Docket: 2002-912(EI)

BETWEEN:

S & F PHILIP HOLDINGS LTD. OP SOOKE HARBOUR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *S & F Philip Holdings Ltd. Op Sooke Harbour* (2002-913(CPP)) on February 5, 2003 at Victoria, British Columbia,

Before: The Honourable Deputy Judge D.W. Rowe

Appearances:

Counsel for the Appellant: George F. Jones

Counsel for the Respondent: Amy Francis

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Sidney, British Columbia, this 7th day of June 2003.

"D.W. Rowe"

D.J.T.C.C.

Citation: 2003TCC384
Date: 20030607
Dockets: 2002-912(EI)
2002-913(CPP)

BETWEEN:

S & F PHILIP HOLDINGS LTD. OP SOOKE HARBOUR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Rowe, D.J.T.C.C.

[1] The appellant appeals from two decisions – both dated January 25, 2002 – issued by the Minister of National Revenue (the "Minister") wherein an earlier assessment was varied with respect to the 1998 taxation year and the assessment for the 1999 year was confirmed as it related to named workers. The decisions were issued pursuant to subsection 93(3) of the *Employment Insurance Act* (the "*Act*") and subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations (EI Regulations)* and section 12 and subsection 27.2(3) of the *Canada Pension Plan* (the "*Plan*"), respectively. In said decisions, the Minister decided certain amounts of employment insurance (EI) premiums and Canada pension plan (CPP) contributions were owing in connection with services performed for the appellant in the 1998 and 1999 taxation years by the individuals listed on Schedule A attached to each Reply to the Notice of Appeal (Reply).

[2] Counsel agreed both appeals would be heard on common evidence. The issue in these appeals is whether tips form part of the workers' insurable and/or pensionable earnings from employment with the appellant during 1998 and/or 1999. The appellant is also referred to in these reasons as Sooke Harbour House or Harbour House.

[3] Frédérique Philip testified she is a Director and Officer of the appellant corporation which owns and operates Sooke Harbour House, a highly-rated resort hotel with 28 rooms and a internationally-acclaimed restaurant that has grown to its present status from a 5-room bed and breakfast business when it was purchased in 1979. Located in Sooke, on Vancouver Island, in British Columbia, Philip stated Harbour House had only 4 workers in the beginning but the staff now totals approximately 80 and is comprised of individuals employed in every aspect of the resort facility including administration, reception, gardening, chambermaid service, cooking and food service. The only workers affected by the issue in the within appeals are those who were employed in the dining room or who had performed services directly related to the dining room. Philip stated that tips are those amounts given as gratuities to employees of Harbour House by guests. In the early years, tips were mainly in the form of cash and would be retained by the recipients without any participation or intervention by the appellant. Later, the use of credit and debit cards increased dramatically and patrons began adding tips to the amount of their bill and either charging the total sum to their credit card or using a debit card connected to their bank account. As a consequence, Philip explained it was necessary for Harbour House to become involved in processing the credit card slips in a manner that would enable the servers to receive the amount the guest had intended them to receive but which was now imbedded in the total of the credit card charge. Philip stated the workers – over the course of many years – had established an arrangement concerning distribution of tips in order to take into account the indirect contribution of persons working as bussers, dishwashers, chefs or other members of the kitchen staff. Pursuant to the entrenched system, all tips - regardless of the intended recipient – were placed into a pool for distribution - in accordance with certain percentages – to all persons who were part of the foodservice team. Philip stated all workers agreed Harbour House would retain 10% of the total amount in the tip pool to cover the cost it incurred in the form of merchant/transaction fees charged by credit card companies to facilitate a financial transaction arising from the use of a particular card as well as the extra work created by having to separate the amount of the tips from the actual bill for food and beverages and then distributing the appropriate share thereof to those workers entitled to share the pool money. Philip stated Harbour House received a copy of a letter - Exhibit A-1 – dated November 4, 1999 – directed to the Canadian Restaurant and Foodservices Association by which she became aware that provincial legislation prohibited the deduction – by an employer - of credit card administration fees from employees' gratuities and Harbour House – thereafter - paid the entire amount of tips into the pool for distribution among the workers. Philip explained the method now followed by Harbour House is to calculate – at the end of the evening – the total amount of tips paid by patrons of the dining room and to place that amount

- in cash – into a drawer where it is removed by a server - chosen by the waiting staff as their representative - and then the money is divided and distributed among entitled workers in accordance with their own arrangement without any further participation by Harbour House. As a result of the new system, there is no longer any need for the appellant to write 30 or 40 cheques every two weeks in accordance with amounts provided to it by the workers' representative as calculated in accordance with the formula for distribution adhered to by the recipients. Philip noted that in Europe – generally – and in France – specifically – the guest has no choice whether to tip because the fixed percentage of 15% is automatically added to the bill. However, without that regime, Philip stated Harbour House incurred merchant fees or financial transaction costs levied by credit card companies - ranging from 2-4% - with respect to all amounts processed in order to provide the workers with the intended amount of the tips. Therefore, it would cost the appellant between $20 and $40 to process $1,000 in credit card charges in order to act as a conduit for payment of gratuities to workers. Philip stated she had a conversation with an auditor at Canadian Customs and Revenue Agency (CCRA) who informed her she should remit EI premiums and CPP contributions in respect of those amounts. She recalled there had been reference to an Interpretation Bulletin and that the discussion had also concerned the definition of a "controlled gratuity". In her view, there was no controlled gratuity at Harbour House since there was no service charge added to any bill nor was there a fixed percentage attributable to tips arising from the use of the banquet room nor was there any agreement in that regard with the waiting staff. In addition, Philip stated she was never involved with any tips that had been left in the form of cash since those sums were distributed by the workers themselves without any need for intervention on behalf of Harbour House. Philip was referred to certain assumptions of fact set forth in paragraph 5 of the Reply in the EI appeal. With respect to the assertion by the Minister that any cash tips, although received directly by the workers, were recorded on a Daily Tip Sheet maintained by the appellant, Philip stated that was not correct in that said sheet was maintained by the wait staff and then provided to Harbour House administration as a basis upon which cheques would be issued - in the appropriate amounts - to certain persons. Philip agreed the tips paid by use of credit cards or debit cards were also recorded on the sheet and one worker would ensure the names of all staff working that day were included on the form. During 1998 and 1999, Philip agreed Harbour House retained 10% of the amount of the tips as recorded on the sheet but explained it was the workers who calculated the amount due to each of them and not Harbour House management. Philip agreed with the assumptions of the Minister at subparagraphs 5(i) and 5(j), respectively, that the workers received a cheque every two weeks for the amount of their tips and another cheque every two weeks – commencing the following week - for the amount of their wages but emphasized the gratuities were never the property of Harbour House since it had

always acted only as a facilitator to transform the amount of the tips – paid by credit cards as part of the overall bill - into actual payment to members of the wait staff.

[4] In cross-examination, Frédérique Philip stated the system agreed to by all dining room and kitchen staff - whereby Harbour House retained 10% of the total of the tips – had been in place throughout the entire relevant period. Counsel referred Philip to a tip sheet – Exhibit R–1 - pursuant to which the bussing staff and kitchen staff was entitled to receive 15% and 10%, respectively, of the total tips. The balance was divided among members of the wait staff. Philip agreed Harbour House had accepted the use of said sheet for that purpose and that the corporate accountant verified the amounts of the credit card charges prior to preparing the cheques for distribution. Philip stated the tip-sharing method had evolved among the workers – from time to time – over the course of 20 years. Any worker could have decided to retain his or her tips directly and to have refrained from participating in the pooling system but it was reasonable to assume he or she would have encountered difficulty with other workers as a result. In such a case, Philip stated she would have informed any worker intending to pursue this course of action that it was a matter requiring discussion with the rest of the staff and, unless there could be consensus, she would not have permitted this departure from the normal pooling arrangement, as to do so would have created disharmony. Philip was referred to a spreadsheet – Exhibit R-2 – and described it as an example of a document that was produced every two weeks in order to pay tips to the workers. As a matter of course, the cheque for the amount of tips was larger than the other one issued by Harbour House for payment of wages.

[5] In re-examination, Frédérique Philip stated the tips were now paid – in cash – to the staff the following day because the amount of cash received in the course of an evening might be insufficient to pay the total due once the credit card slips were tallied in respect of gratuities.

[6] Linda Danielson testified she is a waitperson and has worked evenings at Harbour House - since 1980 – as a cleaning person, chambermaid, office worker, cook and server. During recent years, she had observed that 98% of all dining room bills were paid by credit card so there was only a small amount of cash available for distribution to wait staff. With regard to division of tips, she stated that over the course of many years, the workers had determined the appropriate method of sharing tips – including kitchen and bussing staff - without any involvement by Philip. She stated the staff was aware there was a cost to Harbour House in facilitating payment of those tips that had been included as part of the credit card payment for the meal. Later, the new system of utilizing cash for distribution of tips came into effect but Danielson stated there was never any instruction from Philip concerning the method

by which tip money was to be distributed. She stated the wait staff had always been able to agree on a tip-sharing system and there had never been a dissenter among the workers as that would have led to disharmony. Usually, four waitpersons worked at a time and each person reported the amount of tips - received in cash - in accordance with the honour system forming part of the overall pooling and distribution arrangement.

[7] In cross-examination, Linda Danielson was referred to Exhibit R-1 and stated she did not know who had produced that form - used by the Harbour House accountant to prepare cheques in order to distribute tips to workers - but a representative of the wait staff photocopied the document – as needed – for ongoing use. Danielson explained that when new staff members arrived, a member of the existing wait staff would inform them of the method used to divide and distribute all tips received from dining room/banquet patrons.

[8] Counsel for the appellant submitted that merely because the *Income Tax Act* requires employees to include gratuities into their income does not transpose any obligation on the employer other than to state the amount of tips when issuing a T4 slip to a worker. Counsel submitted the appellant become involved in an administrative accounting process whereby the tip portion of a credit card charge was paid into a pool for the subsequent benefit of the intended recipient as to do otherwise would be to retain funds not belonging to Harbour House. The workers agreed - among themselves - to pay 10% of the amount of the total tips being processed in order to cover the cost of the credit card transaction fees and extra accounting fees incurred by the appellant to verify amounts and to issue cheques to several workers every two weeks separate from the regular payroll period. Counsel submitted the mutual decision to use this mechanism to provide workers with their tips was not a condition of employment nor could it be regarded in the same sense as a term of a collective agreement within the context of bargaining between an employer and its unionized staff.

[9] Counsel for the appellant submitted that with respect to the issue of CPP contributions, it was apparent the CCRA auditor proceeded on the basis Harbour House was controlling the tips in a manner contemplated by the wording of the relevant Interpretation Bulletin. However, counsel submitted the wording of the relevant provision does not encompass the fact situation in the within CPP appeal and further requested the Court consider the application of a specific test - in the process of determining whether contributions are due under the *Plan* - because that legislation has a different purpose than the *Act*.

[10] Counsel for the respondent submitted the wording of the relevant provision of the *EI Regulations* under the *Act* requires an employer to pay EI premiums based on the total of all amounts paid to an employee by the employer in respect of employment. Counsel agreed that if the evidence had disclosed that none of the tip money had ever passed through the hands of Harbour House and had been retained directly by the workers for distribution among themselves, those amounts would not have formed part of insurable and/or pensionable earnings. In collecting the money and proceeding to distribute it to individual workers in return for an administration fee of 10%, counsel argued there was control exercised by the appellant.

[11] Counsel agreed there is a different wording utilized in the relevant provisions of the *Plan* but submitted the tips should also be considered as being subject to the appropriate contribution by Harbour House in its capacity as the employer.

[12] First, I will deal with the issue whether tips formed part of the workers' insurable earnings from employment with the appellant requiring premiums thereon to be paid by the employer – Harbour House - pursuant to subsection 82(1) of the *Act.*

[13] The following definition is found in subsection 2(1) of the *Act*, as follows:

> "insurable earnings" means the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment;

[14] The relevant portion of subsection 2(1) of the *Regulations* reads:

> 2.(1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, 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 ...

[15] In the case of *Canadian Pacific Limited v. A.G. (Can)*, [1986] 1 S.C.R. 678, the Supreme Court of Canada considered the issue of whether tips should be taken into consideration in calculating unemployment insurance premiums payable by the employer pursuant to the provisions of the *Unemployment Insurance Act, 1971*,

1970-71-72 (Can), c. 48, in effect at that time. In a 4-3 decision, the Supreme Court held the amounts paid as tips should be taken into account when calculating the unemployment insurance premiums. La Forest J. – writing for the majority – referred to the question before the Court and set forth the relevant facts, as follows:

> The issue raised in this case relates to the manner in which these premiums are to be calculated. More precisely, as Pratte J. of the Federal Court of Appeal put it, [1984] 1 F.C. 859, at p. 860, "in calculating these premiums, is it necessary to take into consideration amounts which an employer paid its employees after receiving them from its customers, who had paid them to the employer of their own accord, to be distributed to the employees as tips?"
>
> The appellant, Canadian Pacific Limited, operates several hotels, including the Château Frontenac in Quebec City. The collective agreement that governed the labour relations of the employees at the Château Frontenac at the relevant time stipulated that it was agreed that when the organizer of a function such as a convention or a banquet leaves tips to the hotel for distribution, eighty percent (80%) of these tips are to be distributed by the hotel to the employees governed by the collective agreement who have worked during these functions.
>
> In compliance with this stipulation, the appellant distributed certain monies to its employees. It is undisputed that these amounts came from clients of the appellant who, without any obligation on their part, paid them to the appellant for distribution to its employees as tips. The Minister of National Revenue took these amounts into consideration in calculating the premiums that the appellant was required to pay for the year 1978.

[16] After reviewing the relevant legislative provisions requiring an employer to pay unemployment insurance premiums, La Forest J. – at p. 683 and following of his reasons – continued:

> What is important to determine, therefore, is the meaning of the expression "insurable earnings" in the English version of the Act, "*rémunération assurable*" in the French version. These expressions may not be entirely precise, though it seems to me that they would have a broader meaning than, for example, salary. Pratte J. gave them a broad meaning. He relied especially on two English decisions where the expression "earnings" was used, one, *Penn v. Spiers & Pond Ltd*., [1908] 1 K.B. 766, by the English Court of Appeal and

the other, *Great Western Railway Co. v. Helps*, [1918] A.C. 141, by the House of Lords.

In *Penn v. Spiers & Pond Ltd., supra*, the English Court of Appeal was faced with a question similar to that in the present case, namely: in calculating compensation payable under the English *Workmen's Compensation Act* of the time, must one take into consideration tips received by the employee? The relevant provision required that the compensation be calculated in terms of "earnings in the employment". The court decided that tips came within the purview of this expression. Cozens-Hardy, M.R., giving the judgment of the court, stated (at p. 769):

> It has often been pointed out in this Court that the measure of compensation under the Act is not wages, but earnings. This is conceded by the respondents, who admit that the value of the board must be taken into account. It is not every kind of earnings which can be taken into account. They must be earnings in the employment. If the workman by the exercise of his talents during his leisure hours, as, say, a conjurer or a musician, gains money, the money thus gained will increase his income, but not his "earnings", within the Act. "Earnings in the employment" do not always come from the employer. It is common knowledge that there are many classes of employees whose remuneration is derived largely from strangers. A hall porter at an hotel and a driver of a postchaise are sufficient illustrations. It would be absurd to say that the money received from the hotelkeeper or the post-master alone represents the rate per week at which the workman was being remunerated.

The House of Lords came to the same conclusion in *Great Western Railway Co. v. Helps, supra*. Here is what Lord Dunedin says of the matter, on p. 145:

> The whole point, therefore, is, do these tips fall within the statutory expression of "earnings"? If you were to ask a person in ordinary common parlance what this porter earned, the answer would be: "Well, I will tell you what he gets; he gets so much wages from his employers, and he gets on an average so much in tips".

> My Lords, it has been sought in the argument addressed for the appellants to limit the meaning of "earnings", to what the workman gets by what I may call direct contract from his employers. The simple answer is that the statute does not say so; it uses the general term "earnings" instead of the term "wages" or the expression "what he gets from his employer", and as a matter of fact the employer, in a case where there is a known practice of giving tips, obviously gets the man for rather less direct wages than he would if there was not that other source of remuneration to the man when he is in his post.

[17] At pp. 685-687, La Forest J. continued as follows:

> That Parliament used the word "earnings" in the English version is clearly indicative of its intention having regard to decisions on the meaning of the word in a statute of the same nature, i.e., one dealing with social security. It should be noted that the *Unemployment Insurance Act, 1971* also provides that benefits payable to employees who have lost their employment are to be calculated in terms of a percentage of their insurable earnings. Section 24(1), as amended by 1976-77 (Can.), c. 54, s. 35, reads as follows:
>
> > **24.**(1) The rate of weekly benefit payable to a claimant for a week of unemployment that falls in his benefit period is an amount equal to sixty-six and two-thirds per cent of his average weekly insurable earnings in his qualifying weeks.
> >
> > (Emphasis added.)
>
> In this country, Marceau J., acting as umpire in the case of *Association des employés civils v. Minister of National Revenue*, NR 1168, March 29, 1983, came to the same conclusion in a case having considerable similarities to the present. He made the following observations:
>
> > In choosing the term "remuneration", and not the commonly used terms "salary" or "wages", Parliament certainly wanted to express its intention to cover more than just the fixed salary attached to the job, and this "more than just the salary" can only be the amounts, calculated as a percentage or on some

> other basis, that an employee receives from his employer, over and above a basic salary, in return for the services he provides. The method chosen by the employer to obtain from his clients the amounts which he is to pay to his employees (a percentage included in the calculation of a total price or added to a basic price), and the fact that the size of the amount remains to be determined, have nothing to do with the question; what matters is that these are amounts payable and promised by the employer in return for the employee's work.

The conclusion I have arrived at is, in my view, strongly supported by other provisions of the Act. Section 3(1) defines insurable employment in the following terms:

> 3.(1) Insurable employment is employment that is
> ...
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> (Emphasis added.)

See also s. 2(1)(*k*) which defines "insurable earnings" as comprising "the total amount of the earnings from insurable employment".

The regulations adopted under s. 90(1)(*i*) of the Act also support my view. This section gives the Minister power to make regulations, and in particular:

> **90.**(1) The Minister ... make regulations
>
> (*g*) for defining and determining earnings and pay period;
>
> ...
>
> (*i*) for calculating and determining the amount of insurable earnings of insured persons and the amount of premiums payable:

> By virtue of this provision, the Minister established a regulation that gives greater precision to the meaning of the expression "insurable earnings" in the following manner:
>
> > 3.(1) The amount from which an insured person's insurable earnings shall be determined is the amount of his remuneration, whether wholly or partly pecuniary, paid by his employer in respect of a pay period, and includes
> >
> > (*a*) any amount paid to him by his employer as, on account or in lieu of payment of, or in satisfaction of
> >
> > (i) a bonus, gratuity, retroactive pay increase, share of profits, accumulative overtime settlement or an award.
> >
> > (Emphasis added.)
>
> The opening words of this provision raise the question regarding the meaning of the word earnings that has already been discussed. The expression "remuneration ... paid by his employer" in the English version, "*rétribution ... qui lui est payée par son employeur*" in the French version, may also appear equivocal. According to *Le Petit Robert* (1984), *rétribution* means "*ce que l'on gagne par son travail*", a definition that does not give much assistance. But the word "remuneration" in the English version throws more light on the subject. In *Skailes v. Blue Anchor Line Ltd.*, [1911] 1 K.B. 360, the English Court of Appeal interpreted this expression for the purposes of the *Workmen's Compensation Act* of the time as comprising not only a bonus paid to a purser by his employer, but also the profits from the sale of liquor to passengers on board. If one adopts this approach, it seems to me that the word can also include a tip paid to the employer for distribution to his employees. As to the word "paid", which can equally well mean mere distribution by the employer or payment of a debt owing by him, I would simply observe that if one gives the word "remuneration" a broad meaning, one must also give a broad meaning to the Word "paid".

[18] The current definition of insurable employment is found at paragraph 5(1)(*a*) of the *Employment Insurance Act* and the wording is identical to that used in the former legislation. With respect to the wording of the relevant *Regulation* made under the former legislation, La Forest J. – at pp. 689-690 – commented:

> Section 3(1)(*a*)(i), therefore, clarifies or expands the meaning of earnings by telling us that it includes "any amount paid to him by his employer ... in satisfaction of ... a ... gratuity" (emphasis added). In my view, that is precisely the situation we have in this case. The word "gratuity" in the English version is the ordinary synonym for tip. The word *gratification* in the French version certainly includes a tip.
>
> The interpretation I have given to "insurable earnings" is consistent with the purpose of the Act, which is to pay, to persons who have lost their employment, benefits calculated in terms of a percentage of their insurable earnings. Otherwise, an employee who received a good part of his earnings as tips would not benefit to the same degree as his colleagues who receive the whole of their earnings directly from the pocket of their employer. By adding to the definition of remuneration a whole series of benefits an employee receives by reason of his employment, the regulations clearly indicate that the expression should be given a broad interpretation. Moreover, as noted, a law dealing with social security should be interpreted in a manner consistent with its purpose. We are not concerned with a taxation statute. The cases of *Penn v. Spiers & Pond Ltd.* and *Great Western Railway Co. v. Helps, supra*, are merely examples of the principle that I have just stated.
>
> I would add that if the appellant is obliged to pay premiums solely in relation to the part of the earnings of his employee that comes out of his pocket, then it is in a better situation than other employers who pay these premiums in relation to all the earnings accruing to the employee from his work. The employer obviously benefits from the fact that some of his employees are in a position where they can obtain tips. He is able to retain their services at a better price. It, therefore, appears unjust that he should also be able to divest himself of a part of the obligation that all other employers must carry, or to restrict the amount of benefits of his employees whose earnings come in good part from tips.

[19] In concluding that the tips should be included into the calculation of UI premiums, La Forest J. continued – on p. 690 – by stating:

> It is true that these arguments are in a measure applicable equally to employees who personally receive tips, even though s. 3(1) of the Regulations does not mention these. However, those who drafted the Regulations no doubt concluded that it was necessary to proceed in this way for administrative reasons. See on this issue the case of *Association des employés civils v. Minister of*

> *National revenue, supra*. It is almost impossible to levy premiums on tips obtained in this manner and it is for that reason that the Regulation does not take them into account. It goes without saying that insurable earnings include many tips collected in ways other than the ones collected in this case. For example, those added when paying a bill by credit card. (underlining mine)

[20] The dissenting opinion in *Canadian Pacific, supra,* written by Chouinard J. (Beetz and McIntyre JJ. concurring) is instructive, particularly by taking into account the similarity of the circumstances with those applicable to the within appeals. At p. 691, Chouinard J. set out the facts, as follows:

> By an agreement appended to the collective agreement between the union and the employer, it was agreed that the latter would receive such tips and distribute them to the employees. The union and the employer agreed on this course of action in the interests of efficiency and economy, in view of the number of employees working at banquets and the problems which would result from dividing and distributing tips.
>
> The following facts were not in dispute.
>
> The customers decided whether tips should be left.
>
> The amount of the tips was entirely in the discretion of the customers.
>
> Appellant made no service charge to its customers.
>
> None of the amounts paid by the customers as tips were included in appellant's income.
>
> The total amount of the tips was passed on to the employees.
>
> All appellant did was distribute the tips to the employees in accordance with the agreement.
>
> Respondent added the following information, which was not disputed by appellant:
>
> > [TRANSLATION] The tips in question were paid to the Château Frontenac Hotel at banquets or receptions organized by it: at such times the hotel billed the customer for the amount indicated by him

> (generally 12 to 15 percent) and received the amount in question.
>
> According to the collective agreement with its employees, the hotel then distributed the amounts in question as follows: 80 percent of such tips to employees covered by the collective agreement who had worked at the meetings in question and 20 percent to non-unionized employees. The hotel issued a cheque to each employee who had worked at this type of reception, in an amount corresponding to his share of the sum which the customer had agreed to pay the hotel for tips.
>
> Employees working at these banquets also received an hourly wage fixed by the collective agreement.

[21] In *Canadian Pacific*, counsel for the respondent had argued that the hotel had paid the sums at issue to the workers pursuant to an obligation imposed on it by the terms of the collective agreement. The response of Chouinard J. – at p. 701 – is as follows:

> I cannot agree with the propositions of counsel for the respondent. Of course, payment is a method of extinguishing obligations: but there has to be an obligation. In the case at bar, the employer's obligation is at most that of an agent. If it receives amounts for its employees from customers, it is obliged to pass them on. However, if it receives nothing from the customers it does not owe its employees anything.

[22] It could be argued that the appellant in the within appeals was merely acting as a trustee for that portion of each patron's payment attributable to gratuities and that it was under a legal obligation to pay over such amount for distribution among the entitled workers. However, that fulfillment of an obligation – even pursuant to some trust arrangement - still involves the act of making a payment. In the within appeals, Harbour House issued cheques to workers - in specific amounts - representing their appropriate share of the total tips received from patrons. The payment was pecuniary in nature and arose totally within the context of employment. Because the arrangement was more casual than the one in *Canadian Pacific, supra,* case does not mean it is any less significant because it clearly governed the actions of the employees and Harbour House - the employer - with respect to an important facet of their employment. Although not particularly surprising for a resort like the hotel

operated by Harbour House, the tips given by customers were often equal to – or greater than – the wages or salary paid by the appellant. Obviously, the tip component was an important part of their overall earnings upon which EI premiums were based and upon which entitlement to EI benefits would be calculated should a worker become unemployed. It seems there was a clear intention to include tips into the calculation of insurable earnings because the relevant provision of the *EI Regulation* refers to "the total of all amounts, whether wholly or partly pecuniary, received or enjoyed" by the worker that are "paid" by the employer "in respect of" that employment. The Supreme Court of Canada in the case of *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, held that the words, " in respect of" are words of the widest possible scope of any expression that is intended to convey a connection between two related subject matters.

[23] In the within EI appeal, had all customers merely handed over the tips to the servers and, thereafter, members of the wait staff had placed the respective amounts into a pool to be distributed subsequently in accordance with their own agreement, there would have been no involvement by the appellant and no amount would have been paid - by it - to the workers. Any offering up of a gratuity by a patron to a server would have been a transaction fully concluded at that point. Certainly, it would still have been an amount received by the worker as a consequence of having been employed in the Harbour House dining room and - in that sense - would probably have been an amount "in respect of" employment but the other ingredient would not have been present, namely payment of the amount of the tip – to the worker - by the employer. Harbour House – albeit with the full concurrence of the workers - undertook the distribution of tip money – for an administration fee of 10% - by issuing cheques to entitled workers. In so doing, Harbour House made the decision to facilitate distribution of the tip money by fully integrating the requisite payments into the regular payroll mechanism and following the usual procedures related to preparation and issuance of cheques to employees on a bi-weekly basis. The modern usage of credit cards has placed those employers engaged in the restaurant and food services industry in the situation where they must bear yet another burden as a consequence of having to incur the cost of credit/debit card transaction fees and the extra administration associated with issuing cheques to cover the amount of the tips extracted – in a notional sense – from the total amount of the charge approved by the customer in satisfaction of the total amount of the bill including taxes and gratuity. Perhaps an amendment to provincial labour standards legislation is required into order to permit deduction by an employer of the actual amount of the credit card transaction fees so as to permit the employer to pay the relevant server/recipient the net amount of the tip after taking into account the applicable transaction fees.

[24] I am aware the relevant Regulation under the former *Unemployment Insurance Act* - defining insurable earnings - specifically included a "gratuity". In my view, the current definition found in subsection 2(1) of the *EI Regulations* under the current *Act* is even broader in that it refers to "the total of all amounts" paid "in respect of" that employment.

[25] I cannot find any basis upon which to distinguish the decision of the Supreme Court of Canada in *Canadian Pacific*, *supra*, and find the decision of the Minister - wherein the assessment issued pursuant to the provisions of the *Act* was confirmed – is correct.

[26] The next matter to be decided concerns the CPP appeal. The issue is whether the tips form part of the workers' pensionable earnings from employment with the appellant. The position of the Minister is that since the tips are recorded and controlled by Harbour House and then paid to the workers, those tips constitute earnings from pensionable employment, as defined in subsection 12(1) of the *Plan*, and as determined pursuant to subsection 5(1) and section 5 of the *Income Tax Act*, thereby requiring contributions to have been made by the appellant with respect to said tips.

[27] The amount of an employee's contribution under the *Plan* is established by subsection 8(1), as follows:

> 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.

[28] The amount of the employer's contribution is governed by section 9:

> 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.

[29] The amount of contributory salary and wages is defined by the following relevant portion of subsection 12(1):

> The amount of the contributory salary and wages of a person for a year is his income for the year from pensionable employment, computed in accordance with the *Income Tax Act*, ...

[30] The relevant section of the *Income Tax Act* is subsection 5(1) and it reads:

> **Income from office or employment** – Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages, and other remuneration, including gratuities, received by the taxpayer in the year. (emphasis added)

[31] According to Interpretation Bulletin CPP-1 – Tips and Gratuities dated June 10, 1971 - there are two basic ways in which gratuities may be received and – generally – determine whether the recipient contributes to the *Plan* as an employee or as a self-employed person. The Bulletin refers to "direct gratuities" as those amounts received directly by people - such as waiters - in return for a service and also include an amount which a customer adds to the bill - by using a credit card – with

instruction to the cashier to pay it directly to the particular person who rendered the service. The Bulletin also includes into the category of direct gratuities an amount paid voluntarily by a guest – either individually or as a representative of a group – to the employer or to a delegated employee for distribution among the employees who performed the service provided there is no contractual arrangement between the employer and the employees concerning the method of distribution. Under circumstances where tips can be regarded as a direct gratuity, the Minister accepts that the recipients thereof may treat the amounts so received in the same manner as self-employed earnings and pay contributions thereon by paying both parts of said contribution.

[32] According to the Bulletin, the Minister considers controlled gratuities to be those tips which are controlled by an employer or, because of a contractual arrangement, pass through the employer's hands en route to the person who rendered the service. Provided these conditions are met, the amount of those tips constitutes salary or wages on which contributions to the *Plan* should be made on their behalf by the employer. The circumstances contemplated are set out in paragraph 4 of the Bulletin as follows:

> (a) when a service charge is added to the customer's bill to cover gratuities;
>
> (b) when a percentage is added to a banquet bill to provide tips for waiters and other staff;
>
> (c) when tips are pooled according to the contract of employment, to be later shared with other employees;
>
> (d) when tips received are turned over to the employer as a condition of employment.

[33] The evidence in the within CPP appeal makes it clear that none of those conditions applied to the method of distribution utilized by Harbour House during 1998 and 1999. The tips were pooled in accordance with an arrangement between the workers - based on established tradition – and accepted by the appellant as part of its business policy. The tips were not turned over to the appellant as a condition of employment but were inextricably bound up with the payment for the patron's dining room bill and the amount of the gratuity could be liberated only by Harbour House agreeing to process that component of the overall bill payment through its debit/credit card system. There was no fixed amount added to the patron's bill - whether in the dining room or for banquet services - so the amount added as a

gratuity would vary and it is highly improbable that any patron would be aware of the system of pooling and distributing tips among all serving staff and kitchen workers.

[34] Counsel for the appellant submitted the CCRA auditor had indicated to Frédérique Philip the reason for the CPP assessment was that the Minister had taken the position the tips received by Harbour House employees constituted "controlled gratuities" within the purview of the Interpretation Bulletin CPP-1. Since the facts clearly establish the amounts do not fit into that category, counsel requested that the assessment - issued under the *Plan* - be vacated.

[35] The issue is not whether the assessment – and subsequent confirmation thereof by the Minister – is based correctly on the wording of that Bulletin or on the opinion of an official in the CCRA audit department. Instead, one must regard the provisions of the *Plan* and the *Income Tax Act* - as set out earlier - in order to determine whether the assessment is soundly based in law.

[36] Ordinarily, one would regard "salary and wages" as not including any amount received by way of gratuities. Usually, it requires a specific definition for the particular purpose of a provision in order that tips would be considered as forming part of any salary and/or wages as the remuneration paid by an employer on a periodic, regular basis, based on an hourly, weekly, daily, monthly or annual rate or is tied to piecework or commission both of which are readily calculable according to the work performed. In general usage, "salary" is the word usually associated with the remuneration paid to full-time professionals, office workers, public servants, namely, white-collar workers. On the other hand, tradesmen, construction workers, machinery and equipment operators, factory employees, and others – not exercising a supervisory function - who fall within the category of blue-collar workers ordinarily receive payment based on an hourly rate. The term "contributory salary and wages" is utilized in sections 8, 9 and 12 of the *Plan.* By using the word “contributory” as an adjective preceding "salary and wages", it changes the ordinary meaning of that term due to the particular objective sought by the legislation. Precisely how that meaning has been changed for purposes of the *Plan* is disclosed by examining section 12 wherein the amount of an employee’s "contributory salary and wages" is defined as "the income of the person for the year from pensionable employment, computed in accordance with the *Income Tax Act*". There is no doubt that all workers - in 1998 and/or 1999 - were engaged in pensionable employment with the appellant and that their salary and wages – excluding tips – had been the subject of contributions by both the employees and the employer.

[37] It is helpful to re-examine the wording of subsection 5(1) of the *Income Tax Act* and to note that it defines a taxpayer's income as including "salary, wages and other remuneration, including gratuities, received by the taxpayer in the year". Harbour House workers were required to include all tips into their income whether received directly from patrons or paid to them through the distribution mechanism administered by the appellant's accounting staff. However, those tips received directly and retained and distributed by the workers among themselves - without any of those funds passing through the hands of the appellant - could be subject to CPP contributions by the workers based on the rate applicable to self-employed persons. As a result, it is doubtful that any employer – including the appellant in the within appeals – would have any knowledge of the amount of those tips retained directly by the workers unless there was voluntary disclosure by all members of the staff. However, those amounts of tips administered by the appellant and paid – in the form of cheques – to entitled workers were ascertainable and were sums required to be included in the computation of income of the employee in accordance with the *Income Tax Act.* The fact that other money received directly from a patron was also required to be reported by the employee/taxpayer when filing a return of income does not preclude the known amount of tips paid by the appellant from being included within the definition of the contributory salary and wages applicable to a worker. The term "remuneration", as used in sections 8 and 9 of the *Plan* is broader than "wages" and/or "salary" and includes a "reward; pay for services rendered" or "recompense for toil" by extension of the definition of the verb "remunerate", according to The Canadian Oxford Paperback Dictionary, Oxford University Press Canada 2000. The term "remuneration" was also considered to have a broad meaning as discussed in the reasons for judgment of La Forest J. in *Canadian Pacific*, *supra.*

[38] The amounts of the tips distributed by Harbour House to the workers during 1998 and 1999 were known and formed part of the information contained on the T4 slip issued to each worker for purposes of the *Income Tax Act.* Therefore, those amounts should have formed part of the contributory salary and wages of each employee – not because the tips ordinarily fall within that category – but because each of the cheques issued by the appellant - in payment of the amount due in tips - constituted part of the worker's income and had to be reported as such in accordance with the *Income Tax Act.* The overarching requirement contained in section 9 of the *Plan* pertaining to the amount of the employer's contribution, is that the remuneration has to be paid to the employee by the employer. As a result, those tips received without any participation by Harbour House in either their receipt or distribution would not meet that requirement. Further, the wording of section 12 of the *Plan* refers to the amount of the contributory salary and wages of a person for the year as being "his income for the year from any pensionable employment, computed

in accordance with the *Income Tax Act*". I interpret the words, "computed in accordance with the *Income Tax Act*" to mean that the income is "to be computed", or "shall be computed" rather than restricting usage of the term solely to the past tense. Certainly, the obligation to report the tips as income rests on the employee but to the extent the employer has paid remuneration – in the form of tips - to an employee in respect of his or her pensionable employment, then the amount of the tips paid, already subject to inclusion into an employee's income in accordance with the *Income Tax Act*, is capable of also being used in the calculation of the appropriate amount of both the employer's and employee's contribution under the *Plan.*

[39] I have considered the objectives of the *Act* as opposed to the *Plan.* Certainly, the matter of qualifying for EI benefits – if and when needed – is a more pressing concern to a young waitperson or other member of the overall serving and kitchen staff than any angst associated with contemplation of retirement some 30 or 40 years down the road. In that sense, there is room for two different approaches to be taken. One, is to regard the provisions of the *Plan* as applicable only to that identifiable component of remuneration attributable to salary and wages because that can be seen as more consistent with an intent by Parliament to confine contributions to that source without concern for any additional income received in the form of gratuities. However, in the modern workplace, there are many persons employed within the food and service industries who have chosen to make it a career and who will depend on the appropriate calculation of pensionable earnings throughout their working life in order to receive the proper amount of pension ultimately payable under the *Plan.* The worker – Linda Danielson – testified she had worked for Harbour House – at various jobs - for 18 years and had earned her income - during 1998 and 1999 - as a waitperson serving patrons in the dining room and/or at banquets. When one is engaged in an occupation in which a significant portion – or perhaps the majority – of income is received from strangers who – without obligation - pay money in return for service having been provided within the context of employment that is otherwise pensionable, it seems reasonable to include the amount of those tips into the calculation of CPP contributions on the part of both the employer and the employee in accordance with the relevant provisions of the *Plan.* Those tips received directly by the worker – without the knowledge and/or participation of the employer in any subsequent distribution thereof – must be reported – as income - by the workers in their tax returns. Any amount received from that source could – at the option of the employee, according to Interpretation Bulletin CPP-1 – become eligible for an additional contribution to the *Plan* based on the rate applicable to self-employed persons, even though obviously derived from employment. Probably, as was noted by La Forest J. in *Canadian Pacific, supra,* in discussing the levy of unemployment insurance premiums on tips, the policy not to compel CPP contributions in respect of

tips identifiable as direct gratuities – even though they constitute reportable income - was based on an appreciation of the administrative headaches associated with that procedure and the relative insignificance on any ultimate impact upon the calculation of workers' total pensionable earnings.

[40] All of the foregoing strikes me as somewhat complex if the intention of Parliament is that the relevant provisions of the *Act* and the *Plan* should be capable of being understood by young persons bussing tables or chopping vegetables in the kitchen of an establishment within the food service industry. It is also burdensome on the operators of those businesses since provincial law – in British Columbia, at least - seems to prohibit deducting even the actual amount of the credit/debit card transaction fees – 2%-4% - from the total amount of the tips prior to distribution to the workers. In addition, the employers are required to pay EI premiums and CPP contributions on amounts that were not paid by them to their employees in the form of salary or wages in the ordinary sense but were received – instead - from strangers who were not privy to the employer/employee relationship. Although anomalous, these requirements probably can be rationalized by considering the big picture and assigning these additional expenses to the overall cost of doing business. Today, almost every business accepts payment by credit/debit cards and bears the relevant transaction fees, installation and monthly charges for the appropriate apparatus as a consequence of having undertaken that course for the convenience of customers or in order to increase sales volume or just to remain viable within a highly- competitive marketplace.

[41] As earlier noted, the decision issued by the Minister confirming the assessment issued on October 5, 2000 - pursuant to the *Act* - is correct and the appeal therefrom is hereby dismissed.

[42] In accordance with the foregoing reasons, the appeal from the decision of the Minister confirming an assessment issued on October 5, 2000 - pursuant to the *Plan* - is also dismissed.

Signed at Sidney, British Columbia, this 7th day of June 2003.

"D.W. Rowe"

D.J.T.C.C.

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