

**Date: 20091208**

**Docket: A-525-08**

**Citation: 2009 FCA 362**

**CORAM: SEXTON J.A.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**WILLIAM SHAWN DAVITT**

**Appellant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

Heard at Toronto, Ontario, on December 8, 2009.

Judgment delivered from the Bench at Toronto, Ontario, on December 8, 2009.

**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 December 8, 2009)**

**SHARLOW J.A.**

[1] Mr. Davitt is appealing an order of Justice Webb of the Tax Court of Canada granting the Crown's motion to strike a notice of appeal filed by Mr. Davitt under section 103 of the *Employment Insurance Act*, S.C. 1996, c. 23, and a similar notice of appeal filed by Mr. Davitt under section 28 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8. Justice Webb concluded that the

Tax Court was without jurisdiction to entertain either appeal. Mr. Davitt now appeals to this Court. He argues that the decision of Justice Webb is wrong in law and gives rise to a reasonable apprehension of bias.

[2] It is appropriate to deal first with Mr. Davitt's allegation of a reasonable apprehension of bias. In our view, this allegation is based essentially on the fact that Mr. Davitt disagrees with Justice Webb's reasoning and his conclusions, and that the Tax Court has almost never upheld a Charter challenge. These are not valid foundations for an allegation of a reasonable apprehension of bias.

[3] As to the merits of the case, we note that in appealing to the Tax Court, Mr. Davitt was seeking an order relieving him from the obligation to pay any employment insurance premiums or Canada Pension Plan contributions on the basis that the statutory provisions imposing the payment obligations (1) discriminate against him on the basis of age contrary to subsection 15(1) of the Charter, (2) are *ultra vires*, and (3) are excessive and are being charged to further criminal misconduct by the Government of Canada.

[4] Mr. Davitt's appeals were not based on an allegation that he was not engaged in insurable or pensionable employment, or that the employment insurance premiums and Canada Pension Plan contributions he was obliged to pay were incorrectly calculated or determined on the basis of an incorrect statutory interpretation or a misapprehension of the relevant facts. Rather, Mr. Davitt argues on constitutional grounds that he cannot lawfully be required to pay employment insurance

premiums and Canada Pension Plan contributions at all. Justice Webb characterized both appeals essentially as challenges to the premium and contribution rates. Mr. Davitt disputes that characterization. We note, however, that in his initial ruling requests, he expressed his complaint in those terms.

[5] The statutory schemes under which Mr. Davitt appealed to the Tax Court of Canada were established for the purpose of permitting challenges to specific decisions made by the Minister of National Revenue in relation to his limited mandate under the *Employment Insurance Act* and the *Canada Pension Plan*, which is to assess and collect amounts payable as employment insurance premiums and Canada Pension Plan contributions.

[6] Under subsection 90(1) of the *Employment Insurance Act*, an employer, an employee, or a person claiming to be an employer or employee, or the Canada Employment Insurance Commission, may request an officer of the Canada Revenue Agency authorized by the Minister of National Revenue to make a ruling on any of the questions in paragraphs 90(1)(a) to (i). Those provisions read as follows:

90. (1) [...]

- a) whether an employment is insurable;
- (b) how long an insurable employment lasts, including the dates on which it begins and ends;
- (c) what is the amount of any insurable earnings;
- (d) how many hours an insured person

90. (1) [...]

- a) le fait qu'un emploi est assurable;
- b) la détermination de la durée d'un emploi assurable, y compris ses dates de début et de fin;
- c) la détermination de la rémunération assurable;
- d) la détermination du nombre d'heures

has had in insurable employment;	exercées dans le cadre d'un emploi assurable;
(e) whether a premium is payable;	e) l'existence de l'obligation de verser une cotisation;
(f) what is the amount of a premium payable;	f) la détermination du montant des cotisations à verser;
(g) who is the employer of an insured person;	g) l'identité de l'employeur d'un assuré;
(h) whether employers are associated employers; and	h) le fait qu'un employeur est un employeur associé;
(i) what amount shall be refunded under subsections 96(4) to (10).	i) le montant du remboursement prévu à l'un ou l'autre des paragraphes 96(4) à (10).

[7] Section 91 of the *Employment Insurance Act* permits a section 90 ruling to be appealed to the Minister of National Revenue. Section 103 of the *Employment Insurance Act* permits the Minister's section 91 decision to be appealed to the Tax Court of Canada. Thus, an appeal to the Tax Court of Canada under section 103 is limited to issues falling within paragraphs 90(1)(a) to (i). The validity of the statutory provisions by which Mr. Davitt was obliged to pay employment insurance premiums is not, expressly or by necessary implication, one of those issues, and neither is the premium rate. We reject the argument of Mr. Davitt that paragraph 90(1)(f) should be interpreted so broadly as to include those issues. We agree with the Crown that paragraph 90(1)(f) refers to a challenge to the correctness of the arithmetic result of the calculation of the premium payable, including whether the correct premium rate was used, whether the correct insurable earnings amount was used, or whether the calculations are correct.

[8] The same can be said of the relevant provisions of the *Canada Pension Plan*. Under subsection 26.1(1) of the *Canada Pension Plan*, an employer, an employee, or a person claiming to

be an employer or employee, or the Minister of Human Resources and Skills Development, may request an officer of the Canada Revenue Agency authorized by the Minister of National Revenue to make a ruling of the questions in paragraphs 26.1(1)(a) to (f). Those provisions read as follows:

26.1 (1) [...]

(a) whether an employment is pensionable;

(b) how long an employment lasts, including the dates on which it begins and ends;

(c) what is the amount of any earnings from pensionable employment;

(d) whether a contribution is payable;

(e) what is the amount of a contribution that is payable; and

(f) who is the employer of a person in pensionable employment.

26.1 (1) [...]

a) le fait qu'un emploi est un emploi ouvrant ou non droit à pension;

b) la détermination de la durée d'un emploi, y compris ses dates de début et de fin;

c) la détermination du montant des gains obtenus au titre d'un emploi ouvrant droit à pension;

d) l'obligation ou non de verser une cotisation;

e) la détermination du montant des cotisations à verser;

f) l'identité de l'employeur d'un employé qui occupe un emploi ouvrant droit à pension.

[9] Section 27 of the *Canada Pension Plan* permits a section 26.1 ruling to be appealed to the Minister of National Revenue. Section 28 of the *Canada Pension Plan* permits the Minister's section 27 decision to be appealed to the Tax Court of Canada. Again, an appeal to the Tax Court of Canada under section 28 is limited to the issues falling within paragraphs 26.1(1)(a) to (f). And again, the validity of the statutory provisions by which Mr. Davitt was obliged to pay Canada Pension Plan contributions is not, expressly or by necessary implication, one of those issues, and neither is the contribution rate. We reject the argument of Mr. Davitt that paragraph 26.1(1)(e) should be interpreted so broadly as to include those issues. We agree with the Crown that paragraph

26.1(1)(e) refers to a challenge to the correctness of the arithmetic result of the calculation of the contribution payable.

[10] That is not to say that a constitutional challenge can never be made to the statutory provisions requiring the payment of employment insurance premiums or Canada Pension Plan contributions, or that the Tax Court of Canada never has the jurisdiction to consider a constitutional challenge (see, for example, *Campbell v. Canada*, 2005 FCA 420). The difficulty here is that Mr. Davitt has chosen the wrong procedure and the wrong court.

[11] The appeal will be dismissed with costs.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-525-08

**(AN APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE WEBB, OF THE TAX COURT OF CANADA, DATED SEPTEMBER 18, 2008, FROM THE TAX COURT FILE NOS.: 2008-1344 (EI) AND 2008-1345 (CPP).**

**STYLE OF CAUSE:** WILLIAM SHAWN DAVITT v.  
THE MINISTER OF NATIONAL  
REVENUE.

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 8, 2009

**REASONS FOR JUDGMENT OF  
THE COURT BY:** (SEXTON, EVANS & SHARLOW  
J.J.A.)

**DELIVERED FROM THE BENCH BY:** SHARLOW J.A.

**APPEARANCES:**

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