Docket: 2016-1539(CPP)

BETWEEN:

SHIRLEY NETTEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 17, 2016, at Ottawa, Ontario.

Before: The Honourable Lucie Lamarre, Associate Chief Justice

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Vincent Bourgeois

JUDGMENT

The appeal brought pursuant to the *Canada Pension Plan* (**CPP**) in respect of the decision of the Minister of National Revenue dated December 21, 2015 is dismissed and the decision rendered by the Minister is confirmed on the basis that, during the period from January 1, 2014 to April 21, 2015, the Appellant's employment was excepted from pensionable employment within the meaning of paragraph 6(2)(*i*) of the CPP and section 24 of the *Canada Pension Plan Regulations*.

Signed at Ottawa, Canada, this 3rd day of February 2017.

"Lucie Lamarre"

Lamarre A.C.J.

Citation: 2017 TCC 8
Date: 20170203
Docket: 2016-1539(CPP)

BETWEEN:

SHIRLEY NETTEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Lamarre A.C.J.

[1] This is an appeal against a decision, made by the Minister of National Revenue (**Minister**) on December 21, 2015, that the Appellant's employment during the period from January 1, 2014 to April 21, 2015 was excepted from pensionable employment within the meaning of paragraph 6(2)(*i*) of the *Canada Pension Plan* (**CPP**) and section 24 of the *Canada Pension Plan Regulations* (**Regulations**).

Relevant provisions

[2] The relevant provisions of the CPP and the Regulations read as follows:

CPP

CONTRIBUTIONS PAYABLE

Pensionable employment

6 (1) Pensionable employment is

(*a*) employment in Canada that is not excepted employment;

. . .

(*c*) employment included in pensionable employment by a regulation made under section 7.

Excepted employment

6 (2) Excepted employment is

. . .

(*i*) employment by Her Majesty in right of a province or by an agent of Her Majesty in right of a province;

. . .

(*k*) employment excepted from pensionable employment by a regulation made under section 7.

Regulations respecting employment to be included in pensionable employment

7(1) The Governor in Council may make regulations for including in pensionable employment

. . .

(*e*) pursuant to an agreement with the government of a province, employment in Canada by Her Majesty in right of the province or by an agent of Her Majesty in right of the province;

Regulations

Employment by a Province or an Agent of a Province

24(1) Employment by Her Majesty in right of a province set out in Schedule III and employment by an agent of Her Majesty in right of that province, except employment by an agent thereof who is specified in Schedule IV and any employment by Her Majesty in right of the province that is set out in that Schedule, is included in pensionable employment.

SCHEDULE III
(Section 24)
1. Province of Ontario

SCHEDULE IV
(Section 24)
1 Province of Ontario

. . .

(*b*) Employment by appointment of Her Majesty in right of Ontario, or of an agent of Her Majesty in right of Ontario, as a member of an agency, board, commission, committee or other incorporated or unincorporated body, who is paid fees or other remuneration on a per diem basis, or a retainer or honorarium, and who is not in the full-time employment of Her Majesty in right of Ontario or of an agent of Her Majesty in right of Ontario.

General Issue

[3] In sum, employment by Her Majesty in right of a province or by an agent of Her Majesty in right of a province is not pensionable employment, except if the Governor in Council includes that employment in pensionable employment pursuant to an agreement with the government of a province. The Province of Ontario has elected to include in pensionable employment employment by Her Majesty in right of Ontario or by an agent of Her Majesty in right of Ontario, except for employment specified in Schedule IV.

[4] The issue in the present appeal is whether the Appellant's employment is caught by the exception found in item 1(*b*) of Schedule IV, referred to above, such that her employment would not be pensionable employment.

Factual Background

[5] In June 2007, by Order in Council, the Appellant was appointed by the Lieutenant Governor of Ontario to the position of "part-time vice-chair" of the Workplace Safety and Insurance Appeals Tribunal (WSIAT). Since her initial appointment she has been reappointed to the same position, by Order in Council, for fixed terms of three years (Exhibit R-1), and she still holds that position.

[6] The WSIAT is "an Adjudicative Agency within the Ontario administrative justice system",[1] a branch of the Ontario Ministry of Labour (Exhibit A-3, Government of Ontario, Public Appointments Secretariat, "All Agencies List").

[7] The WSIAT is the final level of appeal to which workers and employers may bring disputes concerning workplace safety and insurance matters in Ontario (Exhibit A-1, "Tribunal Report Caseload Processing").

[8] According to the Appellant, when she was first appointed the "part-time vice-chairs" were viewed as self-employed. She was also told that her employment was pensionable and that she would receive annually a T4A issued by the WSIAT.

[9] In 2010, the Canada Revenue Agency (CRA) determined that the part-time appointees to the WSIAT were "in tenure of office and employed by the Province of Ontario." It was also determined that their "employment was not insurable under the *Employment Insurance Act*, but was pensionable under the *Canada Pension Plan*."[2]

[10] This decision was initially appealed to the Tax Court of Canada by the WSIAT, but the appeal was withdrawn on February 24, 2015.[3]

[11] On December 5, 2013, following a request from the province of Ontario, the Regulations were amended to except from pensionable employment certain employment by the Province of Ontario or by an agent thereof.[4]

[12] On February 20, 2015, following the amendment of the Regulations and after receiving from the WSIAT a T4 stating that she was "Exempt" with regard to the Canada Pension Plan, the Appellant requested a ruling from the CRA on the pensionability of her employment.

[13] On July 21, 2015, the CRA informed the Appellant that the following decision had been made:[5]

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1 Workplace Safety and Insurance Appeals Tribunal, "About WSIAT: Mission Statement", (consulted November 10, 2016), online: <www.wsiat.on.ca/english/about/index.htm>.

2 Notice of appeal, para. 2; Reply to the Notice of Appeal, para. 2.

3 Notice of appeal, para. 2; Reply to the Notice of Appeal, para. 2; transcript, p. 24, line 16, p. 26, line 15.

4 *Regulations Amending the Canada Pension Plan Regulations*, SOR/2013-233.

5 Reply to the Notice of Appeal, para. 11.

> . . . the Appellant was engaged in the tenure of an office with the Tribunal, however her employment was excepted from pensionable employment within the meaning of paragraph 6(2)(i) of the *CPP* and section 24 of the *Canada Pension Plan Regulations* (C.R.C., c. 385) (the "*Regulations*") during the Period (the "Ruling").

[14] On August 29, 2015, the Appellant filed an appeal with the Chief of Appeals. The ruling was confirmed by the Minister on December 21, 2015, and it was reiterated that the Appellant's employment was "excepted from pensionable employment".

[15] It is acknowledged by the parties that the Appellant is employed by the WSIAT through the tenure of an "office" within the meaning of subsection 2(1) of the CPP.

[16] In her testimony, the Appellant stated that since 2013 she has been working full-time for the WSIAT (following her decision to assume such a workload and with the approval of the WSIAT) even though she was appointed as a part-time vice-chair. She described the change in her schedule from part-time to full-time as having been "fairly casual" as "[i]t wasn't formalized in any way".[6] She said she was being paid on a per diem basis as well as on an hourly basis for certain functions. In cross-examination, she acknowledged that her hourly rate was in fact the per diem rate to which she was entitled divided by the maximum number of hours that she could bill (eight hours), which gave an hourly rate of $83.

[17] In fact, according to the billing guidelines for a part-time vice-chair filed by the Appellant (Exhibit A-2), her remuneration from the Tribunal is based on an eight-hour day per diem and the maximum daily payment is $664, which also corresponds to her per diem according to the Ontario Public Appointments Secretariat's "Agency Details" regarding Ontario Government appointees to the WSIAT (Exhibit R-2, page 2).

[18] Since her first appointment in 2007, the Appellant has been contributing annually to the CPP. Contributions were also paid by the WSIAT from 2007 to 2009. However, for the period starting in 2010 those contributions were described

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6 Transcript, p. 8, lines 21-24.

as being "pending" (Exhibit A-3, "Canada Pension Plan contributions since appointed to WSIAT".)[7]

Specific Issues

[19] The issue is whether the Appellant was engaged in pensionable employment with the WSIAT during the period from January 1, 2014 to April 21, 2015, or whether the employment was excepted pursuant to item 1(*b*) of Schedule IV of the Regulations.

[20] Specifically, the parties raise two questions in relation to the applicability of the exception: (1) was the Appellant paid on a "per diem" basis? and (2) was she in the full-time employment of the WSIAT?

[21] If I conclude that the Appellant was paid on a per diem basis and that she was not in the full-time employment of the WSIAT, then I will have to find that her employment with the WSIAT was not pensionable employment and the appeal will be dismissed.

[22] For the reasons that follow, the Court finds that the Minister correctly ruled that the Appellant's employment was excepted from pensionable employment.

Positions of the Parties

(1) The Appellant's Position

[23] The Appellant submits that, for the period at issue, she held "pensionable employment" with the WSIAT for the purposes of subsection 24(1) of the Regulations because she did not fall within the exception established by Schedule IV of the Regulations, as she was not paid solely on a per diem basis and was working full-time for the WSIAT.

[24] The Appellant argues that, in order to establish the terms of her appointment to the WSIAT, the Court should look beyond the wording of the Order in Council (Exhibit R-1) and give weight to the substance of her employment.

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[7] Transcript, p. 26, line 28, p. 27, line 7 and p. 30, lines 6-24.

Not in the full-time employment

[25] To support her argument, she referred to the cases of *Town Properties Ltd. v. The Queen*, 2004 TCC 375 and *Woessner v. R.*, [1999] 4 C.T.C. 2337, in which the issue was whether certain individuals were engaged in full-time employment with the employer for the purpose of the small business deduction under the *Income Tax Act*.

[26] At the hearing, the Appellant indicated that the Minister had admitted that she had in fact been working full-time for the WSIAT during the period at issue. Hence, she submitted, in light of her situation there is nothing to justify this Court's reaching a conclusion contrary to that admission by determining that she was not in full-time employment within the meaning of the CPP Regulations.

[27] The Appellant acknowledged that she could refuse work assigned to her by the WSIAT. She also admitted that, if she did so, there would be no consequences except possibly with regard to reappointment, as the recommendation for reappointment is based on performance. However, she mentioned that once she had accepted an assignment she could not subsequently decline it.

[28] Therefore, in response to the suggestion of the Minister's counsel that she was voluntarily working full-time, she stated that, if indeed it was her choice to take on such a workload, it could not possibly have been a unilateral decision, as it was the WSIAT that assigned hearings to her each month and approved her schedule.

[29] The Appellant also stated that her decision to work full-time was made in the context of the WSIAT encouraging its "'part-time' vice-chairs" to work full-time in order to deal with the exponential growth of active caseloads (Exhibit A-1, "Tribunal Report, Caseload Processing").[8]

[30] The Appellant also quoted the following passage from the "Regulatory Impact Analysis Statement" issued regarding the amendment of Schedule IV of the Regulations and published in the *Canada Gazette Part II* (Exhibit A-3):[9]

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8 Notice of appeal, para. 8; transcript, p. 10, line 23, p. 11, line 20, p. 64, line 11, p. 65, line 1.

9 The "Regulatory Impact Analysis Statement" appears immediately following the *Regulations Amending the Canada Pension Plan Regulations*, SOR/2013-233.

> **Rationale**
>
> The Minister of National Revenue entered into an agreement on behalf of the Government of Canada with the Government of Ontario, whereby the Minister would recommend to her colleagues in Cabinet that Schedule IV to the CPP Regulations be amended to exempt the employment of approximately 4 000 part-time, provincial appointees from pensionable employment. Since Ontario and its agents have always considered these individuals to be in employment that is not pensionable, the amendment codifies an existing practice.
>
> [Emphasis added.]

[31] In the Appellant's view, Parliament's intention was not to exclude "part-time vice-chairs" of the WSIAT, as their employment had been considered to be pensionable in the past.

[32] The Appellant argued that, in order to avoid any injustice or punitive effect, the scope of the exception ought not to be broadened to exclude employees working full-time from participating in the CPP.

[33] On the basis of the "Regulatory Impact Analysis Statement", *supra*, the Appellant submitted that the amendment of Schedule IV of the Regulations was intended by Parliament to have a neutral effect and to codify an existing practice, and that it was not meant to deprive taxpayers who were actually contributing to the Canada Pension Plan.

[34] In support of her position, the Appellant argued, referring to the broader context, that the purpose of the CPP and the Regulations is to give the population access to a social program, subject to only a few limited exceptions. Thus, considering her situation, there would be no legitimate reason to broaden the exception found in Schedule IV of the Regulations and to deprive her of the benefits of which she should be entitled to avail herself.

[35] Moreover, the Appellant raised the argument that the "not in the full-time employment" criterion of item 1(*b*) of Schedule IV of the Regulations does not specifically include taxpayers who, while really working full-time, have nonetheless been appointed to a part-time position.

[36] Consequently, on the basis of the interpretation set out above and the fact that she had contributed to the Canada Pension Plan since her first appointment in 2007, the Appellant claimed that the exception in question is not meant to apply to

her situation, as it would have a punitive effect, especially for the period at issue that is now being looked at retrospectively.

Per diem remuneration

[37] With respect to remuneration on a per diem basis, the Appellant noted that the expression "per diem" is not defined in the relevant legislation.

[38] In her view, an hourly rate of pay is not a per diem rate.

[39] In that regard, she relied on the directive issued by the Management Board of Cabinet (**MBC**) (Exhibit A-2, "Government Appointees Directive"),[10] which defines the expression "per diem" in the following way:[11]

> Payments for part-time appointees must be on a per diem basis. Per diem is to be interpreted as the amount payable for work periods in excess of three hours; when less than three hours of work is involved, one half of the established per diem must be paid.

[40] In her testimony, the Appellant pointed out that the per diem remuneration is mainly paid for hearings.

[41] For the other items invoiced by the Appellant (such as preparation, additional time for decision writing, interim decisions, travel time and training), she was paid at an hourly rate (Exhibit A-2, "Summary of Per Diem Billing" and the WSIAT "Administrative Guideline: Part-Time Vice-Chair Remuneration").[12]

[42] On that basis, the Appellant argued that her remuneration does not constitute a "per diem" as defined in the MBC's directive, as a per diem is not automatically paid to her for any period of work exceeding three hours.

[43] That was the basis on which the Appellant distinguished her situation from that described in the guidelines established by the MBC.

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10 This directive, given to the WSIAT, had as its purpose to ensure equitable treatment of all appointees in the province of Ontario (Exhibit A-2, "Government Appointees Directive" at p. 1). According to the Appellant, the CRA appears to have relied on this directive.

11 Notice of appeal, para. 10; transcript, p. 60, lines 23-26; Exhibit A-2, "Government Appointees Directive" at p. 5; transcript, p. 63, lines 2-6.

12 Notice of appeal, para. 11; transcript, pp. 20-23.

[44] The Appellant further submitted that, to the extent that I find that a broader view should be taken of the expression "per diem" when it comes to determining whether the per diem remuneration criterion has been met, the remuneration would have to have been paid solely or primarily on a per diem basis. However, she claimed that this was not her situation, as she is paid mainly at an hourly rate for her work at the WSIAT and that the criterion is thus not met.

(2) The Minister's Position

[45] The Minister's position is that this appeal should be dismissed as the Appellant's employment was excluded from pensionable employment on the basis that it was excepted employment pursuant to subsection 24(1) and Schedule IV of the Regulations.

[46] The Minister argues that the Appellant was appointed as a part-time vice-chair who was to be remunerated on a per diem (calendar day) basis in accordance with the Order in Council (Exhibit R-1).

Per diem remuneration

[47] Regarding the per diem remuneration criterion, counsel for the Minister indicated that item 1(*b*) of Schedule IV of the Regulations does not refer to remuneration based on a yearly salary (which was how the WSIAT's full-time vice-chairs were remunerated).

[48] The Appellant, as a "part-time vice-chair", did not receive a yearly salary. She was paid on a per diem basis (Exhibit R-2). The Minister emphasized that the portion of the Appellant's remuneration categorized by the Tribunal as hourly remuneration was in fact a portion of the per diem allowed for the position of "part-time vice-chair". Thus, regardless of how the WSIAT or its billing software characterized her remuneration, the Appellant was in fact paid entirely on a per diem basis. Only for some tasks was her remuneration processed on the basis of an hourly rate.

[49] Finally, the Minister's counsel pointed out that nothing in the wording of item 1(*b*) of Schedule IV of the Regulations indicates that, in order for the criterion to be met, the Appellant needed to be paid entirely on a per diem basis.

Not in the full-time employment

[50] With respect to the "not in the full-time employment" criterion, the Minister took the position that the modern approach to statutory interpretation should be applied to ascertain what was intended by Parliament, that is, the relevant provision should be analyzed through a textual, contextual and purposive approach.[13]

[51] The Minister argued that the number of hours worked by the Appellant is irrelevant to the resolution of this issue under item 1(*b*) of Schedule IV of the Regulations.

[52] In support of this position, the Minister's counsel applied a textual approach, submitting that item 1(*b*) must be interpreted in its entirety. In his view, the expression "not in the full-time employment" should be read in conjunction with the expression "employment by appointment" found at the beginning of that provision.

[53] The Minister accordingly argued that, to determine whether the Appellant was in the full-time employment of the WSIAT, the Court needed to consider the terms of her appointment instead of the number of hours she worked.

[54] Referring to the contextual approach, the Minister's counsel stressed that, according to the CPP and the Regulations, it is the prerogative of the Government in Council and the Government of Ontario to decide which type of employment should be excluded from "pensionable employment".

[55] As to the purposive approach, the Minister's counsel also cited the above-mentioned "Regulatory Impact Analysis Statement" regarding the amendment of Schedule IV of the Regulations (Exhibit A-3) in support of the position that the purpose of the amendment of Schedule IV at the request of the Government of Ontario, was to except from pensionable employment, on the basis of the status of their positions, the employment of part-time appointees.

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13 *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 26-27.

[56] To support this approach, the Minister's counsel cited as well section 12 of the *Interpretation Act*,[14] which reads as follows:

> **Enactments deemed remedial**
>
> 12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[57] Finally, the Minister's counsel outlined the difficulty that could arise from the application of the item 1(*b*) of Schedule IV of the Regulations if the method of analysis chosen were to take into account the number of hours worked by a part-time appointee, given that, in this particular case, those hours are extremely variable since changes to the work schedule are made "casually", according to the wishes of the appointees or their employer.

(3) Appellant's Rebuttal

[58] In her rebuttal argument, the Appellant replied to the argument of the Minister regarding the expression "not in the full-time employment" by saying that the expression "employment by appointment" (in French « emploi à titre de ») only refers to one aspect of the employment and should not colour the interpretation of the entire provision.

[59] In accordance with her interpretation, the Appellant indicated that "employment by appointment" should rather be seen as one separate criterion that has to be met in order for item 1(*b*) of Schedule IV of the Regulations to apply, and this is distinct from the full-time employment criterion.

[60] Lastly, the Appellant invoked a textual argument based on the fact that if Parliament has used different expressions, it is because they were not intended to have the same meaning. Thus, a distinction needs to be made between the terms "appointment" and "employment".

Analysis

Notion of "Employment"

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[14] *Interpretation Act*, R.S.C. 1985, c. I-21.

[61] It was not argued by the parties that the Appellant was in the employment of the WSIAT. Nevertheless, it is relevant for the purpose of this appeal to consider the applicable governing principles.

[62] The term "employment" is defined in subsection 2(1) of the CPP as follows:

> ***Employment*** means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office.

[63] The expression "tenure of an office" is directly relevant to the issue in this appeal. Hence, in order to determine if the Appellant was engaged in employment with the WSIAT, it is necessary to analyze the meaning of the term "office", which is also defined in subsection 2(1) of the CPP:

> ***office*** means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and *officer* means a person holding such an office;
>
> [Emphasis added.]

[64] The Appellant did not occupy during the period at issue any position listed in the definition of "office".

[65] As a result, in order to establish if the Appellant falls within the definition of "office", it needs to be determined whether she was entitled to a "fixed or ascertainable stipend or remuneration".

[66] In *Minister of National Revenue v. Ontario*,[15] the Federal Court of Appeal held that a "legal entitlement to a *per diem* rate of remuneration established in advance is sufficiently 'fixed or ascertainable' to meet the statutory test".

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[15] *Minister of National Revenue v. Ontario*, 2011 FCA 314, para. 10. The position taken in *Minister of National Revenue v. Ontario* was reaffirmed by the FCA in *Minister of National Revenue v. Real Estate Council of Alberta*, 2012 FCA 121.

[67] In the present case, since the Appellant was entitled to a per diem rate of remuneration, the fixed or ascertainable remuneration criterion is met. Hence, as the Appellant had "tenure of an office", she was consequently also in the employment of the WSIAT.

"Pensionable Employment" & "Excepted Employment"

[68] Given the conclusion that the Appellant fits within the definition of "employment" in the CPP, it must now be determined whether it was "pensionable employment" or "excepted employment".

[69] The expression "pensionable employment" is defined in subsection 6(1) of the CPP as follows:

> **Pensionable employment**
>
> 6(1) Pensionable employment is
>
> (*a*) employment in Canada that is not excepted employment;
>
> (*b*) employment in Canada under Her Majesty in right of Canada that is not excepted employment; or
>
> (*c*) employment included in pensionable employment by a regulation made under section 7.

[70] In the following sections of these reasons, the requirements for "pensionable employment" and "excepted employment" will be analyzed in light of paragraphs 6(1)(*a*) and 6(1)(*c*) of the CPP.[16]

"Pensionable Employment" under Paragraph (6)(1)(*a*) of the CPP

[71] Under paragraph 6(1)(*a*) of the CPP, pensionable employment is "employment in Canada that is not excepted employment".

[72] What can be gleaned from this provision is that any "employment" (within the meaning of subsection 2(1) of the CPP) in Canada can be characterized as "pensionable employment", unless it is caught by one of the exceptions outlined in

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[16] Paragraph 6(1)(*b*) of the CPP is not relevant for the purpose of this appeal as the Appellant was not employed by Her Majesty in right of Canada.

subsection 6(2) of the CPP, which establishes what falls under the expression "excepted employment".

[73] In this appeal, the situation of the Appellant, unfortunately for her, is covered by the exception enunciated in paragraph 6(2)(*i*) of the CPP:

> **Excepted employment**
>
> 6(2) Excepted employment is . . .
>
> (*i*) employment by Her Majesty in right of a province or by an agent of Her Majesty in right of a province.

[74] Therefore, the employment of the Appellant does not qualify as "pensionable employment" pursuant to paragraph 6(1)(*a*) of the CPP.

"Pensionable Employment" under Paragraph 6(1)(*c*) of the CPP

[75] Under paragraph 6(1)(*c*) of the CPP, employment may also be included in pensionable employment by a regulation made under section 7.

[76] As referred to in paragraph 6(1)(*c*) of the CPP, the Governor in Council is given the power, under section 7 of the CPP, to decide which "employment" he believes should be qualified as "pensionable employment".

[77] The relevant provision for the purpose of this analysis is paragraph 7(1)(*e*) of the CPP, which reads as follows:

> **Regulations respecting employment to be included in pensionable employment**
>
> 7(1) The Governor in Council may make regulations for including in pensionable employment . . .
>
> (*e*) pursuant to an agreement with the government of a province, employment in Canada by Her Majesty in right of the province or by an agent of Her Majesty in right of the province;

[78] Paragraph 7(1)(*e*) of the CPP gives the Governor in Council the power to determine, jointly with the government of a province, which employment will be included in the definition of "pensionable employment" in the context of "employment in Canada by Her Majesty in right of the province".

[79] By the enactment of subsection 24(1) and Schedule IV of the Regulations, the Governor in Council exercised with regard to the province of Ontario the power discussed above:

> **Employment by a Province or an Agent of a Province**
>
> 24 (1) Employment by Her Majesty in right of a province set out in Schedule III and employment by an agent of Her Majesty in right of that province, except employment by an agent thereof who is specified in Schedule IV and any employment by Her Majesty in right of the province that is set out in that Schedule, is included in pensionable employment.

[80] What can be gleaned from subsection 24(1) of the Regulations is that being employed by Her Majesty in right of a province set out in Schedule III generally qualifies an individual as being in "pensionable employment", unless the employment is specifically excluded by Schedule IV of the Regulations.

[81] Ontario is one of the provinces set out in Schedule III of the Regulations.[17]

[82] Therefore, the matter at the heart of this appeal is whether the Appellant's employment qualified as "excepted employment" under item 1(*b*) of Schedule IV of the Regulations, which was, as mentioned earlier, amended on December 5, 2013.[18] That provision reads as follows:

SCHEDULE IV (Section 24)	**ANNEXE IV** (article 24)
1 *Province of Ontario*	**1** *Province d'Ontario*
. . .	. . .
(*b*) Employment by appointment of Her Majesty in right of Ontario, or of an agent of Her Majesty in right of Ontario, as a	*b*) Emploi à titre de membres d'une agence, d'un conseil, d'une commission, d'un comité ou de tout autre organisme,

[17] Item 1 in Schedule III of the Regulations.

[18] *Regulations Amending the Canada Pension Plan Regulations*, SOR/2013-233, s. 1.

member of an agency, board, commission, committee or other incorporated or unincorporated body, who is paid fees or other remuneration on a per diem basis, or a retainer or honorarium, and who is not in the full-time employment of Her Majesty in right of Ontario or of an agent of Her Majesty in right of Ontario	doté ou non de la personnalité morale, nommés par Sa Majesté du chef de l'Ontario ou par un de ses mandataires, qui touchent une rétribution ou une autre rémunération à la journée, des avances, des honoraires ou des allocations, mais qui ne sont pas employés à plein temps de Sa Majesté du chef de l'Ontario ou d'un de ses mandataires.

[Emphasis added.]

[83] An examination of item 1(*b*) of Schedule IV of the Regulations shows that a test comprising three criteria needs to be met in order for it to be determined that the employment of the Appellant was excepted from "pensionable employment":

(1) The Appellant must have been employed by appointment of Her Majesty in right of Ontario as a member of an agency (or a board, commission, committee or other incorporated or unincorporated body);

(2) The Appellant must have been paid fees or other remuneration on a per diem basis, or a retainer or honorarium; and

(3) The Appellant must not have been in the full time employment of Her Majesty in right of Ontario.

[84] The use of the conjunction "and" in item 1(*b*) is of great consequence in that it suggests that these three criteria should be applied as cumulative requirements.

[85] Consequently, as long as even one of these criteria is not satisfied this appeal ought to be allowed since, in that case, the Appellant would not fall within the exception set out in Schedule IV of the Regulations; hence she would qualify as having "pensionable employment" for the purposes of the CPP, pursuant to subsection 24(1) of the Regulations.

[86] In the following sections, the three criteria making up the test set out above will be analyzed in greater detail and an analysis of the interpretive approach that ought to be taken will be made.

Interpretive Approach to the Provisions

[87] Although it is clear that the provisions of the CPP are intended to benefit workers, the restrictive interpretation of item 1(*b*) of the Schedule IV of the Regulations suggested by the Appellant cannot be applied, as a decision on that basis would be, in my view, inconsistent with the intention of Parliament and would not allow a consistent, predictable and fair application of the legislation.[19]

[88] In *Canada Trustco Mortgage*, *supra*, at paragraphs 10 and 11, it is established that the interpretation of a statutory provision requires a textual, contextual and purposive approach:

> [10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999 CanLII 639 (SCC),] [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play [*sic*] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [11] As a result of the Duke of Westminster principle (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the *Income Tax Act*, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.
>
> [Emphasis added.]

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19 *Canada Trustco Mortgage Co. v. Her Majesty the Queen*, *supra* note 36, paras. 12 and 61.

[89] In *Bell Express Vu*,[20] the Supreme Court of Canada reiterated that the modern approach to statutory interpretation should be applied:

> [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984 CanLII 20 (SCC),] [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994 CanLII 58 (SCC),] [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 (SCC),] [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999 CanLII 679 (SCC),] [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[90] Furthermore, I cannot agree with the argument of the Appellant that the amendment to Schedule IV of the Regulations is not meant to apply to her, as it was intended to codify an "existing practice" (i.e., that the employment of around 4,000 individuals appointed to part-time positions has always been considered as not pensionable by the province of Ontario)[21] which did not govern her employment at the WSIAT.

[91] Her claim was that she was not covered by the "existing practice" described above since her employment was treated as pensionable in the past, or at least it had been until the amendment to Schedule IV of the CPP was passed in 2013.

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20 *Supra*, note 13, at paras. 26-27.

21 As described in the "Regulatory Impact Analysis Statement" presented during the hearing (Exhibit A-3).

[92] The Appellant also argued that her interpretation of item 1(*b*) of Schedule IV of the Regulations should be accepted by this Court, otherwise its application could have a punitive effect.

[93] To this, I answer that the Tax Court of Canada is bound by the legislation in force at the time the issue arose and that the Tax Court is not a court of equity. The issue before this Court is whether the Appellant's employment is excepted under item 1(*b*) of Schedule IV of the Regulations, and this must be decided on the basis of the interpretation of that provision and its application to the Appellant's situation.[22] If the result of the application of a legislative provision is unfair, this Court unfortunately has no power to amend the legislation. In *Chaya v. The Queen*,[23] at paragraph 4, Rothstein J.A. said:

> [4] . . . The Court must take the statute as it finds it. It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

[94] This was reiterated by the Federal Court of Appeal in *MacKay v. The Queen*.[24]

[95] Now, I will address each criterion separately.

First Criterion: Member of an Agency

[96] The first criterion was not argued by the parties at the hearing.

[97] However, to be precise, the Government of Ontario website shows that the WSIAT is listed as one of its agencies (Exhibit A-3, Government of Ontario, Public Appointments Secretariat, "All Agencies List").

[98] Therefore, as the WSIAT can be characterized as an "agency" for the purposes of item 1(*b*) of Schedule IV of the Regulations, the first criterion is met because the Appellant was in the employment of the WSIAT and has been a

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22 *Main Rehabilitation Co. v. The Queen*, 2004 FCA 403.
23 2004 FCA 327.
24 2015 FCA 94, [2015] F.C.J. No. 456 (QL).

member of that tribunal since her appointment by Order in Council (see Exhibits R-1 and R-2).

Second Criterion: Paid Fees on a Per Diem Basis, or a Retainer or Honorarium

[99] It was not contested by the parties at the hearing that the Appellant has never received either a retainer or an honorarium from the WSIAT.[25]

[100] Thus, this analysis will focus solely on the effect of being remunerated on a per diem basis.

[101] As the Appellant correctly pointed out, the CPP and the Regulations contain no definition of the expression "per diem".

[102] In *Black's Law Dictionary*,[26] "per diem" is defined as follows:

> **per diem, *adj. & adv.*** Based on or calculated by the day.
>
> **per diem, *n.***
>
> > 1. A monetary daily allowance, usu. to cover expenses; specif., an amount of money that a worker is allowed to spend daily while on the job, esp. on a business trip.
> >
> > 2. A daily fee; esp., an amount of money that an employer pays a worker for each day that is worked.

[103] *The Concise Oxford English Dictionary*[27] defines the expression "per diem" in the following way:

> **per diem, adv. & adj.** for each day.
>
> **n.** an allowance or payment made for each day.

[104] From these definitions it is clear that the expression "per diem" refers to a remuneration paid for a day of work.

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25 Notice of appeal, para. 13; transcript, p. 59, lines 8-10.

26 *Black's Law Dictionary*, 10th ed., *sub verbo* "per diem".

27 *The Concise Oxford English Dictionary*, 10th ed., revised, 2002, *sub verbo* "per diem".

[105] As stated earlier, the Appellant did not dispute that she was, at least partially, paid on a per diem basis.

[106] Hence, the question that has to be answered for the purpose of this appeal is whether the fact that she was apparently paid for some of her functions on an hourly basis is sufficient to avoid the application of item 1(*b*) of Schedule IV of the Regulations.

[107] The Appellant argued that, for this criterion to be met, it is required that she have been paid exclusively (or at least mainly) at a per diem rate.

[108] The Minister's counsel argued that nothing in the wording of that provision suggests that the taxpayer must be solely or even mainly paid on a per diem basis.

[109] I do not believe that I have to decide this question in order to resolve the issue here. I agree with the Respondent that the hourly rate was merely the conversion of the per diem rate allocated to the part-time vice-chair for all the functions that she had to perform. The Order in Council states that appointees who hold a part-time appointment are entitled to a per diem remuneration (Exhibit R-1). Clearly, the Appellant's billing was done on a per diem basis as the hourly rate indicated in the samples filed as Exhibit A-2 is derived from the per diem to which she was entitled in her part-time position. I therefore find that the Appellant meets this criterion.

Third Criterion: Not in the Full-Time Employment of the WSIAT

[110] The CPP and the Regulations contain no definition of the expression "full-time employment".

[111] During the hearing, the Minister admitted that the Appellant was in fact working on a full-time basis.

[112] As stated earlier, the position of the Minister is that the expression "not in the full-time employment" ought to be construed in conjunction with the opening words of the provision, which contain the expression "employment by appointment". In the Minister's view, it is the terms of the Appellant's appointment that need to be considered, not the number of hours she worked.

[113] The Appellant took a different view by suggesting to the Court that the correct way to apply item 1(*b*) of Schedule IV of the Regulations is to look at her actual workload at the WSIAT.

[114] As much as I sympathize with the Appellant and as much as I believe her testimony at the hearing that she was actually working full-time, I cannot accept her position because it does not reflect, in my view, the correct interpretation of item 1(*b*) of the Schedule IV of the Regulations.

[115] I considered *Town Properties*[28] and *Woessner*,[29] the two decisions referred to by the Appellant to support her argument that this Court should analyze the reality of her workload as a factor to be taken into account in determining whether she was in the full-time employment of the WSIAT or not. In those cases, reference is made to, among others, *The Dictionary of Canadian Law*,[30] in which a distinction is made between being a "full-time employee" and being in "full-time employment".

[116] The definition of full-time employee refers to the number of hours an employee works. The expression "full-time employment", on the other hand, refers to an employee who is normally required to work a minimum number of hours prescribed by the person having authority to establish the hours of such employment.

[117] Here, while the WSIAT may have had some expectations of its "part-time vice-chairs", it is clear from the Order in Council and from the Appellant's testimony that the WSIAT could not require the Appellant to work in the same manner and under the same conditions as a full-time appointee. The Appellant made known her availability and the WSIAT had to respect that.

[118] Under the Order in Council, the Appellant was clearly appointed on a part-time basis. The WSIAT could not have required the Appellant to work full-time. Even if the WSIAT did encourage its "part-time" vice-chairs to work more or

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28 *Supra*, para. 25 of my reasons.

29 S*upra*, para. 25 of my reasons.

30 *Dictionary of Canadian Law*, Daphne A. Dukelow and Betsy Nuse (Scarborough, Ont.: Carswell, 1995).

even to work full-time, still it was not mandatory for the Appellant to work on a full-time basis, as she herself testified at the hearing.[31]

[119] Thus, the decision to work full-time was one the Appellant took completely voluntarily.

[120] I agree with the Respondent that, for the purpose of determining whether the "not in the full-time employment" criterion has been met, it is more consistent with Parliament's intention that one consider the terms of the Appellant's appointment rather than the number of hours she actually worked.

[121] This position is also supported by the "Regulatory Impact Analysis Statement" (Exhibit A-3), in which the types of employment to be excepted from pensionable employment are described in the following way:

> **Description**
>
> Schedule IV to the CPP Regulations is amended to add a description of the types of employment that the Government of Ontario has requested be exempted from pensionable employment. The types of employment relate to individuals who are employed by appointment of Her Majesty in right of Ontario or of one of her agents as part-time members of an agency, board, commission, committee or other incorporated or unincorporated body and who are paid fees or other remuneration on a per-day basis, or are in receipt of a retainer or honorarium.
>
> [Emphasis added.]

[122] From this excerpt[32] it can be seen that the "not in the full-time employment" criterion listed in the provision is reflected in the words "part-time members". This reinforces the interpretation that the nature of the appointment of the Appellant (by the Order in Council) is the element that needs to be considered to determine if this criterion has been met, and not the number of hours she actually worked on a voluntary basis.

[123] In light of the reasons set out above, it is very doubtful that the intention of Parliament was that qualification under item 1(*b*) would depend on a discretionary

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31 Notice of appeal, para. 8; transcript, p. 7, lines 27-28.

32 Although administrative policy and interpretation are not determinative, they may be an important factor in case of doubt about the meaning of the legislation (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 37.

and casual power (such as the power to modify work schedules and workload) exercised by mutual agreement outside the scope of the Order in Council. Such an interpretation would lead to an inconsistent application of the legislation and would be in contradiction with the interpretive approach adopted by the Supreme Court of Canada.[33]

[124] The use of the term "part-time" in the Order in Council is of some significance since it is not a simple qualifier having no particular effects, otherwise all appointees would be remunerated in the same way and would enjoy the same benefits as full-time appointees (notably paid vacation, an assigned office and the option to participate in the WSIAT's pension plan), which, in reality, is not the case for the part-time appointees.

[125] On the facts that were presented at the hearing, it is clear that an individual who is appointed to the WSIAT will receive the benefits that are associated with the type of position to which he or she has been appointed.

[126] In the end, I find that it is the terms of the Order in Council that must be analyzed to determine whether or not the Appellant can avail herself of the benefits provided under the CPP and the Regulations.

[127] In this regard, the Appellant did occupy during the period at issue (and still does) the position of "part-time vice-chair" (Exhibit R-1).

[128] Therefore, in view of the characterization of the Appellant's position as "part-time", she was "not in the full-time employment of her Majesty in right of Ontario". Consequently, the "not in full-time employment" criterion to be considered in the present analysis has been satisfied.

Conclusion

[129] For the reasons set out above, the appeal is dismissed as the criteria stated in item 1(*b*) of Schedule IV of the Regulations have all been met such that the employment of the Appellant with the WSIAT was "excepted employment" for the purposes of the CPP and the Regulations.

Signed at Ottawa, Canada, this 3rd day of February 2017.

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[33] See par. 87 to 89 of my reasons.

"Lucie Lamarre"

Lamarre A.C.J.

CITATION:	2017 TCC 8
COURT FILE NO.:	2016-1539(CPP)
STYLE OF CAUSE:	SHIRLEY NETTEN v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 17, 2016
REASONS FOR JUDGMENT BY:	The Honourable Lucie Lamarre, Associate Chief Justice
DATE OF JUDGMENT:	February 3, 2017

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Vincent Bourgeois

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada