed with one set of costs, the judgments of the Tax Court of Canada will be set aside, and Ontario’s appeals of the Minister’s decisions dated January 10, 2010 will be dismissed.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-72-11 and A-73-11

(APPEAL FROM THE AMENDED JUDGMENT OF THE HONOURABLE G.J. RIP, OF THE TAX COURT OF CANADA DATED JANUARY 18, 2011, DOCKET NO. 2010-1087 (CPP))

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 16, 2011

REASONS FOR JUDGMENT OF THE COURT BY: (NADON, SHARLOW & DAWSON J.J.A.)

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

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