

FTR Now

Federal Court of Appeal Interprets Term “Fixed or Ascertainable” for CPP Purposes

Date: January 25, 2012

On November 16, 2011, the Federal Court of Appeal (“FCA”) released its decision in *Minister of National Revenue v. Her Majesty the Queen in Right of Ontario* (“*HMQ*”). The FCA’s decision overturns the January 17, 2011 decision of the Tax Court of Canada (“Tax Court”) in which it had held that *per diem* amounts paid to members of Ontario’s Judicial Appointments Advisory Committee (“JAAC”) were not fixed or ascertainable, and not pensionable or subject to *Canada Pension Plan* (“CPP”) contributions.

The facts in *HMQ* and the Tax Court’s decision are discussed in our [FTR Now](#) of March 8, 2011. In this *FTR Now*, we briefly summarize the facts and the issue that was before the FCA, and the FCA’s decision.

Background

The Minister of National Revenue (“MNR”) determined that the *per diems* paid to JAAC members were pensionable and subject to CPP contributions. The MNR’s decision was appealed to the Tax Court.

JAAC members had provided services in their capacity as office-holders, not as employees, and under the CPP amounts that are paid to office-holders are only pensionable and subject to CPP contributions if they are either fixed or ascertainable. The Tax Court concluded that for an amount paid to an office-holder to be fixed or ascertainable for purposes of the CPP, the payor and payee must be able to calculate, with a reasonable degree of certainty, the amounts that will be paid before the term of office begins. In this case the total amount of *per diems* paid to JAAC members could not reasonably be known in advance, and therefore, was not fixed or ascertainable. As such, the *per diem* payments were not pensionable or subject to CPP contributions.

The MNR appealed the Tax Court’s decision to the FCA.

FCA Decision

The FCA held that there is nothing in the CPP requiring that the phrase “fixed or ascertainable” be interpreted as an advance determination of the total remuneration received by the office-holder for

a particular year. While an advance determination of the amount of remuneration received in a year would meet the test for being “fixed or ascertainable,” an advance determination is not necessary.

Implications

Leave to appeal to the Supreme Court of Canada has not been sought. The companion case to *HMQ, Real Estate Council of Alberta v. The Minister of National Revenue* (“*RECA*”), had also been appealed to the FCA but as of the date of this FTR Now has not yet been heard.

We will monitor the appeal in the *RECA* case, but at this time the direction from the FCA is that remuneration paid to office-holders is to be considered pensionable and subject to CPP contributions if it is fixed or ascertainable, regardless of whether the amount can be determined in advance.

Please contact a member of the [Pension & Benefits Practice Group](#) if you wish to discuss the potential implications of this case for your organization.

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